

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 140, (Case No. 140)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

**William R. Miller, Chairman & Neutral Member
Joy E. Mendez, Carrier Member
David D. Tanner, Employee Member**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing May 20, 2013, when Claimant, Thomas J. McCowan (1704568), was disciplined with a Level S 30-day Record Suspension with a 3-year review for his alleged carelessness of the safety of himself and others when he used his personal cell phone for other than business purposes while working as a spiker operator on the Seligman Subdivision on April 25, 2013 on Gang RP17. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.6 Conduct and MOWOR 1.10 Games, Reading or Electronic Devices.**
- 2. As a consequences of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated, if applicable, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 20, 2013, continuing forward and/or otherwise made whole."
(Carrier File No. 14-13-0274) (Organization File No. 1732-SF13C3-132)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On May 2, 2013, Claimant was directed to attend a formal Investigation on May 10, 2013, which was mutually postponed until May 20, 2013, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged carelessness of the safety of yourself and others when you allegedly used your personal cell phone for other than business purposes while working as spiker operator at MP 308 on the Seligman Subdivision, at 1330 on Thursday, April 25, 2013 on TRPX0017.

This investigation will determine the possible violations of MOWOR 1.10 Games, Reading, or Electronic Devices and MOWOR 1.6 Conduct."

On June 11, 2013, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a three year review period.

It is the Organization's position that the record shows that on the date of the incident Claimant was sitting in his machine waiting to go to work, as instructed. While in the machine the alarm on the Claimant's cell phone that was inside his tool bag went off and he picked it up and was listening to the ring tone, which was a song when the Roadmaster walked up. According to the Organization the Claimant was not using his phone to communicate as he was not speaking on the phone and he was not texting. It argued the Claimant was not careless because he was not in the process of working or moving and he never placed himself or anyone else in danger as he was in a place of safety inside his machine.

The Organization further argued that the Carrier's Policy regarding the use of Electronic Devices was in constant flux and had become so watered down from the original policy, that basically anyone could use the phone provided they were in a safe place. The Organization also argued that if the Policy meant that cell phone usage was prohibited while employees were on duty then why would Carrier Officers instruct its employees if they had to use a cell phone to step away from the track at least four feet. It suggested that means because the Claimant was in a safe place when he answered the cell phone alarm he did not violate the Carrier's Policy and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that a review of the transcript reveals that the Claimant's Roadmaster, J. Papenfuhs testified on page 14 of the transcript that while performing an Operations Test (which is a test that is performed to assure all employees are working safely) he walked up to the Spiker machine on the track the Claimant was working on, opened the door and found the Claimant sitting with his cell phone in his hand and listening to ringtones. According to the Carrier Mr. Papenfuhs further testified that the Spiker Machine was running and occupying the track and he went on to explain the Claimant should not have had his cell phone

on his person or be using it unless he was at a designated place of safety, which he was not at, (See page 15 of the transcript) and lastly he was using his cell phone for other than a business purpose. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

The primary Rule in dispute in this case is **Production Gangs Cell Phone Usage** and it states in pertinent part the following:

"Personal cellular phones or electronic devices are prohibited while on duty. Production Gang Roadmasters will provide contact numbers for the Gang Foreman, Roadmaster and 24 hour manpower office ... to be used in the case of an emergency to contact employees assigned to production gangs.

While on duty, do not:

* * * * *

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

(Underlining Board's emphasis)

On page 19 of the transcript Carrier Officer Papenfuhs was questioned about what would constitute a safe place for cell phone usage and he responded as follows:

"Um, predetermined place of safety would be um, off the track you know say in this, on a Production Gangs they usually have vans that are sitting around. I would classify that as a predetermined place of safety, not sitting on a, on a piece of on-track equipment that was running."

(Underlining Board's emphasis)

The aforementioned testimony of Mr. Papenfuhs was not effectively refuted. The Claimant added further credibility to Mr. Papenfuhs testimony when he submitted a statement that reads in pertinent part:

"I finished maintenance and housekeeping on my machine. We never left the industry track due to defects. I'm a Spiker Operator on RP-17. I was told to

stay ready in case we do get the track, and I was. I took my, I took my phone out of my toolbox after 8 hours of waiting and pulled up and listened to a ringtone. Roadmaster opened my door and saw me looking at my phone, which was in my hand. My understanding of the rules was wrong."
(Underlining Board's emphasis)

The record and testimony above substantiated that when the Claimant used his cellular telephone he was not performing any duties as he was awaiting to work and had been in that status for approximately eight hours, however, the record further shows that when the Claimant used his cell phone he was not at a designated place of safety and he was not using the phone for business purposes nor was he using it for some emergency purpose. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged.


The only issue remaining is whether the discipline was appropriate. At the time of the offense Claimant had approximately seven years of service. This was the Claimant's second Serious Level S Discipline event within the 12 month review period. The prior infraction was for a similar incident involving a safety issue. The Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

AWARD

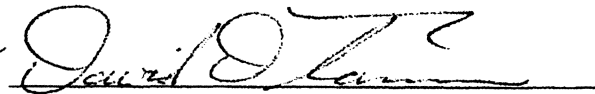
Claim denied.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: July 18, 2014