

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 148, (Case No. 148)**

**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 August 20, 2013, when Claimant, Ty H. Burnside (6415046), was dismissed for being careless of the safety of himself and others when he failed to follow procedures for the use of an electronic device (cellphone) while he drove a BNSF owned vehicle on June 15, 2013 while working as a Track Supervisor in Ashfork, Arizona. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.10 Games, Reading, or Electronic Devices and and MOWOR 1.6 Conduct.**
- 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 all overtime hours at appropriate rate of pay, commencing August 20, 2013, continuing forward and/or otherwise made whole."
(Carrier File No. 14-13-0333) (Organization File No. 170-SF13C3-136)**

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 June 27, 2013, Claimant was directed to attend a formal Investigation on July 11, 2013, which was mutually postponed until July 22, 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 failed to follow proper procedures for using your electronic device while driving a BNSF owned vehicle at approximately 1541 on June 15, 2013 while working as a track supervisor on TINS1588 in Ash Fork, AZ. The date BNSF received first knowledge of this alleged violation is June 19, 2013.

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

On August 20, 2013, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the record shows that on June 15, 2013, the Claimant was working as a Track Supervisor and had physically walked the west end of Ashford Yard checking the tracks and switches. After completing that task he sent a text on his company phone to Track Supervisor J. Dalton (Claimant's relief), while his vehicle was stationary, explaining what he covered so that Mr. Dalton would know what he had to do when he reported to work the following day. Claimant then placed the phone in the cup holder and made a turnaround at West Ashford and proceeded to drive out of the Ashford Yard and while driving on the Carrier property on a washboard road that had no other traffic or employees in the vicinity his phone was bouncing. In a effort to prevent it from bouncing he took it out of the cup and held it at which time it vibrated, indicating an incoming message. Claimant said the phone vibrated, but there was message on the screen and he hit the button to try and silence it on three occasions while being viewed on the vehicle video. It argued that at no time was the Claimant reading or using his company phone for communication purposes, but was only trying to silence its noise. It concluded the Carrier did not prove any wrongdoing and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that on the date of the incident Claimant failed to follow procedures for the use of his cell phone while operating a Carrier vehicle. The Carrier explained that the vehicle operated by the Claimant was equipped with a drive cam that turns on if the vehicle makes a sharp lateral movement, hits a pothole or there is significant braking at which time it films the actions of the driver while also recording what the forward movement of the vehicle looks like from inside the vehicle. It asserted that during that 12 second recording the film depicts the Claimant looking down three times at his hand held cell phone for approximately nine seconds. It further argued that the Claimant confessed that he looked at his cell phone while driving a company vehicle three times (See Page 43 of the Transcript), thus, it is clear that he was guilty as charged. Lastly, it argued the discipline was appropriate and it asked 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 **1.10 Games, Reading, or Electronic Devices** and that portion that the Carrier alleged the Claimant violated states in pertinent part:

"While driving a BNSF owned or rented vehicle (off rail) do not:

- * Use cellular or mobile telephones, or similar hand-held electronic devices for voice communications in other than hands-free mode.**
- * Manually enter or read text from cellular or mobile telephones, or similar hand-held electronic devices (e.g. e-mailing, performing any electronic text retrieval or entry, accessing a web page, etc.).**
- * Dial or answer cellular or mobile telephones by pressing more than a single button when operating a commercial motor vehicle.**
- * Use notebook computers, laptops or similar devices. Display screen of such devices must be closed or off.**

Employees must be aware of and comply with any local, state or federal laws governing use of wireless equipment while driving (e.g. laws banning use of wireless phone while driving)."
(Underlining Board's emphasis)

Additionally, the Carrier alleged that the Claimant violated that portion of **Rule 1.6 Conduct** that states in pertinent part:

"Employees must not be:

- 1. Careless of the safety of themselves or others**
- 2. Negligent..."**

On pages 16 - 19 of the Transcript, Mr. B. Hopenraith, Supervisor of Engine Support, who was the Carrier Officer that reviewed the film of the Claimant's actions, testified that bullet one and four of Rule 1.10 were not violated and he was not sure if bullet 3 was violated because he did not know whether the Claimant was operating a commercial vehicle and lastly he stated that the Carrier was not concerned about the conclusionary paragraph of the Rule, therefore, the issue is whether or not the Claimant violated the second bullet .

The Organization argued that the Claimant did nothing more than press a single button three times to silence the noise of his company cell phone and the only reason the cam recorder was activated was because of the washboard road and had nothing to do with erratic or careless driving on the part of the Claimant whereas the Carrier suggested that the cam recorder was activated because the Claimant either made a radical lateral movement of the vehicle or hit a pothole while reading a text.

The Board is not persuaded that the Claimant's cell phone was activated by Claimant's alleged erratic driving as it was not refuted that the roadway was very rough nor is the Board persuaded that the Claimant was reading a text. However, the Board is convinced by the Claimant's testimony on pages 43 - 45 of the Transcript that he glanced at the phone three different times while trying to silence its noise, therefore, it is determined that substantial evidence was adduced at the Investigation that the Claimant was distracted for a short period of time (approximately nine seconds) that subjected the Claimant to potential harm and he was negligent in not stopping his vehicle to handle his telephonic problems as there was no reason he could not have stopped as he was in a isolated area.

The only issue remaining is whether the discipline was appropriate. At the time of the offense Claimant had approximately 22 years of service and this was his second Serious Level S discipline event concerning safety within a two month period; as he signed a Waiver on June 6, 2013, accepting a Level S 30 Day Record Suspension with a 36 month review period. Claimant's violation was serious because during that short period of distraction he jeopardized his personal safety, however, in this instance based upon a good work record over a long period of time the Board does not believe that Claimant's error in this instance warrants permanent dismissal, therefore, the Board finds and holds that the dismissal is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Claimant is to be reinstated to service with seniority intact and all other rights unimpaired with no back-pay. Claimant is forewarned that upon reinstatement he should be careful to adhere to all directives, instructions and Carrier Rules.

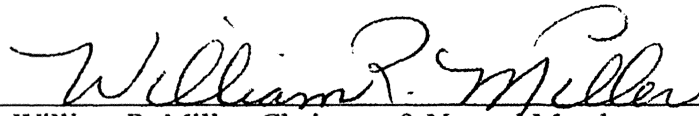
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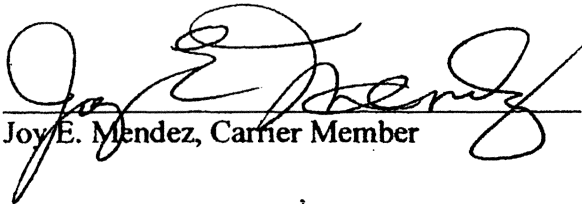
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AWARD

Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: July 10, 2014