

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7357
AWARD NO. 13, (Case No. 13)**

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

vs

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

William R. Miller, Chairman and Neutral Member
Kevin D. Evanski, Employee Member
Anthony Stillittano, Carrier Member

Hearing Date: December 20, 2013

STATEMENT OF CLAIM:

**"Appeal of discipline on behalf of BMW member Mr. Glenn Hamilton requests that the discipline of forty (40) demerits and time served assessed to Mr. Hamilton's personal record be removed and or reversed."
(Carrier File No. 8-00818)**

FINDINGS:

Public Law Board No. 7357, 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 were given due notice of the hearing thereon and did participate therein.

On April 29, 2011, Claimant was directed to attend a formal Investigation on May 6, 2012, concerning in pertinent part the following charge:

"The purpose of this Investigation will be to determine your responsibility, if any, for your alleged violation of the Policy on use of Electronic Devices, Effective June 1, 2009, Revised March 1, 2011, for the incident that occurred on April 28th, 2011 at 12:45 p.m. at Mile Post 8.19 on the Colonie Main."

On May 26, 2011, Claimant was notified that he had been found guilty as charged and was assessed 40 Demerits and Time Served.

It is the Organization's position that the Investigation was not "fair and impartial" because the Hearing Officer attempted to manipulate the Organization's questioning of witnesses and did

not allow the Organization to show that the Claimant was subjected to disparate treatment and it did not allow the Organization to make an opening statement. It also objected to the Labor Relations Department being furnished a copy of the transcript prior to its appeal being made to that office. Based upon the alleged procedural errors the Organization requested that the discipline be set aside and the claim sustained without reviewing the merits. However, if the Board chose to examine the facts it would discover that the Carrier did not meet its burden of proof as the testimony of key Carrier witnesses was not credible. It argued that the record shows that the Claimant made a cell phone call at approximately 12:45 p.m., on April 28, 2011, however, that call was made during a period of time when no physical work was being performed and all mobile equipment, including the Claimant's work truck was stationary. It further argued that the members of the crew were on a recognized break and the Claimant's use of the phone did not present a safety hazard and when the Claimant completed his call the phone was restored to the off position and placed back in his lunch box off his person. It concluded that the Claimant's call was in accordance with exceptions covered by Policy H&S 4329 and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that there were no procedural errors and the Claimant's Hearing was "fair and impartial". Turning to the merits it asserted the record shows that the Claimant was not authorized to use his personal cell phone at the time of the incident, nor did Claimant's Foreman authorize a break or 20 minute lunch period, as his testimony indicated that he was working with the Train Dispatcher and Train 450 that was in his territory with engine problems, therefore, the Claimant was in violation of the aforementioned Policy. It asserted that the risk of distraction posed by electronic devices are genuine and every employee is required to keep those risks from jeopardizing safety in the work place and because of Claimant's violation he placed himself and others at risk. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript (377 pages) and record of evidence and is not persuaded by the Organization's procedural arguments and has determined that the formal Investigation was conducted in a fair and impartial manner and Claimant was afforded all of his "due process" Agreement rights. The dispute will be resolved on its merits.

The instant dispute centers on the Carrier's **Policy on Use of Electronic Devices** which states in pertinent part:

"d. The use of personal communication devices is prohibited at all times except:

- * during a recognized break or meal period in a location that is safe to do so;**
- * in locations designated by local supervision and/or signage; or**
- * for minimal voice communication, unless otherwise prohibited by applicable laws or regulations, local supervision, and/or signage, and only when;**

- * all movement of on track or mobile equipment, or physical work activities are stopped; and
- * the employee is not foul of any track; and
- * the employee confirms with all involved employees that such use will not interfere with any safety related duties; and
- * the device is immediately turned off and returned to storage when call is completed."

The parties recognize that the risk of distraction posed by electronic devices is a real problem that has the potential for catastrophic results. The question at issue in this dispute is whether or not the Claimant's use of a personal cell phone at approximately 12:45 p.m., on April 28, 2011, posed a risk for the Claimant and his co-workers.

Additionally, it has not been disputed that at the time of the incident covered by the charges the aforementioned Carrier Policy regarding Electronic Devices had been recently revised.

The facts indicate that at the onset of the work day Foreman Scott conducted a job briefing during which time he designated that a company cell phone would be available and located in his company vehicle if any crew members needed to make a phone call. The Carrier Policy states in pertinent part: **"The use of personal communication devices is prohibited at all times except:..."**and those exceptions are listed above, however, the Rule does not designate that only Carrier personal communication devices can be used, but instead states personal communication devices. The Board is not persuaded that the Claimant was in violation of the Policy when he used his personal cell phone, provided he met the exceptions for usage.

At the time of the incident the crew including the Claimant were waiting for material to be delivered in order for them to complete their assignment. Work had stopped at approximately 12:30 p.m. and did not resume until 1:10 p.m. and during that period of time three of the crew members left the work site to purchase meals which they ate upon return to work. The Carrier argued that it was not a recognized break nor was it a lunch period. The Board does not take issue with the Carrier's argument that the 40 minutes the crew did not work may not have been an official break or meal period covered by Agreement and/or Work Rules. Additionally, it is clear that Foreman Scott testified on page 151 of the transcript that he did not designate the time in dispute as a meal period, however he added a caveat when he testified as follows:

"A **But, if you're asking was that a proper time to eat their lunch,
I would say yes, waiting for material would be."**
(Underlining Board's emphasis)

The record is clear that Foreman Scott did not take issue with his crew taking their meal period while awaiting the delivery of material and believed that was a wise use of their time. That point is further emphasized by the fact that those crew members who left the property to secure meals were not sanctioned by the Carrier for their actions. The transcript further verifies that at 12:45 p.m. the Claimant received a voice mail and while retrieving that voice mail the Claimant was spotted using his cell phone by Supervisor Miller (See page 22 of the transcript). The transcript substantiates that when Supervisor Miller spoke to the Claimant the Claimant was on a unofficial break and/or meal period.

Review of the transcript further confirms that all movement of Utility 2 track or mobile equipment, or physical work had stopped and the Claimant was not foul of any tracks when he made his call inside a company truck that was parked off the property (See pages 115 and 116 of the transcript). Furthermore, it was not refuted that when the Claimant completed his phone call he returned the phone to storage by placing it in his lunch box.

As previously stated the break was from 12:30 p.m. until approximately 1:10 p.m. On page 252 of the transcript Supervisor Miller testified that he met with Foreman Scott on the work site at 12:40 p.m. and had a short discussion. During that conversation a grapple truck was on site unloading plates. The record shows that even though the crew members of Utility 2 were on a break, Foreman Scott continued to work. Testimony further indicated that during the break period Foreman Scott was also working with the Train Dispatcher and Train 450 that was in his territory with engine problems. The sixth bullet point exception states:

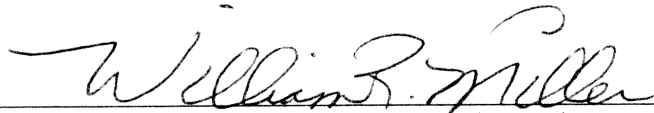
"the employee confirms with all involved employees that such use will not interfere with any safety related duties;"

Foreman Scott was the leader of the gang and was not on break. Claimant should have checked with Mr. Scott to make sure that Claimant's use of his personal telephone did not interfere or jeopardize Mr. Scott's safety or anyone else that Scott was working with. Substantial evidence was adduced at the Investigation that the Claimant violated a portion of the Carrier's Policy on Use of Electronic Devices.

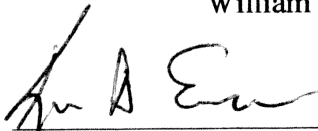
The only issue remaining is whether the discipline was appropriate. The record reveals that Claimant's offense in this instance would have been the norm prior to the new Policy and would not have resulted in any discipline. The Carrier is to be commended for instituting the new safeguards, but in this instance because of the unique facts of the case and on a non-precedential basis the Board finds and holds that the discipline was excessive rather than corrective in nature and it will be reduced to 15 demerits and the Claimant's time held out of service is reduced as well and he will be compensated for 15 days pay at the pro-rata rate.

AWARD

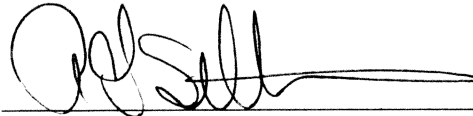
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Kevin D. Evanski, Employee Member



Anthony Stillittano, Carrier Member

Award Date: Feb 13, 2014