

BEFORE PUBLIC LAW BOARD NO. 7602

AWARD NO. 61

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

AND

BNSF RAILWAY

BMWED FILE NO. T-D-4768-M

BNSF FILE NO. 11-16-0031

Claimant: K,M. Wacker

STATEMENT OF CLAIM

The Organization alleges BNSF violated the Agreement when Claimant K.M. Wacker was issued a Level S 30 Day Record Suspension and a one-year probation as a result of a formal investigation held on August 26, 2015, for Claimant's violation of MWOR 1.10 Games, Reading, or Electronic Devices for Claimant's "use of a cell phone foul of the main line on the Aberdeen Subdivision at MP 629.2 on Wednesday, July 22nd at 1146 hours."

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 July 24, 2015, advising him of an investigation:

for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged use of a cell phone foul of the main line on the Aberdeen Subdivision at MP 629.2 on Wednesday, July 22nd at 1146 hours.

Following continuances, an investigation was held. Claimant was sent a letter dated September 9, 2015, which provided:

As a result of investigation held on Wednesday, August 26, 2015 at 0900 hours at BNSF Depot, 1801 Highway 75 N, Sioux City, IA, 51105 you are hereby assessed a Level S 30 Day Record Suspension for your use of a cell phone foul of the main line on the Aberdeen Subdivision at MP 629.2 on Wednesday, July 22nd at 1146 hours. In addition, you are being assessed a One (1) Year Review Period that

commences on September 9, 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).

The Carrier argues that MWOR Rule 1, entitled Games, Reading, or Electronic Devices, is clear in its prohibition from cell phone use within four feet of the track. The Roadmaster was approximately 150 feet from the track and saw Claimant step out of the hole left by removing crossing timbers. The crossing timbers extend approximately two feet from the track. Claimant was in the timber hole and therefore only two feet from the track.

The Organization responds that there was no possible way that the Roadmaster could have seen that Claimant was less than four feet from the rail. The photographic exhibits clearly show the impossibility of judging proximity to the rail from the distance and location of the Roadmaster's truck. Further, everybody on the crew signed a statement that the Claimant was not within four feet of the track. They all were aware of the Rule.

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:

1.10 Games, Reading, or Electronic Devices While on duty, do not:

- Use electronic devices (cellular telephones, notebook computers, laptops, e-books, etc.) for other than business purposes except when located in a predetermined place of safety during break periods and not performing duties.
- 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. (Emphasis added).

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 evidence shows that Claimant has over twenty years working for the Carrier. He was aware of the Rule regarding cell phone usage and was adamant that he did not use a cell phone within four feet of the track. Further, the members of the work crew signed a statement that Claimant did not use his phone near the tracks and was more than four feet away when he received a call. Claimant stated that he was on the road near his end loader when he used his cell phone for company business. A review of the photos show that it would be impossible for the Roadmaster to accurately judge Claimant's distance from the track. The Roadmaster estimated that he was approximately 150 feet from the crossing being renovated. Claimant was on the other side of the track. There was a rise in the roadway to meet the tracks and a decline on the other side where Claimant was located. As the photographic evidence demonstrated, there was no way for the Roadmaster to accurately judge distance from the track.

Award:

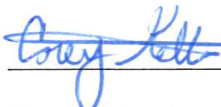
Claim sustained.

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.



Neutral Member



Carrier Member



Organization Member

June 14, 2018