

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 499 – Award No. 499 – Martinez
Carrier File No. 14-18-0353
Organization File No. 2418-SL13C2-1811

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following Claim on behalf of California Division District 600, Jason Martinez (0079152), Seniority Date of October 11, 2011, for Reinstatement with seniority rights restored and all entitlement to and credit for, benefits restored including vacation, and health insurance benefits. The Claimant shall be made whole for all financial losses as result of the violation, including compensation for: 1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the Claimant while wrongfully suspended); 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; 3) overtime pay for lost overtime opportunities based on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended; 4) health, dental, and vision care insurance premiums, deductibles and co-pays that he would have paid had he not been unjustly suspended on May 23, 2018, continuing forward and/or otherwise made whole. All notations of the suspension be removed from all Carrier records.

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, Jason Martinez, has been employed by the Carrier since 2014. On April 23, 2018, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged machine incident on April 23, 2018 at approximately 0815 hours while he was working as a machine operator near milepost 44.9 on the Cajon Subdivision. The charges specified that the machine Claimant was operating was involved in a collision, resulting in significant equipment damage, due to Claimant's use of a hand held electronic device while his machine was in motion. The investigation, the notice stated, would determine possible violation of Maintenance of Way Operating Rules (MWOR) 6.51 Maintaining a Safe Braking Distance and 1.10 Games, Reading, or Electronic Devices.

Following the investigation, the Carrier found Claimant guilty of the charges and assessed him a Level S 31-day actual suspension with a three-year review period.

The facts of this case are not in dispute. On April 23, 2018, Claimant was assigned to surfacing gang TSCX1039, working on the Cajon Subdivision, when he was involved in a collision with the machine traveling in front of the machine he was operating. Division Engineer Jimmy Capps, who as he testified at the investigation, has oversight of operations in the area where Claimant was working at the time of the incident, was notified that day of the collision. He spoke to Claimant by telephone following the incident, and Claimant admitted that he had "effed up." Claimant told Mr. Capps that his wife had called repeatedly, that he finally answered, and, and, as a result, he failed to pay enough attention to his traveling and hit the machine in front of him.

Claimant further acknowledged, in a statement he gave after the incident, that while his machine was traveling to the switch with the machine in front of him, he made the "wrong decision" to look at his cell phone when it went off, and looked up shortly thereafter without enough time to stop before colliding with the machine in front of him. There were no injuries reported, but the leading machine suffered damage as a result of the collision. At the investigation, Claimant admitted that he had violated the applicable Carrier Rules as alleged.

Claimant's personal record shows a formal reprimand issued on June 27, 2012 for a machine incident resulting in running the stabilizer through a dual control switch; a Level S record suspension issued on July 2, 2013 for carelessness and negligence when Claimant failed to secure all working components in stowed position on the tamper prior to track travel, resulting in equipment damage; and a Level S record suspension issued on September 19, 2016 for a machine collision with a third-party vehicle.

Claimant and the Organization do not dispute his guilt, but rather contest the severity of the discipline assessed, arguing that it is arbitrary, excessive and unwarranted. We disagree and deny the claim.

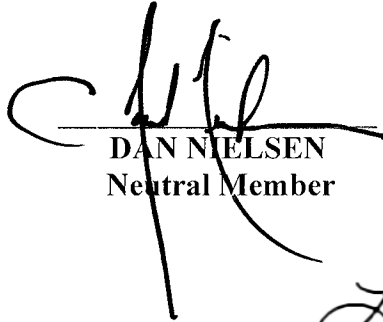
As the Carrier states, Claimant committed a very serious violation by using his cell phone while traveling his vehicle. It is well known that such conduct distracts drivers and operators from operating their vehicles safely, and the Carrier's prohibition against it is in place to protect employees, the public and others from the risk of serious injury or even death. The need for such rules is apparent from the result here. Claimant admitted that the cause of the incident was his inattention to operating his machine safely because he was on a cell phone call.

While the Organization asserts that the leading machine did not suffer significant damage in an attempt to establish that the discipline was excessive, the extent of the damage is not the point. That there was not more damage, and especially that there was no personal injury or death, are fortuitous circumstances. Given Claimant's actions, it could just as easily have been otherwise.

Claimant was aware of the applicable Carrier Rules and chose to violate them. His personal record shows three previous similar violations involving careless operation of his machine, including another collision. Given the nature of the violation and Claimant's record, we cannot find that the discipline assessed here represents an unwarranted or excessive exercise of the Carrier's discretion to determine disciplinary penalties.

AWARD

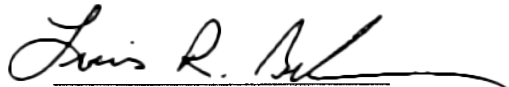
Claim denied.



DAN NIELSEN
Neutral Member



SAMANTHA DAIGLE
Carrier Member



LOUIS R. BELOW
Organization Member

Dated this 9th day of June, 2021.