

PUBLIC LAW BOARD NO. 7564

Case No.46/Award No. 46
Carrier File No. 11-14-0028
Organization File No. B-M-2714-E
Claimant: James T. Ryan

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

Statement of Claim:

1. The Carrier violated the Agreement on August 29, 2013 when it assessed Claimant, James T. Ryan, a Level S 30-day Record Suspension, with a 3-year review period, for alleged violation of MWOR 1.10 Games, Reading, or Electronic Devices, for allegedly crossing the Armington industry track near MP 194.7 on the Laurel Subdivision while using a cell phone, at approximately 0915, on Friday, July 12, 2013.
2. As a consequence of the violation referred to in part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.

Facts:

By letter dated July 15, 2013, the Claimant was informed of an investigation on "Wednesday, July 25, 2015 . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged crossing the Armington Industry track near MP 194.7 on the Laurel Subdivision while using a cell phone, at approximately 0915, on Friday, July 12, 2013."

Carrier Position:

The investigation began on July 25, 2013, as scheduled in the Notice of Investigation, with the introduction of two exhibits and was then recessed until August 9, 2013, with the approval of the Organization, in order to procure two Organization witnesses. All relevant individuals appeared on August 9, 2013. The investigation was fair and impartial. The Agreement does not contain discovery provision; thus the Carrier was not obligated to provide the names of witnesses or documents in advance. The Organization's requests for recesses to

review testimony and exhibits were granted. Mr. Moler of the FRA was not employed by the Carrier and could not be compelled to attend the hearing. The Organization did not show that the conduct of the investigation prejudiced the Claimant and his admission made such arguments moot. The Charging Officer is not restricted by the Agreement from also issuing discipline.

Substantial evidence of a violation of MWOR 1.10 was obtained with the Claimant's admission of improper cell phone use. That the phone was at the Claimant's side is irrelevant; the violation was still serious. The Board's function is to interpret the rules and not to substitute its judgment for that of the Carrier unless the Carrier has abused its discretion. Nor is the Board to usurp the Carrier's prerogative to decide on leniency. Should the claim be sustained, because no work was lost, the only remedy should be the removal of the discipline from the Claimant's records.

Organization Position:

No legally defined hearing was conducted on July 24, 2013 and the August 15, 2013 hearing (actually it was August 9, 2013) was 23 working days from the date of the event, thereby violating Rule 40A. The Notice of Investigation initially scheduled the investigation for July 24, 2013 but the parties did not meet. They met the next day, which constituted a unilateral postponement in violation of Rule 40I. Rule 40C was violated because the Carrier did not list its witnesses on the Notice of Investigation, thus creating trial by ambush and a denial of the Claimant's due process rights. The introduction of a statement by FRA Inspector Moler deprived the Claimant of the right to face his accuser—critical because it is questionable as to whether Mr. Moler could have seen a violation from 400-450 feet distant. The Claimant's due process rights were also violated when the Charging Officer rather than the Conducting Officer issued the discipline.

The Carrier did not provide substantial evidence of a violation. The Claimant began communications in his cell phone before fouling the track, discontinued the conversation as he crossed the track and continued again when he no longer fouled the track. MWOR 1.10 Games, Reading or Electronic Devices, which is ambiguous, was not violated. The industry track that the Claimant crossed was a stub track that had been locked out and was not live. The Claimant has 33 years' tenure with a good work record.

Findings:

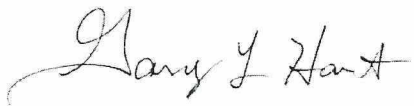
The Organization's reliance on the technically faulty Notice of Investigation is misplaced. The Notice should have read "Thursday, July 25, 2013" rather than "Wednesday, July 25, 2013." The Carrier could have and should have caught and corrected the error, but because the Notice had the correct date, as opposed to the day, the Board does not find a unilateral postponement in violation of Rule 40I. Furthermore, the recess to August 9, 2013 in order to include the in-person testimony of two Organization witnesses was with the explicit approval of Vice General Chairman Ellestad who, when asked if he objected to reconvening between August 5-9, 2013, responded "No, that's fine". None of this violated Rule 40.

Moreover, as the Board has noted in numerous prior awards, because the Agreement does not require discovery, the Carrier is not obligated to produce a list of witnesses or copies of documents before the investigation. Nor is Carrier obligated to have discipline assessed by the Conducting Officer. The Board believes, consistent with the Carrier's indication on occasion, that having the Conducting Officer also assess discipline is the better practice and could be critical in a case that turns on a credibility determination, although this is not such a case.

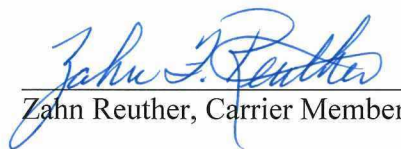
The Carrier has provided substantial evidence that, at a minimum, the Claimant crossed the Armington industry track while his cell phone was on. The Claimant admitted this. Operator Szymanski, when questioned by Vice General Chairman Ellestad, said that he saw the Claimant use the cell phone to call Foreman Alvarez when he was between two tracks, but in response to questions from Conducting Officer Britney, the Operator said that he saw the Claimant walking across the tracks either while he was talking on the cell phone or when he simply had the phone on. The Board is not certain whether the Claimant had the phone at his side or at his ear as he walked across the tracks, but the distinction is irrelevant as the Board defines "use" as having the device turned on. In an industry in which safety and alertness is critical and where cell phone use on duty has led to catastrophe, the broadest possible interpretation of "use" could well save property damage, serious injury and even lives. The Board also finds irrelevant the Organization's contention that the industry track had been tagged out and locked out and was not a live track at the time. This may have been true, but that information is not in the record of the investigation itself and is viewed as new evidence properly excluded from consideration. The Carrier did not abuse its discretion in assessing the discipline; thus the Board has no reason to set the discipline aside.

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
November 30, 2015