

BEFORE PUBLIC LAW BOARD NO. 7386

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE
and
SOUTH KANSAS AND OKLAHOMA RAILROAD**

Case No. 5

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed on Mr. M. Hempen by letter dated December 12, 2011 for alleged violation of Rule E-22 – Cell Phone and Radio Use on November 8, 2011 at approximately 10:00 A.M. was without just and sufficient cause, unwarranted and in violation of the Agreement (System File 22-E22-111).
2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Hempen’s record and compensate him for all losses, including wages, benefits, seniority rights and any other losses suffered as a result of the Carrier’s improper discipline.”

FINDINGS:

By notice dated November 11, 2011, the Claimant was directed to attend a formal investigation on charges that on March 10, 2013, he allegedly had violated the Carrier’s Rule relating to Cell Phone and Radio Use on November 8, 2011. The investigation was conducted, after a postponement, on December 6, 2011. By letter dated December 12, 2011, the Claimant was informed that as a result of the investigation, he had been found guilty as charged, and that he was being dismissed from the Carrier’s service. The Organization subsequently filed the instant claim on behalf of the Claimant, challenging the Carrier’s decision to discipline him. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because substantial credible evidence supports the finding that the Claimant is guilty as charged in

that he used a cell phone while standing in the middle of a track, because the Claimant was afforded all elements of due process and the formal investigation was free of reversible error, and because the discipline imposed was not arbitrary, capricious, or an abuse of managerial discretion. The Organization contends that the instant claim should be sustained in its entirety because the Carrier failed to produce substantial evidence in support of its charges against the Claimant, because there was no rule violation even if the Carrier proved that the Claimant used his cell phone within four feet of the track in light of the factual circumstances of this case, and because the discipline imposed was harsh and excessive.

The parties being unable to resolve their dispute, this matter came before this Board.

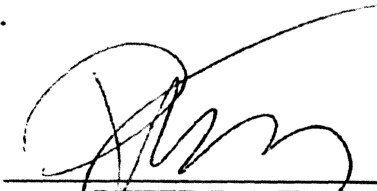
This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier rules when he was walking down the middle of a track using a cell phone. The Carrier's rule requires that employees who use cell phones cannot be "foul" or "within four feet" of any track. On November 8, 2011, the Claimant was working on the track and was using his phone while on the track. The Claimant admits that he was in the middle of the track.

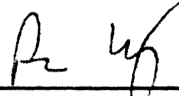
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.


The Claimant in this case was guilty of an extraordinarily serious rule violation. Given the Claimant's short-term employment, coupled with the previous three suspensions for failing to live up to the Carrier's requirements, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment in this case. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER
DATED: 11-4-14

CARRIER MEMBER
DATED: 11-6-14