

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 65

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

and

BNSF RAILWAY

BNSF. 10-17-0051
BMWE C-17-Do70-1
Claimant: T. Morris

STATEMENT OF CLAIM

The Organization requests that the discipline of Mr. Morris be overturned, no reference to this discipline be placed in Mr. Morris' personnel record and he be made whole.

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 advising him of an investigation for the purpose of:

[A]scertaining the facts and determining responsibility, if any, in connection with your alleged failure to comply with the BNSF Policy on use of Electronic Devices, using a handheld electronic device while Vehicle 29458 was in motion at or near Road 2130 Diers Avenue, Grand Island, Nebraska on the Ravenna Subdivision, according to the DriveCam 3 on October 20, 2016 at 1222 Central Time, while assigned as a Track Inspector Relief on Mobile Gang TINS2239. The date that BNSF received first knowledge of this alleged violation is October 24, 2016.

Following continuances, an investigation was held. Claimants was sent a letter which provided:

As a result of investigation held on Thursday, November 3, 2016 at 0900 hours at Roadmasters Office, 14th and Grant Ave, York, NE, 68467 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for failure to comply with the BNSF Policy on use of Electronic Devices, using a hand-held electronic device while vehicle 29458 was in motion, at/or near Road 2130 Diers Avenue, Grand Island, NE on the Ravenna Subdivision, according to DriveCam Event FGS65030 on October 22, 2016 at 1222 CST, while assigned as a Track Inspector Relief on Mobile gang TINS2239.

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). 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 maintains that Claimant violated the rule by using his cell phone while operating a Carrier vehicle. The carrier points to the photo from the DriveCam in support. Due to Claimant's prior history, it was not an abuse of discretion to dismiss him. The Carrier position was summarized in a letter of December 20, 2016, which provides in pertinent part:

The carrier witness provided factual evidence during the investigation showing Mr. Morris holding a hand held device while operating a company vehicle (Exhibit 1). You also claim Mr. Morris was not talking on the phone rather holding it. MWOR 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 OR dial or answer cellular or mobile telephones by pressing more than a single button when operating a commercial motor vehicle (Exhibit 2). Furthermore Mr. Morris testified the vehicle he was operating was equipped with hands free device and his phone was connected to the hand free device (Official Transcript Pg. 16, Lines 20 – 25)

The Organization responds with a number of procedural error allegations based upon the implementation of the Drivecam program. On the merits, the Organization contends that the photo is inconclusive. The rule is specific in its prohibitions. All the

photo shows is a cell phone in Claimant's hand. It does not show Claimant engaged in any prohibited activities.

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.

The pertinent part of MWOR 1.10 provides:

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

- Play games or read magazines, newspapers or other literature not related to duties except when located in a predetermined place of safety during break periods and not performing duties.
- 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. –

On, under or while involved with the operation or movement of equipment or machinery (e.g. cranes, loaders, forklifts, intermodal hostlers, etc.).

Exception: Signal employees within four feet of the nearest rail of a track may use cellular telephones for business-related testing and inspection purposes only while within established working limits on that track, and no movements are permitted within the working limits.

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. emailing, 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. 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 phone while driving).

No DriveCam video was introduced. The entirety of the evidence of a rule violation is summarized in the following transcript excerpts:

SCOTT A FARRELL: Okay. Um, first off, I will be entering the actual screenshot from the video that shows Mr. Morris driving Vehicle 29458, uh, while holding his cell cellular device in his hand and talking. Uh, speed does show 25, 26 mph, the screenshot. It does show that he was moving. And I did print out a copy for you guys.

* * * *

GEORGE LOVELAND: Were you with Mr., uh, Morris on the day of the DriveCam incident on October 22nd?

SCOTT A FARRELL: Negative.

GEORGE LOVELAND: So the only information you have is, is, uh, a picture you give here today ___(15:33 inaudible) you submit, is that correct?

SCOTT A FARRELL: That is correct.

A Carrier witness stated that Claimant's vehicle was equipped with a Bluetooth device in order to allow him voice communication while operating the vehicle. Claimant testified:

ALBERT ONOCHIE: Okay. Are you, uh, turn that, I just want to turn that off. Um, are you aware of the rules of not having any electronic devices in your hand while driving in the BNSF on, um, operating a vehicle?

TROY W MORRIS: Yes.

ALBERT ONOCHIE: So why were you on the phone if you were aware of the rules?

TROY W MORRIS: Well, I wasn't talking on the phone. More than likely, I was waiting for the Dispatcher to answer the phone to hit commute so that we could hear each other.

ALBERT ONOCHIE: Do you have a hands-free device?

TROY W MORRIS: Yeah.

ALBERT ONOCHIE: In that truck? Do you have a Bluetooth device?

TROY W MORRIS: I have Bluetooth through the truck, yes, connected to my cell phone.

ALBERT ONOCHIE: And why didn't you use that?

TROY W MORRIS: I was using it.

ALBERT ONOCHIE: You were using it?

TROY W MORRIS: Yes.

ALBERT ONOCHIE: Then why-

TROY W MORRIS: I have to, I have to hit the mute button to talk to the Dispatcher.

ALBERT ONOCHIE: So you cannot, you can't hit the mute button without having putting a hands-free device, you have to hold the phone to hit the mute button?

TROY W MORRIS: I had to pick it up to hit mute.

ALBERT ONOCHIE: That's what the hands-free device is for.

TROY W MORRIS: Explain hands-free device.

ALBERT ONOCHIE: Hands-free device is a device that, it's a contraption that you do not have to use your hand to hold this, the device, your cell phone, or note, or anything like that such as Bluetooth or, um, one of those dash ____ (23:30 inaudible) cell phone.

TROY W MORRIS: You still have to activate the Bluetooth, some, some for- some form or way or shape, and you have to hit the mute button.

ALBERT ONOCHIE: You can, um, voice activated too, do you have a voice activated Bluetooth?

TROY W MORRIS: I don't have a voice activated Bluetooth.

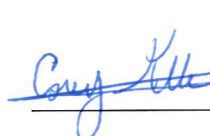
This Board finds that there are no procedural violations which void the discipline. On the merits, this Board finds that there is no substantial evidence in the record to support the discipline issued to Claimant.

The evidence consists of one DriveCam photograph of Claimant with a cell phone in his hand. There was no video introduced at the hearing. Despite the Roadmaster's testimony when he introduced the screenshot, there is no evidence that Claimant was talking on the cell phone. Although holding the cellphone could indicate a prohibited use, Claimant explained how he may have been using the one-touch function to enable his

Bluetooth in the truck so he could talk with the dispatcher. The Roadmaster testified that Claimant was assigned a Bluetooth-equipped truck so that he could communicate while operating the vehicle.

“The claim is sustained in full. The Claimant shall be offered reinstatement subject to the Carrier’s return to service policies. The Carrier shall remove the discipline from the Claimant’s record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident. Lost overtime shall be compensated at the overtime rate. His compensation shall be reduced by any interim earnings he may have had from outside employment. The Claimant shall be reimbursed for medical benefits to the extent that he provides the Carrier and the Organization with receipts of medical expenditures that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier’s employ uninterrupted by dismissal. Any other claims to compensation not specifically granted in this award are hereby denied.”

Claim sustained.

 (Dissent attached)

Carrier Member



Organization Member



Neutral Member

Dated: 02-04-2019

Carrier Member's Dissent
To Award 65 of Public Law Board 7602
(Referee Clauss)

The Carrier dissents with the opinion of the Board. The rule in question, MWOR 1.10, is clear the only exception to using a cellular device while driving is handling the device to answer or dial using no more than a single touch.¹ Claimant's own testimony indicates he'd already used the one touch exception to dial the dispatcher, and then made additional touches to mute/unmute his call with the dispatcher.² Muting and unmuting the device involved additional touches not contemplated by the rule. Accordingly, Claimant's dismissal should stand. By reinstating Claimant with back pay, this Board condones his unsafe and irresponsible behavior.

Respectfully,



Corey Kellam
Carrier Member

¹ See page 3 of award

² See page 5 of award