

**PUBLIC LAW BOARD NO. 7394**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**  
(Former St. Louis—San Francisco Railway Co.)

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Case No. 65; Award No. 65 (Wallace)  
Carrier File No. 12-15-0129  
Organization File No. 361-FR91C3-1524  
NMB Subject Code 106

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**STATEMENT OF CLAIM:**

Claim of the Atchison Topeka & Santa Fe Frisco System Federation of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters, Region II that: "The suspension shall be set aside and the claimant shall be made whole for all financial and benefit losses as a result of violation. Any benefits lost, including vacation and health insurance benefits (including coverage under the railroad industry National Plan), shall be restored commencing July 23, 2015, continuing forward and/or otherwise made whole. Restitution for financial losses as a result of violation shall include compensation for: 1.) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the claimant while wrongfully suspended); 2.) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service. 3.) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held (sic) during the time the claimant was suspended, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been suspended."

**FINDINGS:**

Public Law Board No. 7394, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway

Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Lawrence W. Wallace, has been employed by the Carrier since 1998. On July 23, 2015, following an investigation, the Carrier assessed Claimant a Level S 30-day record suspension with a three year review period for his use of a hand-held electronic device while operating a Carrier vehicle on May 15, 2015.

MOWOR 1.10 Games, Reading or Electronic Devices provides, in relevant part:

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

- **Use cellular or mobile telephones . . . for voice communications** in other than hands-free mode.
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- **Dial or answer cellular or mobile telephones by pressing more than a single button when operating** a commercial motor vehicle.

Claimant's personal record shows a formal reprimand, with a 12-month review period, assessed on December 16, 2014 for failure to properly protect employees and equipment when he set on outside his authority limits.

The evidence in this case consists of a DriveCam video screen shot, which was entered into the record and in which Claimant can clearly be seen holding his phone in his hand, held up in the direction of his mouth. Claimant acknowledged at the investigation that he can be seen holding his phone, although he maintained he was not looking at it. He contended that he was not talking on the phone, and could not recall why he would have been holding it in that fashion.

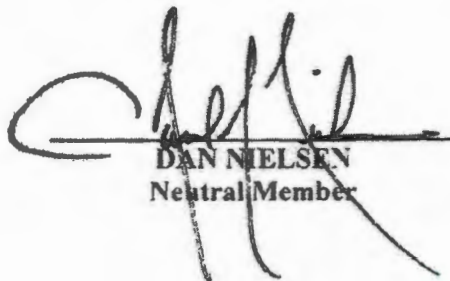
The Carrier states that the evidence clearly shows that Claimant had his cell phone open and in his hand, as his image was captured on DriveCam, in clear violation of the applicable Carrier Rule. Even though Claimant maintained that he was not using his phone, a reasonable person would be unable to deduce any other purpose for him to hold his phone in that fashion. The Carrier asserts that it has proven his guilt by substantial evidence. With respect to the penalty, the Carrier notes that the applicable Rule was put in place after a catastrophic event which resulted in fatalities. Claimant's violation was serious, and the penalty was appropriate. The claim should be denied.

The Organization does not dispute that DriveCam video showed Claimant with his phone in his hand. However, the Organization stresses, there is no evidence that he was talking on his phone. The Organization asserts that the Carrier has failed to meet its burden of proof, and the claim should be sustained.

We have carefully reviewed the record in its entirety. Claimant does not deny that he was captured on DriveCam holding his cell phone in his hand, close to his mouth. He denied that he was using the phone, but could not explain why he would have otherwise been holding it in that manner. We agree with the Carrier that the only logical conclusion is that Claimant was in fact using his cell phone in a manner which violated the applicable Carrier Rule. His guilt has been established by substantial evidence. We see no reason to disturb the penalty deemed appropriate by the Carrier.

**AWARD**

**Claim denied.**

  
DAN NIELSEN  
Neutral Member

  
MICHELLE MCBRIDE  
Carrier Member

  
DAVID SCOVILLE  
Organization Member

Dated this 6th day of September, 2017.