PUBLIC LAW BOARD NO. 4244

Award No. 338
Case No. 345

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on August 4, 2004, when it withheld the Claimant, Mr. T. E. Craft, from service and dismissed him after an investigation for allegedly violating Maintenance of Way Operating Rules 1.6, and 1.13, and Maintenance of Way Safety Rules S-1.4.9 and S-26.6, for failing to follow instructions and for smoking in a Carrier vehicle.

2. As a consequence of the violation referred to in part (1), the Carrier shall immediately return the Claimant to service, remove any mention of this incident from his personal record, and make him whole for any wages lost account of this incident. [Carrier File No. 14-04-0130. Organization File No. 50-13N1-0419.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Thomas E. Craft, entered the Carrier's service in 1977. He was working as a Trackman in the Carrier's Maintenance of Way Department on August 3, 2004, when events allegedly occurred which resulted in a notice of charges being sent him, setting an investigation for August 12, 2004. He was also withheld from service pending the result of the investigation. The notice reads, in pertinent part:

> Attend investigation . . . for the purpose of ascertaining the facts and determining your responsibility if any, in connection with your possible violation of Rules 1.6 and 1.13 of the Maintenance of Way Operating Rules, . . . and Rules S-1.4.9 and S-26.6 of the Maintenance of Way Safety Rules, . . . concerning your alleged failure to comply with supervisor's instructions when told to extinguish cigarette while in company vehicle and wear a seat belt when operating and/or riding in

BNSF company vehicles on August 3, 2004, while you working [*sic*] as a Trackman at Shattuck Oklahoma, on the Kansas Division.

The Maintenance of Way Operating Rules (MWOR) and Maintenance of Way Safety Rules (MWSR) cited in the above notice read as follows:

MWOR 1.6

Employees must not be
1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
   or
7. Discourteous.

(The record states that the above Rule was supplemented by two additional paragraphs):

Any act of hostility, misconduct or willful disregard or negligence effecting the interest of the Company or its employees is cause for dismissal and must be reported.

Indifference to duty or to the performance of duty will not be tolerated.

MWOR 1.13

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

MWSR S-1.4.9

Wear seat belts while operating or riding in equipment or vehicles that are equipped with them.

MWSR S-26.6

> It is the BNSF policy to completely prohibit smoking in all enclosed properties by employees, customers, vendors and guests. Outdoor smoking should not interfere with non-smokers' rights to clean air as they enter and leave the buildings.
>
> Smoking will mean inhaling, exhaling, carrying or burning any lighted pipe, cigar, cigarette or other items which emit smoke.
>
> Enclosed property will mean all BNSF owned or leased office space or buildings, shops, automobiles, rail or work equipment vehicles, locomotives, cabooses and all other Railroad rolling stock.
>
> Employee will mean all exempt and scheduled employees, and other persons working for the BNSF as consultants, private contractors, temporary employees or in similar capacity.

The investigation was held on the scheduled date. A transcript of testimony and evidence presented therein appears in the record before this Board. The Claimant was present and was ably represented by officers of the Organization's System Federation.

There is considerable variance in the testimony of the Claimant and that offered by the Carrier's witnesses.

Foreman Jack Cagle stated that when a Carrier-operated pickup truck arrived at the crew's assembly site, he observed smoke coming out of the windows, and he asked the Claimant if he had been smoking. The Claimant replied, "Write me up." Mr. Cagle reminded him of the rule which prohibits smoking in Carrier vehicles. The Claimant then entered another vehicle for further transportation, and Mr. Cagle said he told him not to smoke in that truck. He said that while they were awaiting the arrival of other employees, the Claimant got out of that truck and smoked outside it. The crew then ate lunch, and Mr. Cagle later noticed that the Claimant was smoking inside the truck. He said he tapped on the door and shook his head, but the Claimant just smiled at him. Mr. Cagle then called his supervisor, Construction Roadmaster Dan Escalante, and reported what had transpired with the Claimant.

Mr. Escalante testified that when he received Mr. Cagle's call, he asked for details and requested Mr. Cagle prepare a written statement of the events. He then went to the work site, pulled alongside the gang's truck as it was moving, and observed the Claimant sitting in the crew cab behind the driver, wearing no seat belt. He said he could see the attached shoulder harness hanging down, not fastened in place on the Claimant. He signaled the truck driver to stop, got out of his own vehicle, and as he approached the gang's truck, saw the Claimant "grab for his seat

belt to put it on." He said he examined the belt and found no defect, also checking to see if the center seat belts were also serviceable.

Mr. Escalante also testified that he had observed the Claimant riding in a vehicle on July 30 without his seat belt being worn, and cautioned him at that time about compliance with the rule. He said that the Claimant had raised an issue about the condition of the seat belts in the truck on August 2. Although the record does not reflect just what repairs were made, it says an Allen wrench was used to make some changes in the arrangement of the belts. The truck was also taken to a repair shop and the belts examined, and found to be working correctly. He added that the truck was being used daily and he had asked other employees if they were aware of any problems with the belts, and had received no complaints. He also said that he had told the Claimant that if the belt did not work as intended, he should move to another seat in the truck, if one was available. He said that when he observed the Claimant riding without a fastened belt, there were unoccupied seats in the crew cab.

Mr. Escalante also interviewed the Claimant about the smoking incident. He said the Claimant denied that he had told Mr. Cagle to "write me up," but said that he admitted lighting up a cigarette in the truck after being told not to smoke therein by Mr. Cagle. He said he lit up in the truck preparatory to getting out to smoke on the outside.

Track Supervisor James Byfield was called as a witness by the Organization. He testified that he accompanied the Claimant's representative to a truck repair shop where the subject truck had been taken taken for inspection of its seat belts. Mr. Byfield said that mechanics employed by the shop told him they had ordered a part for the seat belt. They then located the truck used by the gang, and finding an unlocked door, examined the seat belt where the Claimant was riding on August 3. He said the belt would not retract, and when one attempted to pull it out, it would lock up. "You had to play with it to get it to work," he added. On cross examination, he said he had not attempted to use the other seat belts in the truck, and could not say they were inoperative.

A written statement was submitted into evidence by the Organization, from a fellow employee of the Claimant. That statement reads:

> In regard to the seat belt in BNSF extra gang work truck, the times I saw Tom [the Claimant] trying to put belt on he was struggling to get it to pull out. At times he couldn't get it out at all, other times it would come out part way. I can't say if it was totally defective or not, but he did struggle to put it on.

The Claimant denied not wearing a seat belt while riding in the gang's truck, and he also denied that he was not wearing a belt on July 30, as Mr. Escalante had testified. With respect to the smoking issue, his testimony is quite confusing. He said he was smoking in a Carrier vehicle, was told by Mr. Cagle not to smoke, and he did not thereafter smoke. But, he said that when he

was seen smoking, he was in the gang's work truck, the "big truck," not the smaller pickup. He denied smoking in the pickup. He denied that he told Mr. Cagle to "write me up" at any time. Later, however, questioned by the conducting officer, the following questions and answers were recorded.

211. Q. Were you given instructions by Mr. Cagle on August the 3rd to not smoke in the vehicle?
A. Yes.

212. Q. Did you smoke in the vehicle after that conversation?
A. Yes.

215. Q. Now, you stated you had smoked after he had told you, then you smoked again. Or you had smoked after he, in your testimony, Mr. Cagle said no smoking in the vehicles, then you smoked once after that?
A. Well, he did observe me smoking in the first vehicle. He did not see lighted material in my hand. [Underscoring added for emphasis.]

216. Q. That's correct from his statement. He said he smelled the smoke and he said that you admitted to smoking.
A. Well, that wasn't in our conversation.

217. Q. But Mr. Cagle did instruct you not to smoke in any vehicle. And then you did one other time after that when he came up and told you he's not going to tell you anymore, is that correct?
A.. Yes.

On the record, the Claimant's representative objected to the Claimant's being withheld from service pending the result of the investigation, as indicating prejudgment on the part of the Carrier. He also cited Agreement Rule 13(b), and questioned Mr. Escalante as to whether failure to wear a seat belt or smoking in a Carrier vehicle constituted a "flagrant violation" of the Carrier's rules. Agreement Rule 13 (b) reads:

> It is understood that nothing in this Rule will prevent the supervisory officer from holding men out of service where flagrant violations of Carrier rules or instructions are apparent, pending result of investigation which will be held within thirty (30) calendar days of date of suspension.

On August 27, 2004, Division Engineer Tim Knapp wrote the Claimant the following letter, quoted in pertinent part, dismissing him from the Carrier's service:

> This letter will confirm that as a result of formal investigation on August 12, 2004, concerning your failure to comply with supervisor's instructions when told to extinguish cigarette while in company vehicle and failure to wear a seat belt when operating and/or riding in BNSF company vehicles on August 3, 2004, while working as a Trackman at Shattuck Oklahoma, on the Kansas Division. You are dismissed from employment for violation of Rules 1.6 and 1.13 of the Maintenance of Way Operating Rules, . . . and Rules S-1.4.9 and S-26.6 of the Maintenance of Way Safety Rules, . . .

The above disciplinary decision was promptly appealed by the Organization to the Carrier's Labor Relations Department. The Organization argues that the Claimant was dismissed, not due to flagrant violation of the Carrier's rules, but due to prejudgment by the Carrier's officials, before any testimony was presented.

The Organization further argues that the Claimant was wearing a seat belt, and the Roadmaster could not have seen whether he was wearing it because of the relative sizes of the Roadmaster's pickup truck and the gang's work truck. In view of the recorded fact that the belt in question was a problem issue, with parts having been ordered for it, and the Roadmaster saying that it works properly, the Organization asks, "[H]ow can we now believe that he witnessed the Principal not wearing his seat belt?"

The Organization acknowledges that the Claimant admitted to smoking in a Carrier vehicle, and he justified it by asserting that others also were smoking, but when he was confronted by Mr. Cagle, he extinguished his cigarette. The Organization questions whether smoking in a Carrier vehicle is an offense which warrants dismissal. It contends that the discipline is excessive, unwarranted, and not supported by flagrant abuse of the Carrier's rules, and requests that the Claimant be reinstated and made whole.

The Carrier rejoins that substantial evidence was developed in the investigation to prove that the Claimant had been warned to wear his seat belt, but did not, and had been warned not to smoke in Carrier vehicles, but continued to do so. The Carrier argues that the Roadmaster was in a position to see through the window of the crew cab and observe that the Claimant's seat belt was not being worn. The shoulder harness was easily visible to him, as demonstrated by pictures which the Organization submitted in evidence.

The Carrier further observes that the Organization argues that the seat belt was defective and did not work, but its own witness said, "You had to play with it to get it to work." The Carrier argues that even if the belt was "temperamental" and did not retract properly, it still performed its essential function, and the Claimant made a conscious choice not to wear it.

The Carrier accepts Mr. Cagle's testimony about the smoking issue at face value, and rejects the Claimant's explanation. He was seen smoking in a vehicle, warned not to do it again, was then seen smoking in another vehicle, and did not stop after being told to stop. The Foreman considered it an act of insubordination, asserts the Carrier.

The Carrier charges that the Claimant's testimony was inconsistent and contradictory. The hearing officer chose to believe the testimony of the Roadmaster and the Foreman, and found no credibility in the Claimant's testimony. It argues that his actions bordered on insubordination in that he willfully refused to follow the instructions of the Foreman and Roadmaster. The Carrier denied the claim in its entirety.

The Board has carefully examined the transcript of testimony and evidence, and the arguments of the Parties. We are persuaded that the Carrier has proven its case and severe discipline is justified under these circumstances, but we are not persuaded that permanent dismissal is called for. We shall discuss these conclusions below.

The sharp disagreement between the Claimant's testimony and that of Mr. Cagle and Mr. Escalante is troublesome, but this Board has held, in its Award No. 281,

> The conducting officer, who heard the words and observed the demeanor of those who testified in the investigation, is best equipped to assess the credibility of those who appeared before him, and the Board will not substitute its judgment for his.

Furthermore, the record in this case shows a degree of inconsistency, self-contradiction, and evasiveness in the Claimant's testimony. Others who testified were forthright; he was not.

The Organization charges that the Claimant was withheld from service as an act of prejudgment, and questions whether the charges against the Claimant constituted "flagrant violations," as prescribed in Agreement Rule 13(b). The Board believes that neither smoking in a Carrier vehicle nor failure to wear a seat belt, taken in isolation, would ordinarily be considered "flagrant." (*Webster's NewWorld Dictionary of the American Language* defines "flagrant" as "glaringly bad; notorious; outrageous.") But here, taken in their totality, both offenses were willful and committed in the face of warnings — if we believe the witnesses, which we do — and one of those warnings had been given that very same day.

The Organization's argument that the Roadmaster could not have seen whether the Claimant was wearing his seat belt due to the disparate sizes of their respective vehicles is appealing, but even if there were any uncertainty about his range of vision from inside his vehicle, such uncertainty was dispelled when the Roadmaster testified, "As I got out of my vehicle and when Mr. Craft noticed me, he grabbed for his seat belt to put it on." (Answer No. 21.)

Arguments about any alleged defects in the seat belt are of no avail, in light of the Claimant's assertion that he was belted when observed by the Roadmaster. He cannot have it both ways. If the seat belt was so defective it could not be used, then he was obligated to sit elsewhere. By asserting that he was belted, he negates any extenuation or mitigation attributable to defects in the belt.

With respect to smoking in Carrier vehicles, the Claimant's own testimony supports the charge. He acknowledged understanding of MWSR S-26.6, which clearly prohibits smoking in a Carrier vehicle, as well as other places. That others violated the rule is not a viable defense. His own testimony, convoluted though it is, proves that he smoked in a vehicle after being warned by the Foreman. See Q&A Nos. 211 and 212, above. He further contradicted himself when he asserted that he did not smoke in the pickup truck in which he arrived at the work site, Q&A Nos. 159-162, and then testified that he smoked in the first vehicle, i.e., the pickup truck, in Q&A No. 215. His equivocation is a disservice to the cause of his credibility.

The Carrier has carried its burden of proving the charges, and violation of the rules cited in its notice of charges. His studied indifference to the cited rules justified the Carrier's withholding him from service pending the outcome of the investigation.

The Rules here at issue are not frivolous and are based on common sense. With today's medical knowledge, it cannot be disputed that tobacco smoke is harmful to the user and to those who may passively breathe such smoke. The Carrier is obligated to protect its employees from such hazards. Similarly, the requirement that seat belts be used is not only a legal requirement in some states, but is for the employees' own protection, as well as others. An unrestrained body in an accident may become a projectile, inflicting injury upon even a properly belted vehicle occupant. An unbelted driver risks complete loss of vehicle control, in the event he's displaced from his position at the wheel. These Rules serve a purpose.

The Board looks to the Claimant's personal record, in determining whether the quantum of discipline is appropriate. The Claimant's record is mostly favorable. He is not a short-term employee. He has worked for the Carrier for more than 27 years, and has had only two previous disciplinary entries, a suspension for five-plus months in 2001 for use of drugs or alcohol, and a record suspension in 2003 for, ironically, failure to wear a seat belt while working on a track machine. He was given a three-year probationary period in conjunction with this record suspension. The Board also notices that the Claimant had previously served as a Military Policeman in the United States Marine Corps for two years, before being hired by the Carrier, and in the reserve for about 22 years thereafter. Such career background should have left a lasting impression about obedience to authority and compliance with governing regulations.

The Board is loath to see the Claimant's more than 25 years of mostly good service abruptly ended without an opportunity to mend his ways. Only because of this employee's past

record, on a last chance basis, and notwithstanding the three-year probationary period referred to above, the dismissal in the instant case is converted to an actual suspension of six (6) months, commencing August 4, 2004, after which he shall be reinstated with seniority and other rights intact, but without pay for time lost.

AWARD

The claim is sustained in accordance with the Opinion.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

Jan 12 2005
Date