

BEFORE PUBLIC LAW BOARD NO. 7602

AWARD NO. 53

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

AND

BNSF RAILWAY

BNSF FILE NO. 10-15-0329

BMWED FILE NO. C-15-D040-23

Claimant: T. Morris

STATEMENT OF CLAIM

The Organization alleges BNSF violated the Agreement when Claimant T. Morris was issued a Level S 30 Day Record Suspension and a three-year review period as a result of a formal investigation held on June 17, 2015, for Claimant's violation of MWOR 1.10 Games, Reading, or Electronic Devices for Claimant's use of a cell phone while operating a company vehicle

Findings:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7602 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimant received a letter dated June 3, 2015, advising him of an investigation into his alleged use of an electronic device while operating a company vehicle.

An investigation was held following a continuance. Claimant was sent a letter dated September 9, 2015, which provided:

As a result of investigation held on Wednesday, June 17, 2015 at 1000 hours at 3rd Floor Conference Room, Lincoln Depot, 201 North 7th Street, Lincoln, NE, 68508 you are hereby assessed a Level S 30 Day Record Suspension for your use of an electronic device when operating company vehicle 27893 at approximately MP 103 on the Ravenna Subdivision at approximately 1457 hours, Thursday, May 28, 2015. In addition, you are being assessed a Three (3) Year Review Period that commences on July 15, 2015. Any rules violation during this review period could result in further disciplinary action. It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 1.10

Games, Reading, or Electronic Devices. In assessing discipline, consideration was given to your discipline record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA). Specifically, you stood for possible dismissal under the PEPA Policy. However, managerial leniency was granted due to your 9 years of service with BNSF Railway.

The Carrier argues that MWOR Rule 1.10, entitled Games, Reading, or Electronic Devices, is clear in its prohibition from cell phone use while operating a company vehicle. The DriveCam clearly shows that Claimant was engaged in a prohibited cell phone use. Claimant had BlueTooth in the truck and the still images captured the improper use.

The Organization responds that there was no prohibited use. The witness admitted to an assumption that Claimant was engaged in a prohibited use when the phone was in Claimant's hand. However, there is nothing in the record to support that conclusion.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

MWOR Rule 1.10 states:

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.
- Manually enter or read text from cellular or mobile telephones, or similar hand-held electronic devices (e.g. e-mailing, performing any electronic text retrieval or entry, accessing a web page, etc.).
- Dial or answer cellular or mobile telephones by pressing more than a single button when operating a commercial motor vehicle
- Use notebook computers, laptops or similar devices. Display screen of such devices must be closed or off.

This Board finds that there are no procedural violations which void the discipline. On the merits, this Board finds that there is not substantial evidence in the record which supports the discipline.

The Organization correctly points out that the Rule is specific about phone use while driving. However, a review of the record shows no proof that Claimant was engaged in a prohibited use like talking or accessing email or texts. There is nothing to show he was doing anything more than holding the phone or the acceptable use of pressing a single button to engage in hands free dialing or answering. The Carrier witness assumed Claimant was engaged in a prohibited use, but there is nothing in the record to support that assumption.

The Carrier points to the following testimony in support of its argument:

SCOTT FARRELL: And you do agree that you do have a phone in your hand while you driving?

TROY W MORRIS: In my hand, correct.

SCOTT FARRELL: Okay. And that you are using the electronic device while driving, correct?

TROY W MORRIS: Well, using, how to define using?

SCOTT FARRELL: You were on a phone call while driving?

TROY W MORRIS: I don't re- uh, like I said, I could have been listening. Uh, might, it might not have been verbalizing. I could have been waiting for the Dispatcher to answer. I don't remember that day.

SCOTT FARRELL: Okay. So you were using the electronic device while driving ____ (14:00 inaudible)?

TROY W MORRIS: While using is a vague term.

SCOTT FARRELL: You were on a call while driving?

TROY W MORRIS: I could have been.

SCOTT FARRELL: Listening to a call while driving?

TROY W MORRIS: I could have been listening, yes.

SCOTT FARRELL: Okay. Um, okay. So we had it on speaking phone.

TROY W MORRIS: Mm-hmm.

SCOTT FARRELL: While driving down the right of way, urn, we were holding it in our hand?

TROY W MORRIS: Holding it in my hand.

This transcript shows that Claimant was holding a phone and nothing more. He did not recall what he was doing. Claimant's lack of recall is not proof of misconduct.

The Carrier stated the following during the handling of the claim:

In addition, the interpretation that a BNSF employee could hold their phone while not speaking is clearly not the intent of the Rule. The intent of the Rule is to ensure BNSF employees do not become distracted by the use of a cell phone while driving and that BNSF employees have both hands available for safety. Of course, an employee driving while holding his phone, although not speaking, does not accomplish the goal of requiring

employees to operate vehicles in a safe and attentive manner—which is the entire purpose of the Rules.

This Board notes that the intent of a Rule is not the proper inquiry. The content of the Rule is the proper inquiry. The Rule is clear in its prohibitions against cell phone use and lists several examples of prohibited use. If the Carrier's intent is to ban all interaction with a cell phone, then it is at odds with the following allowable use for hands free:

Dial or answer cellular or mobile telephones by pressing more than a single button when operating a commercial motor vehicle.


Employees follow written Rules. If holding a phone is intended to be a prohibited use, then the Rule should say it is a prohibited use.

Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

 6/14/18

Neutral Member



Carrier Member



Organization Member