

PUBLIC LAW BOARD NO. 6302  
CASE NO. 242

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES

PARTIES  
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline [Level 4 (4) ten (10) day suspension] imposed on Mr. J. Tom by letter dated April 5, 2012 for alleged violation of Cardinal Safety Rule, Supplement 2.21 Electronic Devices, Maintenance of Way Supplements to the General Code of Operating Rules 40.2, effective April 7, 2010, updated October 21, 2011, and deleting Supplements Rule 1.10 Games, Reading, or Other Media as contained in the General Code of Operating Rules, Rule 40.1, effective April 7, 2010, Maintenance of Way Rules, effective November 17, 2008 and System Special Instruction, effective April 7, 2010 in connection with allegations that Mr. Tom was using his cell phone while walking or standing in the track on February 8, 2012, was without just and sufficient cause, unwarranted and in violation of the Agreement (System File D-1248U-202/1571226).

2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Tom's record with seniority and other benefits unimpaired and compensate him at the straight time and overtime rates of pay for all wage loss suffered as a result of the Carrier's unjust and improper discipline.”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was working as a System Tie Plug Inserting Operator on Gang 9065 on February 8, 2012. He received a Notice of Investigation (NOI) dated March 5, 2012 charging him with using his cell phone while at work walking or standing on the track on that date, after having been previously instructed on cell phone use while on duty. By letter dated April 5, 2012 Claimant was found guilty of the charge and in violation of Rule 40.2, Supplement 2.21, which provides in pertinent part:

Supplement 2.21 Electronic Devices

\* \* \* \* \*

Employees must not use cell phones when standing or walking foul of any track or when in close proximity to men or equipment working on or off track.

Claimant was assessed the Level 4 discipline of a ten (10) day actual suspension for this Cardinal Safety Rule violation. This claim protests the imposition of that discipline.

At the Investigation on March 21, 2012, Claimant's Assistant Foreman testified that on February 8 he noticed Claimant standing next to his foam plugger machine and he appeared to be texting on his phone while on the track, he approached Claimant to counsel him and reported the incident to the Foreman. The Foreman testified that he had seen Claimant with his cell phone on the track on December 9 and told him not to be using his phone on the track. He also was told by three different employees working near Claimant on January 9 that Claimant was doing a lot of texting and talking while

working. He and the Track Supervisor had a conversation with Claimant on January 9 repeating the he could not use his cell phone while he was on the track, and to step off to the right-of-way if he needed to use the phone. Claimant denied having this conversation.

Again on January 12, the Foreman received a call from an Assistant Foreman reporting that Claimant was using his cell phone while working, and the Foreman and Supervisor went to speak with Claimant about this report. Both testified that the Supervisor advised Claimant that his cell phone use was over and that he was not to have it out at work at any time. Claimant recalled this conversation but testified that he did not know what they were talking about and was confused. The Foreman testified that he made clear to employees that it was not permissible for them to use a cell phone as a time piece, explaining that they operated on different time from local time and that they needed a watch set to the correct railroad time for work. Claimant denied ever using his cell phone for any purpose while working. He specifically denied doing so on February 8, 2012, asserting that he was cleaning his machine when his Assistant Foreman approached him about his cell phone use.

Carrier argues that there is substantial evidence to support the fact that Claimant was impermissibly using his cell phone on February 8, 2012 and that he had been counseled against such usage in the past. Carrier points out that the serious nature of this Cardinal Safety Rule infraction merits the Level 4 discipline assessed, which was in compliance with its UPGRADE policy. It notes that Claimant was afforded all contractual due process rights and there were no procedural defects affecting the discipline in this case.

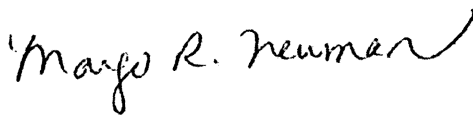
The Organization contends that the Hearing Officer impermissibly relied on hearsay evidence and past behavior to sustain the charges and prejudge Claimant. It asserts that Carrier failed to establish Claimant's cell phone usage on February 8, 2012, as

noted by the absence of any calls during work on his cell phone records, and did not meet its burden of proving a rule violation. The Organization also maintains that the discipline was excessive and unwarranted in this case.

A careful review of the record convinces the Board that there were no procedural violations in this case, and that Carrier sustained its burden of establishing, by substantial evidence, that Claimant was guilty of using his cell phone on February 8, 2012, and had been counseled against such use in the past. This is true despite the absence of any calls on Claimant's cell phone report, since all cell phone interactions are not captured by time and date on a cell phone log, and the evidence was not that he was talking, but, rather, that he was texting or interacting with his cell phone on that, and prior, occasions. Additionally, Claimant was under instructions not to have his cell phone out at work after January 12. There is no doubt that this is a serious safety infraction and is treated as a Cardinal Safety Rule violation under Carrier's UPGRADE policy. The discipline assessed was consistent with such policy.

AWARD:

The claim is denied.



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Margo R. Newman  
Neutral Chairperson



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K. N. Novak  
Carrier Member



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Andrew Mulford  
Employee Member

Dated: 8/6/14

Dated: 8/6/14