

PUBLIC LAW BOARD NO. 7564

Case No.: 40/Award No.: 40
Carrier File No.: 10-13-0453
Organization File No.: C-13-D040-31
Claimant: Daniel J. Potter

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

Statement of Claim:

1. The discipline (Level S 30 Day Record Suspension) imposed upon Mr. Daniel J. Potter by letter dated June 21, 2013 for alleged violation of MOWOR 1.10 Games, Reading, or Electronic Devices on May 10, 2013 at approximately 1729 hours in Omaha, Nebraska, for alleged use of an electronic device while operating BNSF 23758, as evidenced by on board video.
2. As a consequence of the violation referred to in Part (1) above, Claimant Daniel J. Potter shall now receive the remedy prescribed by the parties in Rule 40(G).

Facts:

By letter dated May 16, 2013 the Claimant was directed to attend an investigation on May 27, 2013 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged use of a (sic) electronic device while operating BNSF 23758, as evidenced by on board video, on May 10, 2013, in Omaha, Nebraska, at approximately 1729 hours. The date BNSF received first knowledge of this alleged violation is May 14, 2013." By mutual agreement the investigation was postponed until June 12, 2013.

Carrier Position:

There was a fair and impartial investigation with no procedural flaws. The Claimant admitted his violation of MOWOR 1.10, which satisfied the Carrier's obligation of proving the infraction with substantial evidence. Beyond the admission the DriveCam provided credible evidence that the Claimant, while he might have answered the phone by pushing only one button, had the phone to his ear when talking on other than a hands-free device. Arbitration is not the proper forum in which to protest the implementation of the DriveCam policy. That aside, the Organization has not shown a rule prohibiting the Carrier from installing safety devices, any

claim that installation of the DriveCam violated the collective bargaining agreement was untimely and barred by the doctrine of laches and the investigation was for the purpose of ascertaining facts associated with the Claimant's behavior and not the implementation of the DriveCam. The Board is responsible for interpreting the rules and agreements and not for providing leniency. If the claim against the record suspension is sustained, no back pay is due and the only remedy would be to remove the discipline from the Claimant's record.

Organization Position:

The investigation was not fair and impartial as the use of video tape from the DriveCam deprived the Claimant of an opportunity to face his accuser. Furthermore, the tape was not placed in evidence. Roadmaster Amato had no first-hand knowledge of the incident and simply gave his opinion that the Claimant had violated MOWOR 1.10. However, there is no evidence of a violation because the Claimant's use of a single button to answer the phone was within the MOWOR 1.10. The Carrier has not negotiated with the Organization over the implementation of the DriveCam, as the Federal Railroad Safety Risk Reduction Program Requires and has not introduced hands-free devices in vehicles with DriveCams as the Carrier said it would.

Findings:

The Board has considered the conduct of the investigation and finds no procedural defects that would render the inquiry other than fair and impartial. The use of the DriveCam tape did not impinge on the Claimant's due process rights. Video camera tapes have been routinely used as evidence in other venues so long as available light permitted a reasonable view of the relevant scene. Cameras installed in airport baggage handling areas, in retail stores and in banks provide prominent examples of the use of this technology. While the DriveCam tapes were not made a part of the record of this investigation, the Claimant and his representative were able to view the tape. Other than the contention that the investigation was unfair because the tape could not be confronted, the Organization did not suggest that the tape did not show the reality of the situation. Moreover, the Claimant admitted violating MOWOR 1.10 when he acknowledged that he held the phone to his ear. The Organization claims no violation on the basis of that portion of MOWOR 1.10 that states that the operator of a BNSF owned or rented vehicle may not "Dial or answer cellular or mobile telephones by pressing more than a single button when operating a commercial motor vehicle." However, the Organization has neglected to mention the MOWOR 1.10 prohibition against the use of "cellular or mobile telephones, or similar hand-held devices for voice communications in other than hands-free mode." The Claimant's admission provides substantial evidence of a violation of this part of MOWOR 1.10.

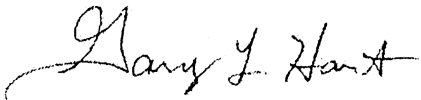
The Organization has not pointed to any rule in the collective bargaining agreement that would require the Carrier to negotiate over the introduction and implementation of safety devices. And, an expedited arbitration procedure is not the proper forum in which to rule on the Carrier's obligation, if any, under federal law, to consult or negotiate with the Organization over the introduction and implementation of safety devices.

Award:

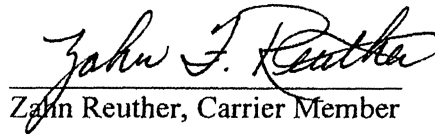
Claim denied.

Order:

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



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
April 23, 2015