Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44571
Docket No. MW-45889
22-3-NRAB-00003-200373

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed upon Mr. V. Frailey, by letter dated November 20, 2018, for alleged violation of M WSR 12.5 Seat Belts was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C- l 9-D070-I /1 0-19-0084 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant V. Frailey shall be reinstated in accordance with Rule 40."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Position of Organization:

The Organization notes that Carrier Officers Pachak and Powers did not ask the Claimant whether the machine was in work or travel mode. It maintains their conclusion -- that the machine was in travel mode — was nothing more than an assumption. It points out that the Claimant has worked in the rail heater position for many years on different gangs and has consistently been using the same procedure throughout the years.

The Organization argues that the Carrier's policy allowed rail heater operators to remove their seat belts because of the frequency of having to get on and off the machine. It insists that the Claimant was in work mode, and there was an unrebutted understanding that a seat belt was not required while in "work mode." As the Organization sees it, Pachak never verified what mode, travel or work, the machine was in.

In a March 14, 1019 letter to Stacey M. Gilbert, the Claimant states:

> **When I arrived at the site, before lighting the burners, I travelled to the front of the gang to work with the forward machines in order to prepare for the day's work. Once they told me to go back and bring my machine forward and be ready to heat rall (sic), then I checked the 20 foot and the 200 foot match marks to see how much pull back had occurred since they cut the rail that morning. Then, I returned to my machine, turned on the propane, unpinned the burners, unchained the vibrators, hooked up the water system and turned it on to make sure it was working correctly, filled out the de-stress book, and set up my i-phone for the day's work. I was clearly in the work mode at the time of this incident. Then, I slowly transitioned my machine to the point of where I started heating rail. I had not started the burners or vibrators until I reached the start point, but I had done all of the other preliminary steps I needed to do to start my job. I freely stated that I was not wearing my seat belt after I arrived at the job site.**

> **I have been instructed that the work mode starts when the gang, as a whole, begins to work the day's project.**

At the investigatory hearing, he stated: "All I had to do was pull up, drop the burner burners and the vibrator and start heating rail." (TR 27)

Pachak and Powers, admitted that they did not notify the Claimant when he was seen without his seatbelt (TR 37), despite being on the same radio channel as the Claimant's work group and also driving directly past the work group. The Organization maintains that if the situation had been grave in terms of danger, they would have acted promptly.

The Organization relies heavily on Award 42875, where a claimant was assessed a Level S 30-day suspension with a three-year review period for failing to wear a seat belt while moving a rail heater from the hole to the work site. In that case, the evidence showed that the rail heater was traveling over rough track, including switches and possible wide gauge. The claimant needed to stand so that his view was not obstructed. MWSR 14.1.2 provides the exception that belts "may be removed when: The field of view is obstructed and it is necessary to stand to obtain a clear view of the surroundings ... " The 42875 Board found substantial evidence supporting a conclusion that the claimant violated the safety despite being familiar with them. With 20 years of service and no prior discipline, the claimant in question provided credible testimony consistent with the record that in the 15 years he had operated a rail heater, he had never been disciplined for not wearing his seat belt. The Board was persuaded that the Claimant's supervisors have seen him without his seat belt in the past, and had let it go. The 42875 Board reasonably determined that enforcement of the seat belt rules, at a minimum, had been lax, if not non-existent. It found the discipline excessive and unreasonable, and substituted a Formal Reprimand with a twelve month review period. The Organization contends this case should guide the Board here.

Position of Carrier:

On September 20, 2018, Managers of Engineering Certification Joseph Pachak and Doreen Powers conducted an operations testing event on the Valley Subdivision. Pachak claims he witnessed the Claimant travelling without a seatbelt. Pachak repositioned his vehicle so that Powers could see and confirm the violation. They notified Assistant Roadmaster Jackie Buchanan and District Roadmaster Ernest

Parker, after which the gang was stopped and the Claimant was interviewed. According to the Carrier, there are no rules exempting employes from the requirement of a seat belt while traveling on the Rail Heater in "work mode," and in any event, he was in travel mode. According to Pachak, "Well, it doesn't matter if you're traveling 40 feet, 40 miles, or 400 feet, the seat belt is required if you're in travel mode, and you're traveling that machine whether it's a bump up or whether it's to move four miles to a different different project." (TR 21) In the Carrier's assessment, the case is cut and dried.

The Claimant had been issued a Record Suspension with a 12-month review period in August of 2019 for a track authority violation. The Carrier maintains that because the review period had not ended at the time of the incident here concerned, the Claimant had two serious violations and was properly subject to dismissal.

Analysis

The machine in question has to travel when working; it does not simply sit on the rails. The record establishes that the operator often walks along beside the machine as it heats the rails. It is also well established that if the machine is simply traveling from one point to another, the operator must wear a seat belt. MWSR 14.1.2 specifies that the operator may remove his/her seat belt when the field of view is obstructed. This is a determination that can only be made by the person sitting in the operator seat. No Carrier witness testified that (s)he sat in the Claimant's seat to observe view the field of view.

However, it must be noted that a need for a better field of vision was not the Claimant's articulated reason for leaving off his seat belt. Rather, he explained he needed to get on and off the machine frequently to check measurements, locate markings etc. His focus was not on the obstruction of view exception in MWSR 14.1, but rather on the work mode exception referenced in MWSR 12.5. This rule expressly exempts "operating vehicles while performing track inspections or coupling air hoses." However, there is no articulated rationale for excluding other operations and machinery which also require frequent departures from the driver's seat. To the contrary, the evidence indicates that in practice, the limited interpretation advocated by the Carrier has not been recognized. The exceptions expressed in MWSR 14.1.2 and 12.5 are a recognition that some jobs, machines and situations would be severely hampered if seat belts were constantly required.

The Claimant has testified that he turned on the propane, unpinned the burners, unchained the vibrators, hooked up the water system and turned it on to make sure it was working correctly, filled out the de-stress book, and set up his i-phone for the day's work. His stated understanding was that once the gang begins work, all the gang members are in work mode.

> **JAMES VARNER: Once you got to the work site and from 10-11 years of being told no different, did you believe you could take your work or your seat belt off at that time?**
>
> **VAUGHN FRAILEY: Yes, I did believe that. (TR 49)**

The Claimant defines work mode as the machine's readiness to work. He states that his preparatory actions meant that his machine was in work mode. The Board finds this argument persuasive. The Claimant was at the work location. His machine was ready to work, even though it had not actually started heating rail. With all the actions he took to get his machine ready, there is no way that it could be deemed to have been in travel mode. The question presented to this Board is whether the machine was primarily prepared to travel or to work. We are persuaded that with the propane turned on, the burners unpinned, the vibrators unchained, the water system turned on, the de-stress book filled out and the Claimant's iPhone set up, the Claimant's bump up was not travel anymore; his rail heater was in work mode.

The transcript does indicate that the Claimant moved his machine a fair distance in work mode, at least 200-400 feet; though already at the work location, the Claimant's movement was to reach the point where he would actually begin heating rail. Apparently, he arrived at the work location, dismounted to check the rail markings, then came back to the rail heater, prepared it to work and moved up to begin.

The Claimant knew or should have known that his movement was akin to traveling the rail heater without a seat belt. The better practice would have been to travel the machine to or close to the start point of work while wearing a seat belt, and to put the machine in work mode only after arriving at that point. By contrast, when the Claimant bumped up the rail heater, he was moving the machine a significant distance without a seat belt. For this reason, we do find he did commit a violation.

However, since he had been given no reason to think this was impermissible, the penalty he was given must be deemed excessive and unreasonable.

This is particularly true given that the Claimant has worked this way for years upon years, without a single advisory to the contrary. As such, the Carrier has not established that its rule has been clearly communicated and evenly enforced. Just cause for the discipline at issue has not been established, and a lesser penalty must be substituted.

Claim sustained. 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 restored. He shall be issued a Formal Reprimand with a 12-month review period in place of the Dismissal. The Carrier shall make him whole for all time lost as a result of this incident, less any interim earnings from replacement employment. Lost overtime shall be compensated at the overtime rate. The Claimant's medical insurance shall be retroactively restored, with deduction from the backpay herein granted of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent the Claimant purchased replacement insurance during his time of separation, he shall be reimbursed for the premiums. His backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of replacement insurance premiums and any claims paid under that insurance. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claims not expressly granted by this Award are hereby denied.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of October 2021.

SERIAL NO. 425

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 44571
DOCKET NO. 45889
OLD NRAB Case No. NRAB-00003-200373
NEW NRAB Case No. NRAB-00003-220634

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division -**
(IBT Rail Conference
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(BNSF Railway Company

STATEMENT OF CLAIM: As shown in Docket No. MW-45889 and not repeated herein.

FINDINGS: The Third Division of the Adjustment Board finds:

That the dispute was certified to the Third Division of the Adjustment Board ex parte by the petitioning party; and

Under date of September 30, 2022, the petitioning party addressed a formal communication to the Arbitration Program Specialist requesting withdrawal of this case from further consideration by the Division which request is hereby granted.

AWARD

Claim withdrawn.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of October 2022.