

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 198, (Case No. 198)**

**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 May 14, 2015, when Claimant, Jason R. Carter (1647767) was disciplined with a Level S 30-Day Record Suspension with a 3-year review period for the use of an electronic device while performing the duties of a flagman on March 23, 2015 at approximately 12:20 p.m. near milepost 27.1 on the San Bernardino Subdivision resulting in being observed using a personal electronic device while on-duty. 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 dismissal and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 14, 2015, continuing forward and/or otherwise made whole.”**
(Carrier File No. 14-15-0262) (Organization File No. 180-SF13C3-1514)

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 on March 23, 2015, the Claimant was working as a Flagman on the San Bernardino Subdivision and it was alleged that he was not attentive to his duties because he was using an electronic device and because of that allegation the Claimant was directed to attend

a formal Investigation on April 7, 2015, which was mutually postponed until May 14, 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 performing the duties of a flagman on March 23, 2015 at approximately 1220 hours near milepost 27.1 on the San Bernardino Subdivision. As a result, you were observed using a personal electronic device while on-duty.

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

On June 1, 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.

The Board notes that the instant case is a companion case to Award No. 199, Case No. 199. This is the first of two cases that involve the same Claimant both of which are record suspension cases. Both cases correctly state in their Statement of Claims, Part 1 that Claimant was issued a Record Suspension whereas in Part 2 each requests reinstatement. It is further noted that this is the chronologically later incident.

It is the Organization's position that on March 23, 2015, the Claimant was acting as a Flagman on an "as needed basis" for an outside contractor (See Claimant's testimony on pages 23 and 24 of the transcript). It argued that the Claimant was the only witness at the Hearing who testified as to what the Claimant's actual duties were for the protection of the contract work group and according to it the Claimant's testimony was not refuted. It further argued that the Claimant's use of an electronic tablet was for the business purpose of reviewing available Carrier jobs, which was only done while the Claimant was sitting in a vehicle that was a safe distance from the track while not needed by the contractor to provide protection. 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 two Carrier Officers witnessed the Claimant using an electronic tablet when he should have been providing protection for an outside contractor's work group. It argued that Roadmaster Martinez testified that when he approached the Claimant's vehicle he told Claimant his use of the tablet was against the Rules and Claimant confirmed that he knew what he was doing was a violation. According to it, Mr. Martinez further testified that the Claimant was not on lunch break – when it might have been acceptable to use an electronic device. The Carrier stated that at the time of the incident, Claimant was serving as a lookout for contractors and the duty was constant, therefore, the Claimant had no right to be using an

electronic device as it was a distraction from his responsibilities. 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.

Turning to the record there is no dispute that Carrier Officers P. Smith and P. Martinez witnessed the Claimant using an electronic tablet while on duty (See pages 11, 13 and 16 of the transcript) which the Claimant admitted (See page 22 of the transcript). However, there is dispute between the parties as to whether or not the Claimant was serving as a lookout for the contractor on a "constant" basis or on "as needed" basis.

On page 11 of the transcript Roadmaster Smith was questioned as following:

"Frank Barrera: Okay, and what can you tell us about the incident under investigation here today?"

Phil B. Smith: Uh, myself and Paul Martinez went to go see Jason to give him letters for two other investigations and we, uh, we arrived, we pulled up, we couldn't park right by him because there was equipment working, so we backed up, parked, walked over to his vehicle and his head was down and seen he closed his lid to his tablet and put it to his right." (Underlining Board's emphasis)

Mr. Smith's testimony was not refuted that the outside contractor's work group had equipment and people were working in close proximity to the Claimant's vehicle and on or near the tracks. On page 18 and 19 of the transcript Roadmaster Martinez was questioned as follows:

"Frank Barrera: And once again, you stated that they are compensated through their lunch period due to the fact that they have continuous people out their working on or near the track?"

Paul Martinez: That's correct, they have to stay there observing the, the contractors working." (Underlining Board's emphasis)

On page 20 of the transcript the questioning of Mr. Martinez continued regarding whether the Claimant's duties were constant as follows:

"Brian Poston: Okay, would that, uh that duty be constant or would that be as needed?"

Paul Martinez: That's constant...do it the whole time.

Brian Poston: So they're fouling the track the entire eight hour day?

Paul Martinez: They're going back and forth that entire day, correct.

(Underlining Board's emphasis)

Mr. Martinez's testimony was not effectively refuted that the contractor's equipment and employees were constantly crossing the tracks nor was it refuted they were working while the Claimant was using his electronic tablet.

On page 11 of the transcript Roadmaster Smith testified that Roadmaster Martinez told the Claimant that Claimant knew better than to be on an electronic device and the Claimant told him he was doing it **"...to keep sane."** That testimony was consistent with a portion of the Claimant's rendition of the incident wherein on page 22 of the transcript the Claimant stated he was using the tablet because **"...I was trying to keep my sanity."** Interestingly, the Claimant did not refute the Carrier Officers that his services were needed by the contractor at the time of the incident or that he was using the tablet for non-business purposes.

Assuming for the sake of argument the Claimant had said his use of the tablet was for business purposes that argument is not persuasive. A business purpose would have been accessing information that was necessary to accomplish the duties of the day rather than looking for available jobs open for bid. Furthermore, the record substantiated that equipment and employees continued to work on or near the tracks, therefore, it is clear 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 incident the Claimant had approximately ten years of service with a Formal Reprimand still open under a 12 month review period and a 30-Day Record Suspension with a One Year Review Period (covered by Award No. 199) issued on the same date as the instant discipline. The discipline assessed in this instance was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, the discipline will not be disturbed and the claim will remain denied because it was not contrary to PEPA, nor was it arbitrary, excessive or capricious.

AWARD

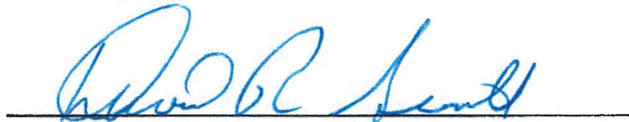
Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 7/21/17