

Award No. 48
Case No. 48
NMB Case No. PLB-07602-000048

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
v.)
BNSF RAILWAY COMPANY)

Carrier File No. 10-15-0084
Organization File No. C-15-D040-4

Claimant — Eugene Henneberry

BACKGROUND:

This claim challenges the Carrier's imposition of a Level S 30-day record suspension with a 3-year review period for the Claimant's alleged violation of the Carrier's electronics device policy. At the time of the events giving rise to the discipline, he had worked for the Carrier for approximately fourteen and had been working as a Track Inspector at Willow Springs, Illinois, for two to three months.

On July 31, 2014, a Supervisor of Engineering Support, Hector Alanis, was driving with another employee, Aaron Selph (formerly a Roadmaster with the Carrier but no longer employed at the time of the hearing), going to Willow Springs on Pulaski Road heading toward the on-ramp for I-55 South. As their vehicle passed another BNSF vehicle, Alanis could see the driver, the Claimant holding his cell phone in his hand, which was not on the wheel of the vehicle. At Willow Springs, Alanis and Selph saw the Claimant and told him about the hands-free policy. According to Alanis, the Claimant acknowledged that he had been in violation of the policy and that he should not have been "talking to the contractors" while he was on the road. Selph pulled Claimant out of service and sent him for a UA test.

The Carrier sent the Claimant a Notice of Investigation dated August 5, 2014, informing him that an investigatory hearing had been scheduled “for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with BNSF Electronic Device policy, when you were allegedly seen talking on your cell phone in other than hands free mode, while driving a company vehicle (25475) on Pulaski Rd to Interstate 55 at approximately 1120AM, on Gang TINS1986.”

Following a mutually agreed postponement, the hearing was held September 24, 2014. At the hearing, Mr. Henneberry testified that as he was stopped at a stoplight, he received a call from a contract Track Inspector who wanted to ask him a question. He put the phone on speaker mode, which he had been told by Roadmaster Selph complied with the electronic device policy. As he was ending the conversation, the vehicle carrying Alanis and Selph pulled up in the right-hand lane and the two men saw him. The Claimant expressed his opinion that he was being punished for having bid off on one position and onto another. He also testified to conversations that he had with another Roadmaster about signing a waiver for a Level S in lieu of going to investigation so that he could return to work and get paid sooner. The Organization questioned the Hearing Officer, who had been in violation of the cell phone policy herself. As an exempt employee, she was counseled about her conduct during her annual evaluation.

The Carrier’s Decision Letter, issued October 20, 2014, concluded that the Claimant had violated MWOR 1.10, Games, Reading, or Electronic Devices, and assessed a Level S 30-day Record Suspension with a three-year review period. The Organization filed a timely appeal protesting the Carrier’s decision. The parties having been unable to resolve the matter through their grievance process, the matter was submitted to the Board for a final and binding decision.

According to the Carrier, the Claimant acknowledged that he had been talking on his cell phone when Selph and Alanis spotted him. While he may have been on speaker phone, he was not in hands-free mode, which is the only use the electronic devices policy permits while driving a Carrier vehicle. Talking on a cell phone while driving is a serious safety violation under PEPA’s Appendix A, Paragraph 1, the penalty for which is a Level S 30-day record suspension with a three-year review

period. That is the discipline that was issued in this case. The conduct having been admitted and the standard penalty having been issued, the claim should be denied.

The Organization contends that the discipline imposed on the Claimant was improper, excessive and arbitrary. There is no evidence that the Claimant violated the electronic device policy: he was using his cell phone in a manner that a supervisor had told him was acceptable. The phone was not near his ear. The fact that he was holding a cell phone is not enough to warrant Level S discipline—he could have been holding a cheeseburger and would not have been disciplined. The Carrier has a program, “Approaching Others,” designed to bring situations to light in a non-disciplinary fashion. Alanis testified that he used “Approaching Others” to talk to the Claimant about his cell phone use, and the matter should have ended there. Instead, the Claimant was eventually disciplined for being honest and admitting that he had been on the phone. Moreover, the Carrier engages in disparate treatment: bargaining unit employees are formally disciplined while exempt employees who engage in the same conduct are merely counseled. Finally, the Claimant was harassed by a management employee about his decision to go forward with an investigation instead of accepting a waiver. The Claimant has every right under the collective bargaining agreement to proceed with an investigation and then with an appeal without threats or harassment. There is no evidence that the Claimant is an “unsafe” employee whose conduct warranted Level S discipline.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

The Claimant was charged with violating the Carrier’s Electronic Devices policy. MWOR 1.10, Games, Reading, or Electronic Devices, states, in relevant part:

“While on duty, do not:

- Play games or read magazines, newspapers or other literature not related to duties...

- Use electronic devices (cellular telephones, notebook computers, laptops, e-books, etc.) for other than business purposes...
- Use cellular telephones for voice communications, emailing, performing any electronic text retrieval or entry, or accessing a web page when:
 - On the ground within four feet of the nearest rail of a track.
 - On, under or while involved with the operation or movement of equipment or machinery...

.....

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

- Use cellular or mobile telephones, or similar hand-held electronic devices for voice communications in other than hands-free mode....

Employees must be aware of and comply with any local, state or federal laws governing use of wireless equipment while driving (e.g. laws banning use of wireless phones while driving)."

The dangers inherent in talking on a cell phone while driving are well-known and widely recognized, to the point where a number of states have banned the practice altogether. The Carrier's electronics device policy simply mirrors state laws in that respect. The Claimant stated that he had answered the phone while he was stopped at a stoplight when a contractor called him with questions about a job he was working on. The battery on his Blue Tooth device was dead and he thought that putting the phone in speaker mode satisfied the policy. It seems clear from the record that the Claimant did not set out to deliberately violate the cell phone policy, but that he automatically answered the phone when it rang. It also appears that the Claimant was not on the phone for long. Unfortunately, his actions, unintentional as they may have been, did put him in violation of the policy. Regardless of how one responds to a ringing cell phone in the privacy of one's personal vehicle, the Carrier's cell phone policy requires employees to be more mindful about cell phone use while driving and avoid it unless they can use hands-free mode, which does not include speakerphone mode.

The Organization argues that the unintentional nature of Claimant's cell phone use makes the Level S 30-day record suspension that was assessed against him excessive and arbitrary, especially in comparison to how exempt employees' cell phone use is treated. The Carrier's treatment of exempt employees is not an appropriate comparison, because the terms of employment between bargaining unit employees and exempt employees are different. Unit employees have the benefit of a formal collective

bargaining agreement that sets forth employees' rights. Exempt employees do not enjoy many of those rights, most notably the right not to be discipline or terminated except for just cause. Employee rights under a collective bargaining agreement are negotiated between the union representing unit employees and are the product of that give and take. Exempt employees may be treated differently. Sometimes their treatment may seem preferential, but at other times it may be harsher.

The Organization's real point is that the Claimant's violation of the cell phone policy was inadvertent, unintentional, and minimal. As such, it was not as serious as a deliberate violation of the policy and should not be treated the same by being assessed the same level of discipline. After considering the record as a whole, the Board is in agreement with the Organization. The Claimant must bear some responsibility for his actions—he could have pulled over to the side of the road or waited until he reached Willow Springs to return the contractor's call—but he did not intend to violate the cell phone policy, and it is excessive for the Carrier to assess the same level for such an unintentional violation of the policy as for a deliberate violation. The discipline shall be reduced to a Standard Violation, the penalty for which is a formal reprimand with a 12-month review period.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made, in that the Level S 30-day record suspension with a 3-year review period shall be reduced to a Standard Violation formal reprimand with a 12-month review period. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is

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transmitted to the parties.


Andria S. Knapp, Neutral Member


Nathan O. Moayyad, Carrier Member


Zachary Voegel, Organization Member

01-13-2017
Date