

PUBLIC LAW BOARD NO. 7425

**PARTIES) SMART - TRANSPORTATION DIVISION
TO)
DISPUTE) BNSF RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of Lake Superior First Seniority District (Minneapolis, MN) Switchman Scott Bruce for reinstatement to service with seniority rights unimpaired, removal of censure from his personal record and pay for all time lost including but not limited to the following: payment of vacation allowance, health and welfare costs, reimbursement of all expenses related to the pursuit of alternative employment, reimbursement for any damages incurred as the result of discharge from service including proceeds on any property, real estate or financial instruments sold to replace lost compensation, as a result of an investigation held on August 19, 2014. (Organization File No. D1000-309-14A; Carrier File No. 50-17-0006)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

This appeal arises from the Carrier discharge of the Claimant from service in its determination that testimony and exhibits presented at an August 19, 2014 hearing show the Claimant using a cellular phone in a not hands-free mode while operating a company vehicle on June 19, 2014; a circumstance the Carrier held to constitute negligence and indifference to duty in violation of GCOR 1.6, "Conduct."

It is the position of the Carrier that photographs from a download of a "DriveCam" installed in the company vehicle the Claimant was operating on June 19, 2014 as presented into evidence at the hearing, show a cellular phone in the right hand of the Claimant while the vehicle was in motion and the Claimant driving without both hands on the steering wheel. Although a Carrier letter of March 5, 2015 to the Organization in denial of appeal of discipline says the video shows the Claimant passing a stop sign without stopping, the video was not presented into evidence at the hearing. Therefore this particular contention may not be viewed as a part of the record before the Board.

At the hearing it was testimony of Terminal Manager Dingmann that for some unknown reason the Claimant used excessive braking while operating the vehicle and that this activated the DriveCam which, in turn, as designed, captured video showing the Claimant holding a cellular telephone in his right hand and that the photos as introduced were taken from the video.

It is the position of the Organization that the Carrier failed to properly conduct an investigation in accordance with the Uniform Investigation Rule, failed in its obligation of burden of proof, and that the discipline assessed is harsh, excessive and unwarranted under the facts brought forth at the investigation.

In study of the hearing record the Board finds nothing to support the Organization contention that the Claimant was denied benefit of a fair and impartial hearing. The record rather shows that the conducting officer allowed both the Claimant and his representative great latitude in challenging testimony of the Carrier's witness and the application of various rules and policies as concerns the charge of record.

The Organization also protests that the video recording from the DriveCam was not entered at the hearing as an exhibit, this despite the fact that the transcript of hearing shows that neither the Claimant nor his representative requested the video be shown or presented into the record. Further, although the Organization says the still photos that the Carrier introduced as coming from the video are of poor quality, the fact remains that neither the Claimant nor his representative took exception to the photos being made a part of the record at the hearing, and the Board finds the photos sufficiently clear for viewing.

In further defense of the Claimant, the Organization posits that in using the cellular phone as a navigational device it shows the Claimant was clearly behaving in a safety-conscious manner and therefore not guilty of negligence and indifference to his assigned duties, as held by the Carrier.

At the hearing when asked to describe what was in his right hand as shown in the video, the Claimant's initial response was: "A black object." Next questioned as to whether there was a reason why "he was holding it in that position," the Claimant said:

Um, for the GPS because the job I was on. They had put me on a job called the St. Paul Utility that was a new job that they never gave us instructions how to get there or, um, what roads to take or just told us we had to be at Sioux Line Junction at this time and, but never gave us directions how to get there.

In further questioning, the Claimant acknowledged that the device was a cellular phone; it was turned on while he was driving; probably turned on before he started

driving; and, he was using the GPS mode on the phone so he would know where he was going.

The Board has studied the photos presented into the record and finds them to clearly show the Claimant with the cellular phone being held in his right hand, with two of the photos showing the phone to be in close proximity his mouth. It appears from this position that the Claimant was holding the cellular phone, and the Claimant having said he constantly had his eyes on the roadway as he was driving, that the Claimant was not, as he offers, using the cellular phone for navigational purposes. In any event, it must be held that in driving with a cellular phone in his right hand, and, in addition, being shown in two photos not to have both hands on the steering wheel, that the Claimant was in fact properly held to have violated GCOR 1.6 as held by the Carrier.

In regard to an assessment of discipline, the Carrier, among other past award citations, specifically directs attention to the following excerpt from Award 31 of PLB 7674, Arbitrator David Vaughn: "The use of personal electronic devices while performing safety sensitive duties is expressly prohibited. The potential catastrophic consequences of distraction from using such devices makes the violation a serious violation."


An employee of the Carrier for seven years at the time of the incident the subject of this dispute, the Claimant's record shows that he was disciplined on three prior occasions, twice for failures to protect an assignment and once for a failure to wear a seat belt while operating a company motor vehicle. Further, the record shows that the Claimant was subject to a 36-month Review Period that attached to the Claimant's 30-Day Record Suspension for the seat belt offense; the June 19, 2014 rules violation in the instant case thus being a second serious violation within that stated Review Period and for which the Carrier's discipline policy states may result in dismissal from service.

Testimony as given by the Claimant not being found to be convincing, the disciplinary action taken by the Carrier shall stand. The claim will be denied.

Award: Claim Denied.


Melissa A. Beasley-Coke
Carrier Member


Robert E. Peterson
Chair & Neutral Member


J. Michael LaPresta
Organization Member

Fort Worth, TX
Dated: March 1, 2018