

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 477 – Award No. 477 – Glisson
Carrier File No. 14-14-0346
Organization File No. 130-SF13C1-1413

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 14, 2014, when Claimant, M.W. Glisson (65171335), was disciplined with a Level S 30-day Record Suspension with a 3-year review period for his use of an electronic device, cell phone, while he was operating a company vehicle at milepost 499 on the Panhandle Subdivision on June 22, 2014 while assigned as a Welding Supervisor. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.10 Games, Reading or Electronic Devices and Maintenance of Way Safety Rule (MOWSR) 12.1.1 General Requirements.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing July 14, 2014, continuing forward and/ or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Monte W. Glisson, has been employed by the Carrier since 1994. On June 23, 2014, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged use of an electronic device while he was operating a Carrier vehicle at MP 499, on the Panhandle

Subdivision, at approximately 0930 on June 22, 2014, while assigned as Welding Supervisor. The Investigation Notice stated that the investigation would determine possible violation of MOWOR 1.10 Games, Reading or Electronic Devices, and MOWSR 12.1.1 General Requirements. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged and assessed him a Level S 30-day record suspension with a three-year review period.

MOWOR 1.10 Games, Reading or Electronic Devices provides, in relevant part:

While on duty, do not:

- **Use cellular or mobile telephones, or similar hand-held electronic devices for voice communications . . .**

- **Use personal electronic devices (cellular telephones . . .) for other than business purposes, except when located in a predetermined place of safety during break periods and not performing duties.**

When driving a BNSF owned or rented vehicle (off rail) do not:

- **Use cellular or mobile telephones . . . for voice communications in other than hands-free mode.**

- **Dial or answer cellular or mobile telephones by pressing more than a single button when operating a commercial motor vehicle.**

MOWSR 12.1.1 General Requirements provides, in relevant part:

While driving, the operator of a CMV must not:

- Use a hand-held mobile device for voice communication
- Dial or answer a mobile telephone by pressing more than a single button

Carrier Roadmaster John Thomas testified at the investigation that at 9:30 a.m. on the day at issue he observed Claimant, with a cell phone to his ear, while driving, at the intersection of Tyler and Highway 60 in Pampa, Texas. He explained that Claimant was making a turn at the intersection. He stated that he was on his way to church, dropped his family off and returned to find Claimant about two blocks from where he had last observed him, pulled over and talking on his phone. He stated that Claimant told him he did not have a hands-free device, which the Carrier will provide if the employee requests

it. Mr. Thomas acknowledged that Claimant told him he had answered the phone because of a family emergency.

Claimant testified at the investigation that he knew he could answer the phone with one touch and he told the caller, his sister, to hang on because she never called him, and she was caring for his granddaughter, a serious diabetic whose condition can deteriorate quickly. He stated that he instinctively picked up the phone, told the caller to hang on for a minute and pulled over. He was stopped and talking when Mr. Thomas approached him.

Claimant testified that he did not deny answering the phone; it was just when he picked up to learn of the family situation he told the caller to wait a minute and he would pull over. He added that there were no cars coming. He stated that he would have accepted a waiver but did not believe a three-year review period was warranted.

Claimant's personal record shows a Level S 15-day actual and a 15-day record suspension assessed on August 13, 2012 for misconduct creating an intimidating, offensive and hostile work environment.

The Carrier asserts that this case is not complicated, as the testimony of Roadmaster John Thomas revealed that he personally observed Claimant holding his cell phone to his ear and speaking into it, while driving a Carrier vehicle. Further, the Carrier notes, Claimant admitted that he looked at the cell phone and then picked it up, answered it, and spoke into it, all while driving and before he pulled over and stopped to continue to talk. It is well-settled, the Carrier states, that such an admission is sufficient to meet its burden of proving Claimant guilty by substantial evidence.

While the Organization attempts to excuse Claimant's conduct on the basis that a family emergency required him to answer the phone, the Carrier argues, the applicable Rule cannot be violated at any time, because answering the phone while driving could well have created another emergency. Fortunately, the Carrier adds, nothing catastrophic occurred, but Claimant's conduct created the potential for such an event. The Carrier asserts that the charges against Claimant have been proven, and the Organization's argument amounts to a request for leniency, which is the sole province of the Carrier. The Carrier concludes that the penalty was appropriate given the nature of the offense and Claimant's personal record, and the claim should be denied.

The Organization states that there is no dispute regarding the essential facts of this case, but the accusation and discipline are exaggerations both by the Carrier's witness and the Carrier Officer who issued the discipline. The discipline, the Organization asserts, is far out of proportion to what actually occurred.

The Organization notes that Claimant was honest about what occurred, acknowledging that he did answer a call from a family member, because his granddaughter, an insulin-dependent diabetic, was, that day, being cared for by a family member who was inexperienced in dealing with her condition. Claimant, the Organization adds, answered the phone with a single touch and immediately told the caller to wait so he could pull over to talk, which is what anyone would have done under the circumstances. The Carrier, the Organization adds, ignored the potentially life threatening medical situation when it determined to assess this discipline against Claimant.

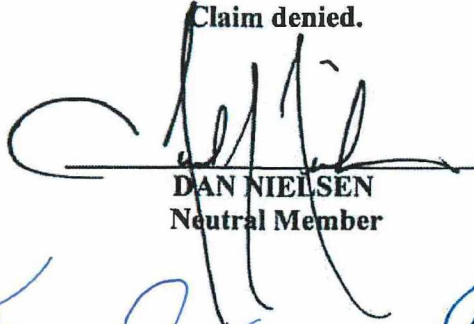
The exact moment Claimant took the call was when Mr. Thomas observed Claimant on the phone, the Organization notes. He did not address the situation until later, when he saw Claimant pulled over to the side of the road, having his telephone conversation. The Organization argues that the Carrier has not met its burden of proving, by substantial evidence, that Claimant violated Carrier Rules as alleged. Even if it had, the Organization urges, the discipline is extreme and unwarranted, and the claim should be sustained.

We have carefully reviewed the record in its entirety. As the Carrier states, Claimant acknowledged that he answered and spoke on his cellular phone while driving a Carrier vehicle. He acknowledged that he broke the applicable Carrier Rules, and this admission is sufficient to meet the Carrier's burden of proving his guilt by substantial evidence.

Claimant defended his action on the grounds that there was no traffic coming, the call concerned a family emergency, and he pulled over as soon as he could to continue the conversation. We understand the sense of urgency that might arise, given the circumstances. However, the Carrier Rule against using a cell phone while driving is in place to prevent distracted driving and the potential risk of injury to the Carrier's employees and other drivers. Whatever the family situation, Claimant should have pulled over and returned the call rather than answering and talking while he was still driving. Given that the violation has been proven, we cannot say that the penalty determined appropriate by the Carrier represents an unfair, arbitrary or discriminatory exercise of its discretion to assess discipline. While Claimant seeks a reduced review period, the Policy for Employee Performance Accountability (PEPA) specifies that three years is the normal period for an employee with Claimant's record and length of service.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID SCOVILLE
Organization Member

Dated this 12th day of Oct., 2016.