

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 197, (Case No. 197)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing March 27, 2015, when Claimant, M. R. Powell (6465603) was disciplined with a Level S 30-Day Record Suspension with a 3-year review period for his use of an electronic device while driving vehicle number 21456 on the Fort Worth Subdivision on February 24, 2015 at approximately 4:01 a.m. The Carrier alleged violation of Maintenance of Way Operating Rule (MWOR) 1.10 Games, Reading, or Electronic Devices.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant’s record this discipline and he be reinstated, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 27, 2015, continuing forward and/or otherwise made whole.”**
(Carrier File No. 14-15-0216) (Organization File No. 90-SF13C3-1510)

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 all 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.

The facts indicate that the Claimant was working as a Track Supervisor on February 24, 2015, on the Fort Worth sub-division. It was alleged that on the aforementioned date the Claimant used an electronic device while driving a Carrier vehicle and because of that allegation the Claimant was directed to attend a formal Investigation on March 13, 2015, which was mutually postponed until March 27, 2015, 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 use of an electronic device while driving vehicle number 21456 on the Fort Worth sub division on February 24, 2015 at approximately 0401 hours. The date BNSF received first knowledge of this alleged violation is February 27, 2015.

This investigation will determine possible violation of MWOR 1.10 Games, Reading, or Electronic Devices."

On April 24, 2015, 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 no credible evidence was presented by the Carrier at the Investigation that shows the Claimant used an electronic device while operating his company vehicle. It argued the Carrier offered grainy low quality resolution photographs with no captured frames that show an electronic device in the Claimant's hand. It further argued that the Organization produced evidence (Claimant's cell phone records) that indicated that no text messages were sent or received nor were any phone calls in process sent or received during the time frame covered by the charges. It emphasized that evidence was not refuted. The Organization concluded that the Carrier had not met its burden of proof and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that on February 24, 2015, Claimant violated MOWOR 1.10. It argued the DriveCam on vehicle 21456 recorded Claimant using his cellular phone while driving the vehicle. It further argued that the Claimant admits he was driving vehicle 21456 on the day in dispute and that it is him in the DriveCam photographs. Lastly, it asserted the record is clear that the Claimant was guilty as charged and 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 it is determined the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11.

Examination of pages 10 and 11 of the transcript reveals that Mr. Larry A. Wilson, Roadmaster was questioned about the photographs taken of the Claimant by the DriveCam while the Claimant was driving as follows:

"Brian T. Poston: Well, then, my, exact question would be, how is that, whatever that is in the top center of that picture, illuminated bright white? Can you explain that one?"

Larry A. Wilson: I cannot tell.

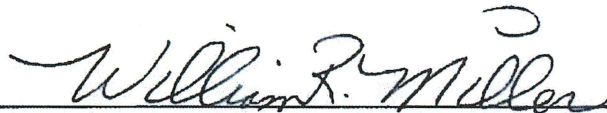
Brian T. Poston: So you can't determine that it's an actual cell phone in his hand?

(Underlining Board's emphasis)

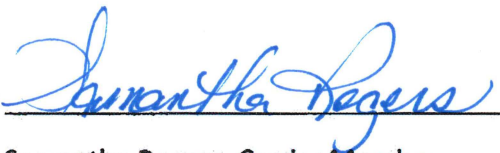
The Carrier's only witness against the Claimant testified that he could not determine that the Claimant was holding a telephone after reviewing the photographs. The Board agrees with Roadmaster Wilson's testimony that it is impossible after examining the poor quality pictures to determine what was in the Claimant's hand and that coupled with the unrebutted evidence, Claimant's phone records, presented by the Organization which showed no usage of Claimant's cell phone during the time period covered by the Notice of Investigation leads to the inescapable conclusion that the Carrier did not meet its burden of proof. Therefore, the Board finds and holds that the discipline is set aside and the Claimant's disciplinary record is cleared of the allegation and the Claim is sustained in accordance with Part 2 of the Claim.

AWARD

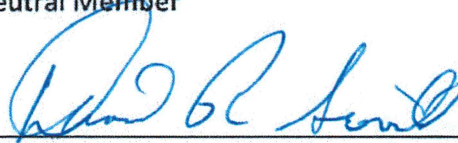
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 7/21/17