

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 429 – Award No. 429 – Claimant: Bacon
Carrier File No. 14-12-0011
Organization File No. 160-13N1-1169.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing October 28, 2011, when Claimant, Benjamin H. Bacon (0057398), was disciplined with a Level S 30-day Record Suspension with a 3 year review period for his alleged failure to have steering wheel cover in place during boom operations on September 1, 2011 while working as Welder Trainee. The Carrier alleged violation of EI 15.5 Vehicle 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 reinstated, if applicable, of seniority, with all rights unimpaired; the reinstatement of lost vacation time; and for the payment of all wage and expense loss, commencing October 28, 2011, continuing forward and/or 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, Benjamin H. Bacon, has been employed by the Carrier since May, 2011. On September 6, 2011, 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 to have steering wheel cover in place during boom

operations on Thursday, September 1, 2011, at approximately 4:40 PM while working on TRWX0411 as . . . Welder Trainee.” Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, in violation of E.I. 15.5 Vehicles Equipped with Cranes, 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:

15.4 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.

At the opening of the investigation, the Organization representative objected to the fact that the Hearing Officer noted that Claimant had been charged with violating Engineering Instruction 15.4, as both the investigation and postponement notices listed EI 15.5. The Hearing Officer responded that the rule number appeared to be a typographical error, and that the heading of the Engineering Instruction, Vehicles Equipped with Cranes, was correct.

Rodney Riley, Carrier Senior Manager of Operations Testing and Rules, testified by telephone that he and Manager of Rules Brad Bryant had been performing operations testing on the Clovis Subdivision on the day of the incident, and they were driving into Clovis to tie up when he observed the boom truck on the railroad with the boom in the air, and no steering wheel cover was in place. He stated that he had a perfectly clear line of sight to the truck.

Mr. Riley stated that he approached the truck, rolled down his window, and spoke to Claimant. He explained that he asked Claimant if he should have a boom cover on his steering wheel, he replied in the affirmative, and Claimant then placed the cover on the wheel and resumed working. He added that he and Mr. Bryant contacted Roadmaster Victor Lopez and remained in the area until he arrived, and he and Roadmaster Lopez met with Claimant and his co-worker, the truck driver, who were very forthright and honest concerning the situation.

Mr. Bryant also testified by telephone. He confirmed the account of events given by Mr. Riley, and acknowledged that Engineering Instruction 15.4 requires the truck driver to place the cover on the steering wheel. He stated that at the time he and Mr.

Riley instructed Claimant to place the cover on the wheel they did not know whether he was the truck driver, but all employees are responsible for safety and complying with Rules. He explained Claimant was the first employee to approach their vehicle. He stated that the purpose of the cover is to ensure that equipment does not move if the boom and outriggers are deployed.

Carrier Manager of Rail Trains Victor Lopez testified at the investigation that he was the Roadmaster out of Clovis, New Mexico at the time of the incident, and Claimant and Tom Gum were members of his welding crew. Mr. Gum was the head welder and Claimant was a trainee, and he did not recall which employee drove the truck that day.

Mr. Lopez stated that he met with both employees when he arrived at the scene, and both acknowledged that they had been operating the boom and outriggers without the steering wheel cover in place, and assured him that it would not happen again. He maintained that both employees told him they had gotten involved in their work and forgot to place the cover on the wheel. He added that both employees admitted that they had made a mistake.

With respect to the specific language of Engineering Instruction 15.4, Mr. Lopez stated that ensuring that the cover is on the steering wheel is the responsibility of both employees. He explained that they should have held a job briefing and discussed the requirement before they began work. He added that all employees are responsible for this safety requirement because if there is non-compliance they are all at risk of being injured, and that all welders are required to possess commercial drivers' licenses and to be truck driver qualified.

Claimant testified at the investigation that he was a welder trainee at the time of the incident. He acknowledged that he participated in the discussion with Mr. Lopez, and acknowledged that he was part of the work group involved in the incident. He stated that he held a commercial drivers' license at the time.

Claimant stated that Mr. Riley flagged him to come over to his vehicle, and when he did so Mr. Riley pointed at the truck and asked if there was something wrong with this picture. Claimant acknowledged that he knew there was no boom cover on the steering wheel and told Mr. Riley that. Mr. Riley asked him if he thought they should put one on, and Claimant replied yes, went to the truck, put the cover on the steering wheel and resumed work.

Claimant denied that Mr. Lopez told them that all employees were responsible for ensuring that the steering wheel cover was on, and denied that he admitted any responsibility. He stated that he did not drive the truck on the day of the incident. However, he acknowledged that all employees are responsible for working safely, and he is responsible for his own safe work.

Claimant's personal record shows a Level S 30-day record suspension, with a three-year review period, assessed September 13, 2011, for failure to have the steering wheel cover in place during boom operations.

The Carrier first states that there is no merit to the Organization's procedural arguments. With respect to the allegation that the investigation transcript included two copies of page 6 and omitted pages 57 and 72, the Carrier responds that this was inadvertent, that it provided the pages with its response to the claim, and that it would not object if the Organization wished to present any additional argument based upon the information in those pages. As for the Organization's objection to witnesses testifying by telephone, the Carrier states that this practice is well-established and did not interfere with Claimant's right to a fair and impartial investigation. Finally, with respect to the Organization's complaint that Engineering Instruction 15.5, which Claimant was charged with violating, does not exist, the Carrier maintains that a revision changed the numbering of the relevant provision from 15.5 to 15.4, that citation to the previous rule number was a typographical error, and that the rule was not changed and remained in force at all relevant times.

On the merits, the Carrier asserts that Claimant violated the applicable Rule, regardless of the number placed before it. Two Carrier officers, the Carrier states, observed that Claimant's vehicle had no cover on its steering wheel, and Claimant testified at the investigation that he admitted as much to the Carrier officers at the time. The Carrier points out that the cover protects employees by instructing them not to operate when the boom is in use, and all employees on the boom truck are responsible for ensuring that the cover is properly placed on the vehicle's steering wheel. Claimant's after-the-fact excuses, the Carrier urges, should not be given credence, and the Hearing Officer's decision to instead credit the testimony of the Carrier's witnesses should not be disturbed. The Carrier states that it has proven Claimant's guilt by substantial evidence, and the discipline assessed was appropriate given the seriousness of the offense, especially as Claimant was disciplined for the same offense just two months earlier. 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 the transcript was incomplete, with duplicates of page 2 and missing pages 51 and 72, which prevented the Organization from responding to the discipline letter. The Organization also objects to the fact that all of the Carrier's witnesses testified by telephone rather than appearing at the hearing, making it impossible for the Organization to verify their statements or to ensure that they did not communicate among themselves concerning their testimony. The Organization notes that the Carrier also failed to call the member of Claimant's work group who signed a waiver, as a witness in this investigation. The Organization also points out that Claimant was found to have violated Engineering Instruction 15.5 Vehicles Equipped with Cranes, but Chapter 15 ends with 15.4. Claimant, the Organization asserts, cannot be found guilty of violating a Rule which does not exist.

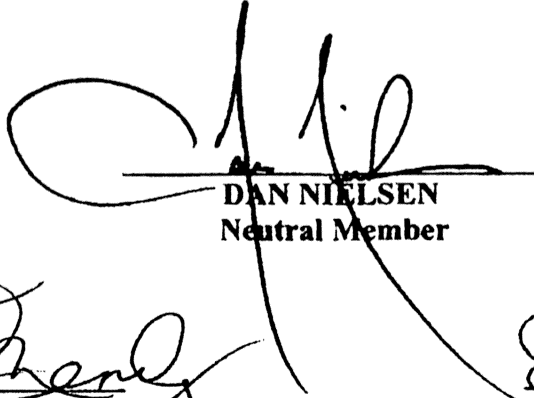
On the merits, the Organization contends that even if it were appropriate to apply E.I. 15.4 to the instant situation, it would not apply to Claimant, as it requires the truck driver to place the cover on the steering wheel, and Claimant never operated the truck and the truck driver signed a waiver and took full responsibility for the incident. The Carrier Officers' instructions to Claimant to put the cover on the wheel actually violated the Rule requiring the cover to be placed by the truck driver, the Organization asserts. The Organization concludes that the discipline assessed is extreme, unwarranted and unjustified, and urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we no find evidence of any procedural irregularity which denied Claimant to his right to a fair and impartial investigation. In particular, the incorrect section number citation to the applicable Engineering Instruction appears to be, as the Carrier asserts, a typographical error, and the notice to Claimant and the Organization included the correct heading of the rule. In addition, it is apparent from Claimant's testimony that he was aware from the outset of the incident of the substance of the rule he was subsequently found guilty of violating. He suffered no prejudice from the incorrect number citation. In addition, as the Carrier states, the practice of telephonic testimony is well-established practice and there is nothing to demonstrate that it denied Claimant 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. Claimant was aware of the requirement that the boom cover be in place. Whether he admitted his responsibility in this matter, as the Carrier witnesses testified, or not, he admitted that he was aware the cover was not in place as required. He acknowledged that all employees are responsible for working safely. Therefore, even if he was not the truck driver responsible for physically placing the cover, he was responsible for working in an unsafe manner, that is, failing to ensure that the cover was in place before beginning work. The Carrier has proven his guilt 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

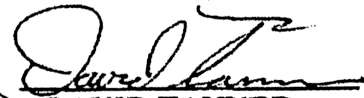
Claim denied.

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DAN NIELSEN
Neutral Member

A large, stylized handwritten signature in black ink, appearing to be 'Joy Menendez', written over a horizontal line.

JOY MENDEZ
Carrier Member

A large, stylized handwritten signature in black ink, appearing to be 'David Tanner', written over a horizontal line.

DAVID TANNER
Organization Member

Dated this *5th* day of *October*, 2013.