

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44572
Docket No. MW-45960
22-3-NRAB-00003-200374**

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

**(Brotherhood of Maintenance of Way Employees 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 [Level S thirty (30) day record suspension and a one (1) year review period] imposed upon Mr. F. Chika, by letter dated November 20, 2018, for violation of MWSR 12.5 Seat Belts was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-19-D040-6/1 0-19-0083 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant F. Chika shall have his record cleared of the charges leveled against him in accordance with Rule 40 of the current Agreement.”**

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.

Factual Background:

The Carrier alleges that on September 20, 2018, the Claimant failed to wear a seat belt while operating the track spiker machine at or near Mile Post 35.2 on the Valley Subdivision. At the time, he was assigned to Regional System Gang TRPX0004. As a result of this incident, he was assessed a Level S 30-day record suspension and a 1-year review period.

Position of Organization:

Rule S-14.1.2 specifically states, *'Seat 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 Claimant explained the reason for the need to stand - his view from the operator's seat was obstructed. Carrier witnesses on the scene did not sit in the operator's seat to see if the view was truly obstructed.

The Organization notes that Carrier supervision allowed the Claimant to keep working until they could gather other Carrier Officers, find another employee to operate his machine and then they approached the Claimant and removed him from service. As the Organization sees it, this action by the Carrier Officers clearly shows that this alleged incident was far from a Critical Decision failure. It asserts the Claimant was looking for markings made by the rail heater operator that were on the track components that the machine was moving over, meaning the markings were in a location where the operator was required to look down from the windows of the machine, not ahead as if approaching a crossing or a welding truck.

Production Roadmaster Jackie Buchanan was the Carrier Officer that spoke with the Claimant on the date in question concerning this alleged incident, yet Buchanan did not attend the investigation. In the Organization's assessment, the Carrier withheld Buchanan's testimony because his testimony would have been damaging to its case.

Several years ago, the Carrier implemented a program called 'Approaching Others'. This program was meant to encourage employees, scheduled and exempt, to

approach an employee and discuss a situation, such as this alleged incident, in an effort to provide guidance and training instead of discipline. Instead of using this Carrier sanctioned program, the Carrier Officers in this case chose to ignore their own program and assess discipline twice to the Claimant.

It is telling, the Organization argues, that the Carrier concluded that the Claimant was in travel mode as opposed to work mode. The gang was at the designated work location and neither of the Carrier Witnesses looked in the machine to determine whether it was in work or travel mode. It concludes the discipline was unfounded and must be overturned.

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. While observing Region System Gang (“RSG”) TRPX0004 (“RP04”) traveling east to west near 35.2, they witnessed the Claimant standing up without his seat belt on traveling his assigned Track Spiker. They reported this to the Claimant’s supervision who interviewed him.

In the Carrier’s view, the Claimant was properly Issued A Record 30-day Suspension for violating MWSR 12.5—Seat Belts, which states:

S-12.5 Seat Belts Wear seat belts while operating or riding in equipment or vehicles that are equipped with them. Seat belts must be worn according to the manufacturer’s guidelines posted in the vehicle or equipment. Lying down while wearing seat belts is prohibited. Exception: Seat belts are not required when employees are operating vehicles while performing train inspections or coupling air hoses. When operating the vehicle in travel to and from such work activities, seat belts must be worn.

The Carrier argues that seat belt violations are critical violations, and the discipline issued was proper.

Analysis:

In support of its position, the Carrier refers to the following testimony:

ALLAN BREDEN: Mr. Pachak, on September 20th was there in your opinion any reason for Mr. Chika not to be wearing a seat wearing a seat belt and be standing?

JOSEPH PACHAK: No. It was like I said, if you look at the track shot it tangent track um there was you know a machine parked or a uh sorry a welding truck parked in front of him. Um should've been no other hazards to uh the crossing was disabled and there was a welding truck between the crossing and him. So uh should've been no reason to be out of the seat um trying to gain a better view. (TR 15) * * *

ALLAN BREDEN: Um this regarding the line that states the seat belts may be removed when the field of view is obstructed and it is necessary to stand up to obtain a clear view of the surroundings. Um was was it necessary for Mr. Chika to remove his seat belt to obtain a clear view of the surroundings?

DOREEN POWERS: Absolutely not.

ALLAN BREDEN: And why would that be?

DOREEN POWERS: He had a clear vision of what was in front of him. (TR 36).

Powers testified that she observed the Claimant standing as he was coming up to the work location. Powers also testified that if he was in work mode, he would have been in radio communication and could have used that. (TR 37) Powers stated definitively that he was not spiking. (TR 39)

The Claimant stated: “[t]he time they observed me standing up was at when I was at the west part of the crossing trying to get to the points where the rail heater has made a mark and told me to get to that point and pass it.” (TR 48).

He explained that his destination point on the track was marked by poles to help him find it. He said he could see the poles while seated, but not the spot they were marking; he had to stand up to see that. (TR 55)

There are two rules governing this case. S-14.1.2 requires seat belts but carves out an exception where the operator’s field of vision is obstructed. It makes no distinction between travel and work mode in the application of this exception. S-12.5 also requires seat belts, but establishes a different exception: “Seat belts are not required when employees are operating vehicles while performing train inspections or coupling air hoses. When operating the vehicle in travel to and from such work activities, seat belts must be worn.” The Organization argues that the application of this exception on a practical level has been extended beyond train inspections or coupling air hoses.

For the sake of analysis, the Board will assume that the distinction between work and travel mode applied to the Claimant. That said, the Organization has not rebutted the testimony that the Claimant was in travel mode. The Claimant testified that on the day in question, the gang traveled from the hole to the location. He said another employee pointed to a spot along the track where there were poles, and indicated he should go no further than that. The front machines were already working. According to the Claimant: “So, at that moment I could not see the point that the Rail Operator told me where I should stop. I couldn’t see it while sitting in the machine. And mark you at this point was just before the starting of the work which was west part of the crossing.” (TR 46). This is an admission that he was not working. Once he got to the marked point on the tracks, he started spiking and was in work mode. By his own admission he was not yet spiking, but was traveling to the location where he would begin doing so. This testimony establishes that the Claimant was in travel mode when he stood up to locate the poles. Hence, the S-12.5 exception does not apply.

According to the Claimant, “In this case there is no way I could’ve seen a point on the track on the rail track without getting up to see ahead of me you know, have to pass. So, that is the reason why I removed the seat belt to stand up to look temporary.”

This explanation falls squarely within the exception referenced in S-14.1.2. However, Carrier witnesses testified that he did not need to stand up to view the track.

Significantly, the Carrier witnesses did not mention the poles or the point in the track where the rail heater had left a mark. Yet these were the points marking the Claimant's destination. The Board can only conclude that the Carrier witnesses knew nothing about the mark on the track or the poles, and were simply looking at the possibility of an obstruction.

Standing up for a clear view is a safety precaution. If, out of a fear for discipline, employees are afraid to double check when uncertain about that lies ahead, safety would be compromised. The Claimant was not looking for an obstruction, but the Carrier witnesses did not know that. Carrier witnesses reached their conclusion without the benefit of the Claimant's perspective.

This interpretation of the facts is reinforced by the Carrier's failure to call Roadmaster Buchanan as a witness. He would have been able to confirm whether or not the Claimant's contemporaneous explanation was that he was looking for a mark on the track. This calls for an adverse inference. We find the exception articulated in S-14.1.2 applies and the Claimant did not violate the seat belt rules.

Claim sustained. The Carrier shall remove the discipline from the Claimant's record, with seniority, vacation and all other rights restored. The Carrier shall make him whole for any time lost as a result of this incident, including overtime, less any interim earnings from replacement employment. Any 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.