

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 66

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

and

BNSF RAILWAY

BNSF 10-17-0061
BMW C-17-Do40-4
Claimant: M. Kirtwright

STATEMENT OF CLAIM

The Organization requests that the discipline of Mr. Kirtwright be overturned, no reference to this discipline be placed in Mr. Kirtwright's 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 dated October 28, 2016, advising him of an investigation:

An investigation has been scheduled at 0800 hours, Friday, November 4, 2016, at the Conference Room, 4515 Kansas Ave, Kansas City, KS, 66106, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged improper use of electronic device while operating company vehicle, NE 48th and Worlds of Fun Avenue, Kansas City, MO, at approximately 1751 hours on October 24, 2016.

This investigation will determine possible violation of MWOR 1.10 Games, Reading, or Electronic Devices.

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

As a result of investigation held on Tuesday, November 15, 2016 at 1000 hours at Conference Room, 4515 Kansas Ave, Kansas City, KS, 66106 you are hereby assessed a Level S 30 Day Record Suspension for your improper use of electronic device while operating company vehicle, NE 48th and Worlds of Fun Avenue, Kansas City, MO, at approximately 1751 hours on October 24, 2016. In addition, you are being assessed a One (1) Year Review Period that commences on December 5, 2016. 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). 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 video from the DriveCam in support. Due to the nature of the violation, the discipline was appropriate.

The Organization responds with a procedural error allegations based upon the timing of the notice of investigation and the implementation of the Drivecam program. On the merits, the Organization contends that the video is inconclusive. The rule is specific in its prohibitions. All the video 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 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).

A DriveCam video was introduced. The carrier witness who reviewed the video testified:

ANDREW MOLGREN: We're back, the time now is 10:36. Mr. Anderson, are you ready to proceed with your questioning of Mr. Davis?

RANDY ANDERSON: Yes, sir. Mr. Davis, can you pull up the video one more time from this?

JEFFREY E DAVIS: Sure.

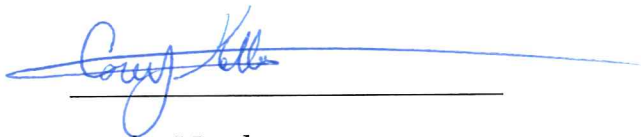
RANDY ANDERSON: Mr. Davis, Exhibit Number 5, rule 1.10, basically is it, are you stating that Mr. Kirtwright was in violation of this rule because he was using his phone?

JEFFREY E DAVIS: Well, it appears on the video that, uh, it shows on the video that he's looking down and then up and then down and then up, and then you can see that he was reaching for whatever he was looking at, and all this takes place prior to the triggering event, uh-

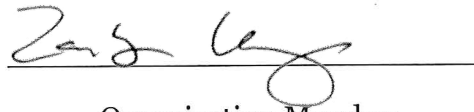
This Board finds that there are no procedural violations which void the discipline. The organization received notice of the investigation and was afforded a continuance in order to prepare for the hearing. On the merits, this Board finds that there is substantial evidence in the record to support the discipline issued to Claimant.

The evidence consists of one DriveCam video of Claimant looking up and down at a cell phone that is later seen in his hand. Despite the organization's argument that he was not engaged in voice communication, it is clear that Claimant was engaged with the cell phone display. He stated that he was checking whether it was a call from the welders. His Bluetooth was not operating properly. The evidence shows that Claimant was not using handsfree or one touch when he picked up the phone to check it.

Claim denied.

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Carrier Member

A blue ink signature, possibly reading "Zary...", is written over a horizontal line.

Organization Member

A blue ink signature, possibly reading "B. Chan", is written over a horizontal line.

Neutral Member

Dated: 02-04-2019