

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**

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Case No. 479 – Award No. 479 – Trevino  
Carrier File No. 14-14-0401  
Organization File No. 180-SF13C3-1415

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 30, 2014, when Claimant, Adrian J. Trevino (6550727), was dismissed for his use of an electronic handheld device while driving BNSF vehicle 22288 on July 30, 2014 at approximately 6:10 a.m., near the city of Santa Fe Springs, California while heading south on the Santa Ana Freeway. The Carrier alleged violation of the BNSF Railway Maintenance of Way Operating Rule (MOWOR) 1.10 Games, Reading or Electronic Devices.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this dismissal and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing July 30, 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, Adrian J. Trevino, had been employed by the Carrier since 1981. On August 1, 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 handheld device while driving BNSF vehicle 22288 on July 30, 2014 at approximately 0610 hours near the city of Santa Fe Springs, CA while heading south on

the Santa Ana Freeway. The Carrier asserted that its first knowledge of the incident was July 31, 2014. The Investigation Notice stated that the investigation would determine possible violation of MOWOR 1.10 Games, Reading or Electronic Devices. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged and dismissed him from service.

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

While on duty, do not:

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

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- **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.**

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- **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:

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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

On the day of the incident, Claimant was working as a flagman at two locations. Carrier Roadmaster Donald Brooks testified at the investigation that he received a message of a DriveCam incident concerning Claimant. He headed to Claimant's location, where he was flagging, and approached him with the information. Mr. Brooks explained that Drive Cam is a camera system installed in Carrier vehicles, and it begins recording if the driver brakes too hard or runs into something. It records the first three to eight seconds before the event and another three to eight seconds after the event.

Several still shots of the video taken by the Drive Cam in Claimant's vehicle were entered into evidence. There are 12 photos, all showing Claimant holding his cell phone in his hand, up near his ear. In seven of them, his lips are moving and he appears to be speaking. Mr. Brooks testified that Claimant was on the freeway at the time. In the first shot, he stated, he could not tell if the vehicle was moving, but the subsequent shots show that the clock has moved and the vehicle is moving. He also explained that the shots show the vehicle behind him coming closer, and then that he picks up speed and the vehicle behind him is not as close.

Mr. Brooks explained that the shots show eight seconds before he put pressure on his brakes and four seconds afterwards, and throughout Claimant can be seen holding the phone up with his mouth in different positions. He acknowledged that he could not tell whether Claimant was actually talking on the phone.

Mr. Brooks stated that if a cell phone has a speaker which allows the individual to talk without holding the phone in his hand, it is considered hands-free. However, if the phone is in the individual's hand, even if there is a speaker, it is not considered hands-free communication. The Carrier's policy, he stated, does not allow an employee to hold the phone in his hand while driving.

Claimant testified at the investigation that he was on the freeway, driving towards his job site, when his girlfriend called. He stated that he pressed the speaker button because she had been ill and he wanted to know how she was doing. He explained that she had had complications from high blood pressure and he wanted to find out if she had a ride home from the hospital or if she needed him to pick her up. He acknowledged that in the photographs he was holding onto his cell phone and talking.

Claimant maintained that this was hands-free communication, like picking up the Carrier radio and driving with one hand when, for example, he receives instructions to clear a train. He acknowledged he was aware he was not supposed to pick up his cell phone, but he was in bumper to bumper traffic and was alert and attentive. He denied that he lost focus on his driving. He explained that this was a family emergency and he had to pick up the phone to find out how his girlfriend was doing and whether he had to go back to get her.

Claimant's personal record shows a Level S conditional suspension, with a 36-month review period, for a first-time violation of Rule 1.5 on September 14, 2011, and a Level S record suspension, with a 36-month review period, for striking another vehicle on September 14, 2011.

The Carrier asserts that this case is not complicated, as the testimony of Roadmaster Donald Brooks and DRIVE CAM snapshots establishes that on July 30, 2014, Claimant operated a Carrier vehicle while holding and using his cell phone.

Moreover, the Carrier notes, Claimant admitted that he used his cell phone while driving. It is well-settled, the Carrier states, that such an admission is sufficient to meet its burden of proving Claimant guilty by substantial evidence.

The Carrier notes that this was Claimant's third Level S offense within his 36-month review period, and, under its Policy for Employee Performance Accountability (PEPA), two such offenses may subject an employee to discharge. Thus, the Carrier asserts, Claimant has already been shown leniency. The Carrier concludes that it has established that Claimant violated its Rules and dismissal was appropriate due to the seriousness of the offense and Claimant's personal record. The Carrier urges that the claim be denied.

The Organization states that the basic facts of this case are not in question, but the discipline is disproportionate to the violation committed, and the incident should not have resulted in the discharge of a 33-year employee. The Organization acknowledges that the Carrier has photographic evidence and Claimant did admit to talking on the phone. The Organization asserts that Claimant took the call because his girlfriend was at the hospital with issues relating to her high blood pressure and he thought he might have to pick her up. The Organization further asserts that he answered the phone with one touch on a speaker phone while he was driving.

The Organization also points to Claimant's testimony that he viewed his conduct as no different than answering a Carrier radio while driving. The Organization notes that the radio microphone must be held in the hand in order for the operator to key it properly, and thus Claimant's analogy between the two devices is correct. The Organization asserts that the Carrier has failed to meet its burden of proof.

As for the penalty, the Organization states that the Carrier's PEPA provides for multiple levels of discipline before the Carrier assesses what amounts to capital punishment. The Organization concludes that the discipline is excessive and unwarranted, and urges that the claim be sustained.

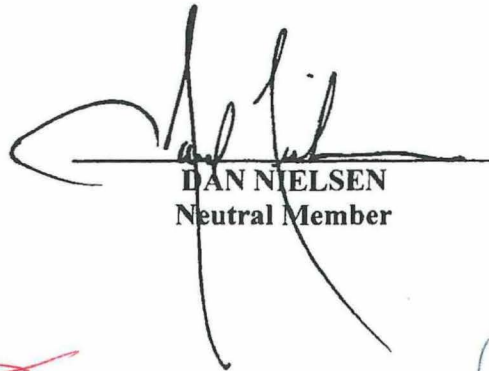
We have carefully reviewed the record in its entirety. As the Carrier states, Drive Cam snapshots show, and Claimant acknowledged, that he answered and spoke on his cellular phone while driving a Carrier vehicle on the freeway. His movements and the positioning of the phone are not consistent with the speaker having been on, and in any event, he was clearly not using it hands free. Claimant's admission and the visual evidence are sufficient to meet the Carrier's burden of proving his guilt by substantial evidence.

Claimant defended his action on the grounds that he was in bumper to bumper traffic and the call concerned a family emergency. However, the Carrier Rule against using a cell phone while driving is clear, and 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, even though the penalty assessed is harsh it comports with the Carrier's Policy for Employee Performance Accountability (PEPA). We note that, during the term of his review period, Claimant had three Level S offenses, whereas two would normally trigger a termination. We find that consideration has already been given for his long service, and in light of that we cannot say that the Carrier's choice of penalty represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to assess discipline.

**AWARD**

**Claim denied.**

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**DAN NIELSEN**  
Neutral Member

A handwritten signature in red ink, appearing to read 'Alex Stadheim', is written over a horizontal line.

**ALEX STADHEIM**  
Carrier Member

A handwritten signature in blue ink, appearing to read 'David Scoville', is written over a horizontal line.

**DAVID SCOVILLE**  
Organization Member

Dated this 16 day of November, 2016.