

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

and

**UNITED TRANSPORTATION UNION**

NMB Case No. 171

**Claim of J. P. Kirklen**

Dismissal - Use of  
Personal Electronic  
Device

**STATEMENT OF CLAIM:** Claim on behalf of Trainman J. P. Kirklen requesting reinstatement to service, restoration of seniority and fringe benefits, and pay for all time lost.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on October 10, 2014, in Washington, D.C. Claimant was not present at the hearing.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings.

On December 7, 2012, Claimant, who was hired on January 9, 2006, was working as a Conductor on Train S-LYWLPC1-06 out of Los Angeles, California. Between 10:18 a.m. and 10:29 a.m. during Claimant's tour of duty, Claimant received an e-mail from Terminal Manager Eric Lindbeck and responded to that same e-mail. During that same time period, his train was in constant motion.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of GCOR Rules 1.6 (Conduct) and 2.21 (Electronic Devices) and dismissed him from service.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

**POSITIONS OF THE PARTIES:** The Carrier argues that it met its burdens to prove Claimant's violation of the Rules and the appropriateness of the penalty. It maintains that there is no dispute that, with narrow exceptions not relevant to the instant matter, Rule 2.21 requires that personal electronic devices be turned off and stowed. BNSF contends that, despite this clear

requirement, Claimant received - and responded to - an e-mail while his train was moving.

As to the Organization's arguments - that the investigation was not conducted properly, that Terminal Manager Lindbeck violated the Code of Federal Regulations ("CFR") and that the Carrier failed to satisfy its burden of proof - BNSF asserts that they are without merit. It maintains, with respect to the investigation, that no objection to the train engineer not being called to testify was made during the investigation or the on-property appeal and, citing prior awards, that procedural objections must be raised at the first opportunity. It contends that, in any case, the technical evidence demonstrates - no matter what the testimony of the engineer might have been - that the train was in motion at the time of the communications. As for the CFR issue, the Carrier asserts that nothing in the CFR prohibits a supervisor from e-mailing an employee during a non-testing situation, that Mr. Lindbeck did not know where Claimant was (or that his train was moving) and that the e-mail concerned an attendance issue for which he did not need an immediate response. It maintains that it met its burden of proof and that the Organization failed to raise any viable defense during the investigation.

As to the penalty, the Carrier argues, citing prior awards, that improper use of a cell phone is a serious rules violation designed to protect employees and the public from injury and death. It points out that Claimant was previously reinstated to service but that, since the prior incident remained on his record as a Level S time-served suspension, the current incident is now a second Level S violation that qualifies as his fifth event in the last 12 months.

The Carrier urges that the Claim be denied as without merit.

**The Organization** argues that the Carrier failed to meet its burden to prove Claimant's guilt by substantial evidence. It contends that Claimant's Engineer, E. L. Stitt, could definitively testify as to whether Claimant did or did not use a personal electronic device and that, by failing to have Engineer Stitt in attendance at the hearing, the Carrier violated Article 13. The Organization asserts, as well, that BNSF violated the CFR by "testing" Claimant, *i.e.*, to see if he would respond to the e-mail. Finally, it maintains that the Carrier failed to prove that Claimant was sending the e-mails from a moving train. It points out that Claimant was the only credible witness who testified and that he stated that he did not send the e-mails from a moving train. It contends that is why Engineer Stitt's testimony was important.

The Organization urges that the Claim be sustained, that Claimant's termination be expunged from his record and that he be made whole for wages and benefits lost.

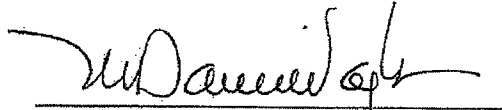
**DISCUSSION AND ANALYSIS:** The Board is persuaded that the Carrier met its burden to prove Claimant's guilt by substantial evidence. There is no dispute that Rule 2.21 requires that personal electronic devices be turned off and stowed, *i.e.*, that they not be used in various circumstances, including when an employee is working on a moving train. The record demonstrates that Claimant was the working Conductor on his train and, therefore, was only permitted to respond to an e-mail if his train was stopped. The record conclusively demonstrates that the train was moving at the designated times. The violation of the Rule is clear. Given the fact that the use of electronic devices on moving trains has caused collisions, damage and loss of life, Claimant's violation is inexcusable.

The Board has carefully considered, but is not persuaded by, the Organization's challenges to the discipline imposed. The Board recognizes that there is a fundamental conflict between Claimant's testimony that he did not respond to his supervisor's e-mail while his train was in motion, and the technical data, which show that he did. While it may be true, as the Organization suggests, that the Engineer's testimony might have supported Claimant's testimony, the Board is not convinced that his testimony would have overcome the technical data demonstrating that, at the times the e-mails were exchanged, the train was moving. The Organization offered no evidence to demonstrate that the technical data was somehow flawed or not credible. Similarly, the Organization's contention - that the Carrier was "testing" Claimant by sending the e-mail - was solely conjectural and is not supported by any actual evidence.

Given the nature and circumstances of his violations, and in light of his record of previous violations, the Board concludes that Claimant's termination was within the range of reasonableness. The Award so reflects.

**AWARD:** The Carrier met its burdens to prove Claimant guilty of the charges and to establish his termination was an appropriate penalty and not arbitrary or unreasonable. The claim is denied.

Dated this 5<sup>th</sup> day of November, 2014

  
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M. David Vaughn,  
Neutral Member

  
\_\_\_\_\_  
Jason Ringstad,  
Carrier Member

  
\_\_\_\_\_  
D. L. Young,  
Employee Member