

**PUBLIC LAW BOARD NO. 7564**

Case No. 104/Award No. 104  
Carrier File No. 10-19-0141  
Organization File No. C-19-D040-12  
Claimant: Darrell E. Law

BNSF RAILWAY COMPANY )  
 )  
 -and- )  
 )  
 BROTHERHOOD OF MAINTENANCE )  
 OF WAY EMPLOYEES DIVISION )

**Statement of Claim:**

By letter dated December 27, 2018, Track Inspector Darrell E. Law was given a Level S 30 Day Record Suspension and a three (3) year review period for an alleged violation of MWOR 1.10 Games, Reading, or Electronic Devices. The February 22, 2019 claim from the Organization, Jim L. Varner, Vice General Chairman, appealing the decision, asks that the discipline be removed from the Claimant's records "as it is excessive, unfounded and without merit."

### Facts:

By letter dated November 30, 2018 the Claimant was informed that "An investigation has been scheduled at 1000 hours, Friday, December 14, 2018, at the BNSF Railway Co., 260 E. 44<sup>th</sup> Avenue, Denver, CO, 80216, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged use of a hand held electronic device while operating company vehicle 26164 while in motion on November 28, 2018. The date BNSF received first knowledge of this alleged violation is November 30, 2018.

**Carrier Position:**

The Carrier contends that the investigation was fair and impartial but also that the Organization's contention that it was not was untimely. The required substantial evidence was obtained with testimony indicating that the Claimant was holding an electronic device and looking at it while operating the company vehicle. DriveCam video, shown twice at the investigation, was triggered by rough, uneven road. The Claimant's contradictory accounts of the events in question raise concerns about his credibility. The discipline involved a serious safety matter and was in accordance with the Policy on Employee Performance Accountability (PEPA).

### **Organization Position:**

The Organization insists that the investigation was not fair and impartial, that the Claimant's due process rights were ignored because the DriveCam video was not entered into evidence for the Organization to review. Nothing specific triggered the DriveCam recorder. The Claimant was not communicating via mobile phone as, according to the Claimant, it was his hearing aid case that was shown on the video. Discipline was based on unsubstantiated allegations and assumptions, because the object in the Claimant's hand was not conclusive evidence that MWOR 1.10 was violated. The claim should be sustained.

### **Findings:**

The discipline and claim arose from an incident late in the evening of November 28, 2018 when the Claimant was called out because of a car stuck on BNSF tracks. The subsequent DriveCam recording shows the Claimant with a device in his hand while operating the company vehicle, with the Carrier alleging that it was a cell phone and the Claimant explaining that it was his hearing aid case, which is about the same size as the mobile phone.

A careful reading of the investigation transcript shows that the investigation was fair and impartial and that the Claimant's due process rights were respected. Contrary to the Organization's contention, the DriveCam video was shown twice during the investigation so that it was reviewed by the Claimant and his representative. There is no doubt that the Claimant had something in his hand when the DriveCam recorder was triggered. Roadmaster George Mukai testified that the object was a mobile phone, not a hearing aid case.

One of the hallmarks of credible evidence is consistency, whether that consistency is within direct testimony, between direct testimony and cross examination, between testimony and prior written statements or between explanations given at different times. At various times during the investigation, the Claimant stated that he was using the GPS function on his cell phone because of his unfamiliarity with the area and that he had to touch the screen twice to relight it after the screen went dark and that he had his hearing aid case in his hand and that there was an inside light in the case that went on when the case was opened. However, the Claimant also had stated that his hearing aids were in the shop for repair and therefore he did not have them the night of November 28, 2018. This did not gibe with latter testimony that suggested he might have been getting his hearing aids out to listen to the vehicle radio. The Board further observes that if the hearing aids were in the shop for repair, there is no explanation for why the Claimant had the case with him at all.

The multiple inconsistencies within the Claimant's testimony raise more questions than the testimony answered and utterly destroy any confidence in the persuasiveness of any of the Claimant's explanations. The Board has no choice but to join the Carrier in the conclusion that arose from the investigation—that being that the Claimant was using his mobile phone in violation of MWOR 1.10 that prohibits the use of cell or mobile phones while driving a BNSF vehicle. The evidence is substantial and the discipline appropriate.

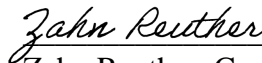
**Award:**

Claim denied.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be made.

  
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Zachary C. Voegel, Organization Member

  
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Zahn Reuther, Carrier Member



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I. B. Helburn Neutral Referee

Austin, Texas  
Date: July 30, 2020