

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 560 – Award No. 560 – R. Sebor
Carrier File No. 14-21-0124
Organization File No. 2405-SL13C3-2104

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Ron Sebor (1357714) Seniority date April 22, 1999 for the removal of Level S 30 Day Record Suspension and One (1) Year Review Period, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 12, 2021, 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, R. Sebor, has been employed by the Carrier since 1998. On March 31, 2021, following an investigation, the Carrier determined that Claimant was using his cellphone while operating a company hi-railing vehicle on February 25, 2021. The Carrier found that Claimant had violated Maintenance of Way Operating Rules (MOWOR) 1.10 Games, Reading, or Electronic Devices and assessed him a Level-S 30-day Record Suspension with a one-year review period.

MOWOR 1.10 reads, in relevant part:

While on duty, do not:

While operating or occupying the control compartment of on-track equipment including hi-rail vehicles (on rail), do not:

- Use cellular telephones or other electronic devices for voice communications (e.g., phone call, voice mail, video conference, etc.) when the equipment is in motion.

Exception: Roadway Equipment employees may use cellular telephones or other electronic devices for mechanical or technical evaluations while occupying the control compartment of on-track equipment in motion; before using the device, a job safety briefing must be held with the operator and EIC and all must agree how communications can safely take place.

While operating on-track equipment including hi-rail vehicles (on rail), do not:

- Handle or touch cellular telephones when the equipment is in motion.
- Type alpha or numeric text on the keyboard or keypad of an electronic device when the equipment is in motion. (Equipment operators may use necessary keystroke functions for equipment control and testing/inspection purposes when in motion.)

At all times relevant, Claimant was working as a Track Supervisor out of Mulvane, Kansas. Claimant's supervisor, Roadmaster Jeremy Willingham, testified that Claimant called him on February 25, 2021 to self-report that he activated the DriveCam unit in his vehicle when he came to a sudden stop at a crossing, and that he had his phone in his hand at the time. Mr. Willingham provided screenshots of the DriveCam video, which showed Claimant holding and/or looking at his cellphone while hi-railing. Mr. Willingham explained that Claimant also had a keyboard in his lap, which is allowed, and that Claimant is permitted to use a company application on his cellphone while inspecting the track.

However, Mr. Willingham stated, there is no reason for Claimant to be using his cellphone while in motion. Mr. Willingham further testified that there is no function on a cellphone that is necessary to use while a vehicle is in motion, nor is there any reason to use a cellphone to operate a company vehicle. He stated that although Claimant could have used his cellphone to perform some of his track inspection duties, there was absolutely no reason for him to do so while in motion. He stated it was expected that Carrier employees will stop the vehicle and place it in park, and use their functions only then.

Mr. Willingham explained that while Claimant had a tablet mounted in his company vehicle to view as he was hi-railing and had previously mentioned concerns with it, he could not have used his cellphone to perform the tablet's functions if the tablet was malfunctioning.

Mr. Willingham explained that MOWOR 1.10 includes different scenarios or exceptions which allow employees to use cellular mobile devices in certain circumstances, but none of them circumvent the initial rule that an employee may not use a cellular telephone when equipment is in motion if that employee is the operator. In particular, Mr. Willingham noted, the language (recited above) which allows an employee to use a cell phone "for mechanical or technical evaluations" while occupying the controlling compartment of an on-track vehicle in motion specifically requires a job safety briefing with the operator and the employee in charge to

determine how communications may safely occur. This, Mr. Willingham stated, explains that the operator cannot be the one using the electronic device; it must be the EIC.

As for the second portion of the Rule recited above, Mr. Willingham acknowledged that there would be reasons Claimant could use a cellphone to perform his track inspection functions, as he was at the time of the incident. However, he repeated, there would be no reason to do so while operating the vehicle in motion.

The DriveCam shots, Mr. Willingham stressed, clearly showed Claimant holding his phone while operating the vehicle, which was motion. Therefore, Mr. Willingham stated, Claimant violated MOWOR 1.10.

Claimant admitted that he had his cellphone in his hand while operating the hi-rail vehicle. He explained that because his tablet kept freezing, he was using the LSMP app on his cellphone to see which milepost and main he was occupying while he was moving. He explained that the app was a device that allowed him to stop and hit the button, and it would indicate the exact milepost location. Because the app does not continually run like the tablet program, Claimant stated, he had to keep his phone in his hand to press to push a button to find the LSMP to tell him his location. It was a necessary keystroke function. When asked why he could not stop to use the phone, then put it away and continue hi-railing, Claimant stated that trains were pulling up behind him and he did not want to pass the correct spot and have to back up.

Claimant maintained that use of his cellphone in this instance fell under the parenthetical exception in Rule 1.10 that "operators may use necessary keystroke functions for equipment control and testing/inspection purposes when in motion." He contends that he was in compliance since he was using the cellphone to find his location for inspection. Claimant further testified that he texted Mr. Willingham after setting off the DriveCam device to notify him that he had used his phone solely to locate a milepost for a red tag.

Claimant had no previous disciplinary record.

The Carrier asserts that it has proven by substantial evidence that Claimant violated Rule 1.10, which states that employees are prohibited from using or handling electronic devices while operating company-owned vehicles. The DriveCam footage clearly shows Claimant with his cellphone in hand, and Claimant admitted to using his cellphone while the vehicle was in motion. Therefore, the Carrier asserts, his guilt has been proven. The Carrier further notes that using a cellphone while driving is a serious offense, the discipline assessed Claimant was appropriate, and the claim should be denied.

The Organization argues that Claimant was using his cellphone for inspecting purposes and therefore believed he was in compliance with Rule 1.10, which gives several directions and exceptions, without complete explanations, and can be misleading. The Organization references the language which states that, "Equipment operators may use necessary keystroke functions for equipment control and testing/inspection purposes when in motion," and states that Claimant reasonably believed that as he was performing testing/inspections he was allowed to handle the

electronic device and use necessary keystrokes. The Organization adds that nothing in this investigation proved that Claimant violated the rule as he reasonably understood it.

The Organization argues that it is the Carrier's responsibility to make sure the Rules are clear to avoid such confusion. Further, the Organization contends that Claimant notified Mr. Willingham he was using his phone so the situation did not get blown out of proportion, but Claimant believed then and still believed at the hearing that he had not done anything wrong. The Carrier failed to show that Claimant willfully violated the Rule. Moreover, the Organization states, Claimant's discipline was excessive and unwarranted, and it should be removed from his record.

We have carefully reviewed the record in its entirety and find that the Carrier has failed to meet its burden of proving Claimant's guilt by substantial evidence. Claimant indeed admitted to holding his cellphone while operating his vehicle, as captured in the DriveCam video. However, as Claimant and the Organization cite a specific exception to the general prohibition against cell phone use in Rule in 1.10 which, it appears, could apply to Claimant's situation. The Carrier has not explained why that exception is inapplicable; its witness simply stated that the Rule always prohibits an operator from handling a cell phone. The Carrier, in its on property correspondence, fails to address that exception at all.

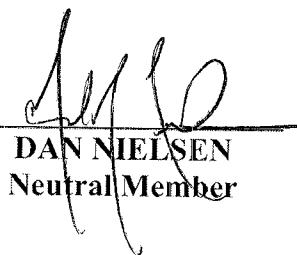
We agree with the Organization that the Rule is, at best, confusing. It was incumbent upon the Carrier to maintain clear conduct rules, and it cannot meet its burden of proof by failing to address and explain an exception that, on its face, might apply to Claimant's situation. We also note that Claimant, at the time of the incident, was an employee with more than 20 years of seniority and no disciplinary record, and it appears that he acted in good faith reliance upon the language at issue. The claim will be sustained.

AWARD

Claim sustained. All notice of the discipline shall be removed from Claimant's personal record, and he shall be made whole for his losses, if any. The Carrier shall comply with this Award within 45 days.



JOE HEENAN
Carrier Member



DAN NIELSEN
Neutral Member



JEFFERY L. FRY
Organization Member

Dated this 30th day of March 2025.