

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 415 – Award No. 415 – Claimant: Vincent
Carrier File No. 14-10-0217
Organization File No. 100-13N1-1084.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing October 22, 2010, when Claimant, Travis D. Vincent (1704543), was issued a Level S 30-day Record Suspension with a 3 year review period, concerning his failure to have a steering wheel cover in place during boom operations on August 25, 2010. The Carrier alleged violation of EI 15.5 Vehicles Equipped with Cranes.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be compensated for his lost time and expense and otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Travis D. Vincent, has been employed by the Carrier since 2006. On September 2, 2010, the Carrier notified Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged failure, on August 25, 2010, to have a steering wheel cover in place during boom operations while working as a Brandt Roadrailer on TMOX 3002 on the El Paso Subdivision. The notice indicated that the investigation would determine possible violation of Engineering Instruction 15.5. Following the investigation, the Carrier

determined that Claimant had committed the violation alleged and assessed him a Level S 30-day record suspension with a three-year review period.

The applicable Carrier Engineering Instruction provides, in relevant part:

15.5 Vehicles Equipped with Cranes

All vehicles equipped with cranes must be equipped with a standardized steering wheel cover with a message reminding the driver to stow boom and outriggers prior to travel. The truck driver must place the cover over the steering wheel when the boom and outriggers are deployed.

The specified steering wheel cover, with the message, "Danger. Do Not Operate...Verify Boom Stowed...Verify Outriggers Stowed" had been assigned BNSF Item No. 362050005.

Dale Jochems, Carrier Manager of Operating Practices with the System Operations Testing Team, testified at the investigation that at the relevant time he and two supervisors were conducting an operations testing audit on the El Paso Subdivision, Southwest Division. He stated that they observed the Brandt Roadrailer operating, and the boom was in use loading scrap ties into a gondola. He stated that they pulled up to the vehicle and one operator was operating the crane. He added that it appeared that the operator was sitting in the driver's side seat of the truck.

Mr. Jochems stated that they clearly observed that there was no steering wheel cover on the steering wheel, and the audit team members got out of their vehicle to make contact with the employees. At that time, he added, the crane operator stowed the boom and climbed down off the crane, and Claimant, the other operator, got out of the truck

Mr. Jochems added that they ascertained that Claimant was the truck driver and informed him that not having the steering wheel cover on would be a failure under the Critical Decision Process. He stated that Claimant informed them that he believed the cover had fallen off. Mr. Jochems maintained that they wished to give the employee the benefit of the doubt, so he walked around to the truck's driver's side and opened the door to see if the cover was on the floor or somewhere where it might have slipped off the wheel, but he did not see it. At that time, he stated, Claimant's co-worker climbed into the cab and pulled out what looked like a folded steering wheel cover from behind the seat and threw it up on the dashboard. He stated that the cover had not been on the dashboard when they first observed the vehicle.

Ramon Class, Carrier Rail Grinding Supervisor, testified by telephone that he was part of the audit team at the relevant time and that he also observed the Brandt Roadrailer in operation. He explained that if the unit is in operation of any type, or setting up for operation, the steering wheel cover should be in place before operations begin. This

vehicle, he stated, was in full operation. He added that he walked up to the vehicle and opened the passenger side door, and saw no cover on the steering wheel. He stated that he was not present when Mr. Jochems questioned Claimant. Mr. Class confirmed that he saw Claimant's co-worker, Mr. Case, pull the steering wheel cover from behind the seat area and toss it onto the dash.

Structure Supervisor Dante Zuniga testified at the investigation that he was also part of the audit team. He stated that when they arrived in the area they observed that the Brandt Roadrailer was in use, with the boom extended. He added that they approached the vehicle and asked Claimant if he had a steering wheel cover on the machine and Claimant replied that he did. He stated that they opened the passenger side door and observed that the cover was not on the wheel and Claimant told them that it must have fallen off. He added that the cover was not on the seat, console or floor. He stated that Claimant climbed into the vehicle, grabbed the cover from behind the driver's seat, unfolded it and showed it to them, and then put it on. He stated that the employee had to reach behind the driver's seat and the cover was folded twice. He stated that he has not had issues with the covers failing off and they have straps to keep them in place.

El Paso Roadmaster Bill Shoemake explained at the investigation that Carrier policy requires that the steering wheel cover must be on when the boom is in operation. He stated that there had not been any issues with the boom covers, no complaints about them blowing off. He acknowledged that new boom covers had been ordered but stated that they had not yet arrived. He stated that he had not received any request for a new cover to replace an existing one.

Bryan Case, Brandt Roadrailer Machine Operator, testified that he was running the crane on the afternoon at issue. He stated that he did not place a cover on the steering wheel before operating the crane because it was Claimant's responsibility and he saw him do it. He denied having climbed up into the driver's side door and retrieving the cover from the seat. He stated that when he climbed up into the truck the cover was over by their console, near the train brake, unfolded as if it had slid off the steering wheel. He stated that the covers had fallen off in the past, and it was quite windy that day. He stated that he stores the cover by folding it up and putting it on the floorboard behind the driver's seat.

Mr. Case acknowledged that when the audit team arrived he was on top of the crane and could not see whether the cover was on the steering wheel. He stated that when he retrieved the cover from the console he placed it on the steering wheel. He stated that they had been operating for about 10 minutes when the audit team arrived.

Claimant testified at the investigation that both he and Mr. Case are operators on the Roadrailer, but he was driving it on the day of the incident. He stated that he and Mr. Case returned from lunch, he put the truck in position and he and Mr. Case discussed what they were going to do. He maintained that he put the cover on the steering wheel and Mr. Case observed him do it. He added that he saw the audit team pull up and park their vehicles. He stated that he was seated in the driver's seat at the time. He added that

when they arrived the cover was in place on the steering wheel and the boom was in use. He maintained that when he climbed out of the truck to talk to the audit team members the cover was in place.

Claimant explained that the normal storage for the cover is folded neatly behind the driver's seat. He stated that Mr. Jochems came to the truck first, asked if they had a cover and whether it was in place, and he said yes. He added that the Carrier officers notified him the cover was off and when they opened the door and climbed in it was off. He stated that must have fallen off after he exited the truck because it was on all the time he was in the truck.

Claimant stated that Mr. Case opened the door, climbed up and found the cover right there approximately five inches from the steering wheel on the brake console. He stated that Mr. Case picked the cover up from the brake console and unfolded like it had just slid right off the wheel and landed. Claimant noted that it was quite windy, and said he had previously told other supervisors at a safety meeting that there was a problem with the covers staying on.

The Carrier's Policy for Employee Performance Accountability (PEPA), provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules. Claimant's personal record shows no previous discipline.

The Carrier first asserts that, contrary to the Organization's contention, Claimant was not denied a fair and impartial investigation when the Hearing Officer allowed two witnesses to testify by telephone. On the merits, the Carrier asserts that it has met its burden of proving Claimant's guilt by substantial evidence. The Carrier states that Claimant's co-worker was operating the crane and using the boom and Claimant was sitting in the driver's seat without the proper cover on the steering wheel. Moreover, the Carrier states, as Claimant eventually left the seat, the cover would have informed any other employees not to operate as the boom was in operation. The violation was discovered, the Carrier continues, when three employees conducting operations testing audits looked in the truck and saw that there was no cover on the steering wheel.

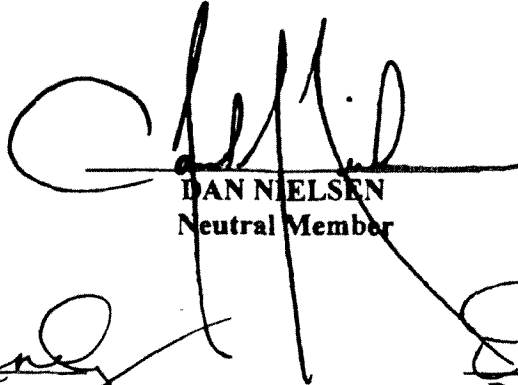
The Organization's excuses for Claimant's conduct should not be accepted, the Carrier urges, as three eyewitnesses testified that the cover was not near the steering wheel and they observed Mr. Case reach behind the seat where it was stowed, still folded, and throw it onto the dash. To the extent that Claimant gave contrary testimony, the Carrier notes, it is well established that the Hearing Officer's resolution of credibility conflicts should not be overturned by this Board. The Carrier concludes that it has proven by substantial evidence that Claimant violated Carrier rules as alleged. The discipline assessed, the Carrier asserts, is appropriate given the seriousness of Claimant's offense and was consistent with its PEPA. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization states that Claimant was denied his right to a fair and impartial investigation as the Hearing Officer allowed certain witnesses to testify by telephone. On the merits, the Organization asserts that this case presented conflicting accounts of the relevant events, and in the case of such doubt it must be presumed that Claimant is not guilty. The Organization notes that Claimant saw the audit team observing operations and would never have left a known failure for them to find. It appears, the Organization states, that the audit team saw that the cover was not on the steering wheel and did not take into consideration that it could simply have fallen off. The Organization asserts that this has been a problem in a number of cases and a new style of cover has been released to correct it, but Claimant's vehicle was not equipped with the updated cover. The Organization contends that the Carrier has failed to prove Claimant's guilt by substantial evidence. As for the penalty assessed, the Organization states that it would have been more appropriate to correct a performance error such as the one alleged here with coaching, counseling or other non-disciplinary corrective measures. The Organization urges that the claim be sustained.

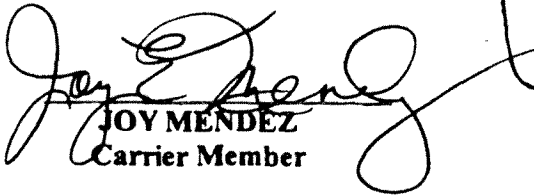
We have carefully reviewed the record in its entirety. First, we do not find evidence of any procedural irregularity which denied Claimant to his right to a fair and impartial investigation. On the merits, we find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. Four Carrier officers testified consistently that they observed Claimant's truck in full operation without the required steering wheel cover on the vehicle's steering wheel. Claimant and his co-worker acknowledged that when the Carrier officers entered the vehicle the cover was off, but both maintained that Claimant had put it on and it must have simply fallen off. While the Organization asserts that the Carrier failed to consider that possibility, the record establishes that the Carrier officers did allow for that possibility, but witnessed one of the employees retrieve the folded cover from its storage location behind the seat and attempt to make it look as if it had fallen off. The Hearing Officer's resolutions as to this conflicting testimony will not be disturbed by this Board. Given the observations of the Carrier witnesses, it is not possible that the cover blew off – it must also have folded itself and put itself behind the seat. Claimant's guilt has been proven by substantial evidence. He committed a serious violation, and there is nothing to suggest that the Carrier's determination as to the appropriate penalty represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 21st day of May, 2013.