P.L.B. No. 7585
Case No. 21
Award No. 21

PUBLIC LAW BOARD NO. 7585

CARRIER FILE NO. 10-12-0732

ORGANIZATION FILE NO. C-12-D070-19

CLAIMANT: Daniel Monohon

Parties To Dispute:

Brotherhood of Maintenance of Way Employes Division – IBT
& BNSF Railway Company

Statement of Claim: *The Carrier violated the Agreement on September 28, 2012 when it dismissed Daniel Monohon (1772268) for alleged violation of Maintenance of Way Operating Rule 1.6-Conduct, Maintenance of Way Safety Rules 1.4.9 – Seat Belts, and OPT 321 Monitors Rules Compliance & Best Practices For The Operation of Motor Vehicles, for alleged failure to wear seatbelt while operating BNSF 23752 and alleged insubordination towards an officer while discussing the violation while working on the Ottumwa Subdivision.*

Background Facts:

Maintenance of Way Safety Rules 14.1.2, 1.4.9 and 12.5 require that employes wear seatbelts when operating or riding equipment supplied with them. S-14.1.2 allows for exceptions when the employe's field of view is obstructed or when the employe is operating cranes that require being seated in an upper rotating structure. S-12.5

provides for two exceptions: when the employe is inspecting a train or coupling an air hose. Under the Company's Vehicle Policy, an employe can lose eligibility to operate equipment for failure to wear a seatbelt. Rule 1.6 prohibits insubordination, defined as wilful disobedience of an authority.

At hearing, Roadmaster Tyson Pate testified that on September 5, 2011, Claimant Monohon called and said he had been seen operating a vehicle without wearing a seatbelt. According to Pate, there was a briefing about seatbelts the day before, and Claimant asked about wearing them while hy-railing and was advised this was the rule.

Roadmaster Michael Paz testified that on September 5, 2011, Claimant was hy-railing when both he and AVP of Engineering Anderson noticed he was not wearing a seatbelt. They stopped him and asked why, to which Claimant replied he was not comfortable wearing it in case he needed to quickly exit the vehicle. Claimant said he had talked to his Roadmaster about it and did not really agree with the rule. Anderson decided he did not have full commitment to comply with the rule and sent him home. According to Paz, Claimant was not insubordinate.

Claimant testified he had been in and out of his truck multiple times that day and did not realize his seatbelt was off at the time. He said he got into a discussion with Anderson and told him he understood it was a rule, but did not agree with it. When he gave an example, he was told to go home for the day. Claimant contended he put his seatbelt on in the middle of the conversation. "I never said I wouldn't wear it." [TR 50]

The Organization maintains this incident is only an Ops Test Failure and dismissal is excessive and draconian. There are exceptions to the seatbelt rule; it is not absolute, the Organization points out. In the Organization's view, the rule leaves it to the discretion of the employe. It contends there was no insubordination because disagreement is not a refusal.

The Organization also argues there is fatal procedural error in this case because the Charging Officer on the Notice of Investigation and the Officer issuing the Dismissal letter are the same person. It further notes S. Anderson was not available during the investigation for questioning.

The Carrier maintains its disciplinary action was not excessive in view of past injuries and even death where the rule requiring seatbelts was violated. The Carrier notes the Policy for Employe Performance Accountability (PEPA) calls for dismissal after two level S offenses. At the time of the facts here concerned, Claimant was under a Level S 36 month review period for a vehicular accident. As a result, the Carrier maintains he was subject to dismissal.

Opinion of the Board:

The Board is not persuaded by the Organization's argument that wearing seat belts is left to employe discretion. The requirement is reiterated in several different rules and the few exceptions that exist are explicitly defined and do not apply here.

The facts in this case clearly show that Claimant failed to wear a seatbelt as required, despite a briefing on this specific topic the day before. However, the Board is not persuaded that Claimant has been insubordinate. Insubordination is defined as wilful disobedience of an authority. Without question, Anderson was an authority within the meaning of this definition. However, there was no wilful disobedience. Rather, Claimant attempted to explain his concerns about the rule. Claimant's uncontroverted testimony established that he in fact did attach his seatbelt during this conversation. There is no evidence that he wilfully refused to wear a seatbelt. As the Organization points out, an employe can comply with a rule while disagreeing with its import. Although Claimant is not found insubordinate, his response when confronted is a factor in the case, as more fully explained below.

The Board is not persuaded that there is fatal procedural error in this case due to the fact that G. D. Wright issued both the Notice of Investigation and the Dismissal. Nor does the Board find Anderson's failure to testify to defeat due process. It is not disputed that Claimant was in violation of the safety rules requiring him to wear a seatbelt. Hence, procedural error could not alter the ultimate finding of a rule violation for failure to wear a seatbelt.

Appendix A to the Policy for Employee Performance Accountability defines a serious offense as including "violation of any work procedure designed to protect employees ... from potentially serious injury(ies) and fatality(ies)." Without question, the rule requiring seatbelts is designed to protect employees from potentially serious injuries or fatalities. Claimant's situation is aggravated by two different factors. First, he was briefed on this exact subject the day before and was specifically told he would be in violation of the rules if he failed to wear a seatbelt. The requirement should have been fresh in his mind.

His offense is further aggravated by the fact that when found minus his seatbelt, his reaction was more argumentative than cooperative. Just the day before, he had voiced to management his objection to seatbelts while hy-lining. The unequivocal response was that the seatbelt was required. The next day, when found beltless, Claimant did not demonstrate a cooperative attitude, or even react as if he simply forgot. Instead, he re-initiated his objection from the day before and disputed the rule. At best, he was argumentative; at worst, he failed to reassure management of his intent to comply with the safety rule when specifically asked.

The Carrier has the right and obligation to make a serious attempt to safeguard its employes from injury. It is entirely reasonable for the Carrier to require seatbelts when hy-lining; they snap on and off in seconds and there was no serious contention that wearing a seatbelt while hy-lining could be dangerous. It follows that the Carrier's rule was reasonable and enforceable.

Though Claimant has not been shown guilty of insubordination, this does not mean the discipline taken was improper. In view of the aggravating circumstances and safety considerations in this case, Claimant's failure to wear his seatbelt was reasonably considered a Level S offense. Claimant was under a Level S review period at the time the events here concerned occurred. As a result, dismissal was proper.

AWARD:

The claim is denied.

Patricia Thomas Bittel

Chair and Neutral Member

Donald J. Merrell

May 22, 2014

Donald Merrell,

For the Carrier

Gary Hart,

For the Organization

Dated: April 27, 2014