

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 449 – Award No. 449 – Mead
Carrier File No. 14-13-0208
Organization File No. 50-SF13N1-1330

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing April 4, 2013, when Claimant, Ronald K. Mead (6496897), was disciplined with a Level S 30-day Record Suspension with a 1-year review period for his alleged failure to wear a seat belt while operating a motor vehicle, near MP 172, El Dorado, Kansas, at approximately 6:09 a.m. on March 16, 2013. The Carrier alleged violation of Maintenance of Way Safety Rules (MOWSR) 12.5 Seat Belts and MOWSR 14.1.2 Seat Belts.
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, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing April 4, 2013, 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, R.K. Mead, has been employed by the Carrier since 1975. On March 26, 2013, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to wear a seat belt while operating a motor vehicle, near MP 272, El Dorado, Kansas, Arkansas

City Subdivision on March 16, 2013. The Carrier stated that its first knowledge of the alleged violation was March 19, 2013. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, in violation of Carrier Maintenance of Way Safety Rules MOWSR 12.5 Seat Belts and 14.1.2 Seat Belts, and assessed him a Level S 30-day record suspension with a one year review period.

The applicable Carrier MOWSR provide:

S-12.5 Seat Belts

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

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.

S-14.1.2 Seat Belts

Wear seatbelts while operating or riding in equipment or vehicles that are equipped with them. Seatbelts may be removed when:

- The field of view is obstructed and it is necessary to stand to obtain a clear view of the surroundings, or
- Employees are operating cranes that require being seated in the upper rotating structure (e.g., Locomotive Cranes, Rail Bound Track Cranes, etc.)

On March 16, 2013, Claimant was operating a Carrier truck. Certain Carrier vehicles, including this one, are equipped with DriveCam devices; the one on Claimant's vehicle had been installed on March 13, 2013. The DriveCam views the interior and exterior of the vehicle, creating a continuous recording. In the event of abrupt or excessive braking, it takes snapshots beginning eight seconds before, and continuing for four seconds after, the incident.

The Carrier's Manager of Safety regularly reviews the video from these devices for safety violations. Carrier Roadmaster Cleveland Tolbert testified at the investigation that on approximately March 19, 2013, he received an e-mail from the Carrier's Manager of Safety indicating that his regular review of DriveCam video had disclosed that the Drive Cam on Claimant's vehicle had been triggered on March 18, 2013, at 1:42 p.m., while Claimant was on his way to work, and showed that Claimant had not been wearing his seatbelt.

Mr. Tolbert received the video concerning the incident, which was played during the investigation. It showed what appeared to be a deer in the right of way, and the driver

braking from 63 miles per hour at the beginning of the video, to 27 miles per hour when the video stops. The braking triggered the video.

Four still shots from the video were entered into the hearing record; they did not show an employee identification number. Mr. Tolbert maintained that one still shot showed that the driver was not wearing a seatbelt. Mr. Tolbert acknowledged that three of the shots do not show the driver not properly secured with a seatbelt, or any other Rules violation.

Mr. Tolbert stated that he spoke to Claimant after receiving the information, and Claimant maintained that he had been wearing his seatbelt, but under his arm. Claimant told him he always wore his seatbelt that way. The Carrier's snapshots show driver unknown and do not have any employee identification number. He also acknowledged there was no Milepost 172 on the Arkansas City subdivision. The Hearing Officer also acknowledged that there was an error in the investigation notice, as milepost 172 was on the Emporia Subdivision rather than the Arkansas City subdivision.

Claimant acknowledged at the investigation that on the day of the incident he slammed on the brakes to avoid hitting a deer and the DriveCam took his picture. He acknowledged that he was the individual shown in the video. Claimant maintained that he was wearing his seatbelt at all times and if it was not visible the camera probably was not adjusted correctly. He stated that he did not see a seatbelt in the one still shot the Carrier relied on, but pointed out that the latch where the seatbelt hooked was not visible and the seatbelt was under his left shoulder. His left shoulder is visible. Claimant maintained that there was nothing in the Carrier's Rules requiring him to wear the seatbelt over his shoulder.

Claimant's personal record shows a Level S 30-day record suspension in 2005 for failure to be alert and attentive, resulting in an accident while operating a backhoe, and a formal reprimand in 1998 for backing his personal vehicle into a Carrier truck.

The Carrier asserts that this case is not complicated, as the record establishes that on March 16, 2013 Claimant was operating Vehicle 22237, with is equipped with a Drive Cam device. The device's recording mechanism is triggered by a hard braking action. Here, the Carrier state, hard braking to avoid hitting a deer triggered the recording device, and screen shots entered into evidence clearly show Claimant, at the relevant time, driving 27 miles per hour without wearing his seatbelt.

The Carrier discounts the Organization's only argument, that the Drive Cam evidence was defective or inaccurate, especially as the Organization provided no evidence to support this contention. In addition, the Carrier notes Claimant's admission that the photo the Carrier contends shows him without a seat belt was of him, and he also admitted he had braked hard to avoid hitting a deer. The Carrier asserts that it has met its burden of proving Claimant's guilt by substantial evidence, and the discipline was assessed in accordance with its Policy for Employee Performance Accountability (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 the Carrier failed to provide Claimant and/or the Organization with a transcript of the investigation within 30 days as required, as the investigation was held on April 4, 2013 and the transcript was not received until May 7, 2013. In addition, the Organization asserts that the Hearing Officer took the unprecedented step of asking Claimant whether he wished to secure a different representative, as the Hearing Officer apparently found the assigned representative's representation too difficult to handle. The Organization also contends that the investigation notice referenced a non-existent location, as there is no milepost 172 on the Arkansas City Subdivision.

On the merits, the Organization denies that Claimant violated Carrier rules as alleged. The Organization notes that Claimant is a 60-year old employee with 37 years' service, and he steadfastly maintained that he was wearing his seat belt at the time at issue, as he always does, under his arm. The Carrier, the Organization asserts, provided no credible contrary evidence. In particular, Carrier witness Tolbert could argue only that, in the photographs, he could not see a seat belt where he thought one should be, and several of the photographs did not demonstrate that the driver was not wearing a seatbelt. Moreover, Mr. Tolbert was sufficiently unfamiliar with the seatbelt latching system that he needed Claimant to explain it to him.

The Organization concludes that the Carrier has failed to prove Claimant guilty of any misconduct, and the discipline assessed is extreme, unwarranted, unjustified and unsupported by the facts of the case. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. The Carrier acknowledges that the Investigation Notice references an incorrect location, but the record is clear that Claimant was fully aware of the particular incident at issue and he and the Organization were able to present a defense on the merits. There was no demonstrated prejudice to Claimant.


On the merits, the record is clear that Claimant braked hard to avoid hitting a deer, triggering his vehicle's Drive Cam device. No one saw Claimant driving, so the Carrier's evidence consists solely of the video and related data, and the still shots, allegedly showing him driving without a seatbelt.

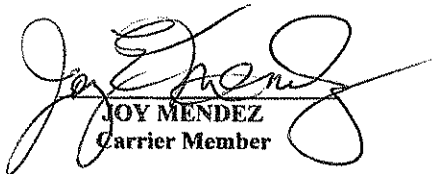
Four shots were entered into evidence. Three are focused to the left, and show nothing. The Carrier relies upon only one to prove its case. In the photo, the Grievant is visible, from just above his waist and up. No seatbelt can be observed, either across Claimant's chest, across his belly or over his waist. The seatbelt latch is not visible. While Claimant contends that he wears his seatbelt under, rather than over, his left shoulder, and there is no allegation that wearing it in that manner violates Carrier Rules, the photo – while far from perfect – depicts enough of Claimant's upper body that a seatbelt would have been visible had he been wearing one. There is no visible line, no

discoloration, and no distortion in the photo that can be interpreted as being a seatbelt. We therefore conclude that the Carrier has met its burden of proving this violation by substantial evidence. As for the penalty, failure to wear a seatbelt is a serious offense, one which substantially increases the possibility of injury in a situation like the one that occurred here. We therefore cannot say that the penalty determined appropriate by the Carrier represents an unfair, arbitrary or discriminatory exercise of its discretion to assess discipline.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID SCOVILLE
Organization Member

Dated this 31st day of October, 2014.