

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 476 – Award No. 476 – Dorrell
Carrier File No. 14-14-0221
Organization File No. 20-SF13S1-146

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 13, 2014, when Claimant, M.A. Dorrell (6528418), was disciplined with a Level S 30-day Record Suspension for his alleged failure to wear a seat belt while operating BNSF vehicle 25475 on February 27, 2014 near Orrick, Mississippi as revealed by Drive Cam event while assigned as a Foreman on RP02.
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, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing May 13, 2014, 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, M.A. Dorrell, has been employed by the Carrier since 1980. On March 3, 2014, 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 Carrier vehicle 25675 on February 27, 2014 at 0552 hours near Orrick, Missouri, as revealed by DRIVE CAM, while assigned as a foreman on RP02. The Carrier stated that its first knowledge of the alleged violation was March 3, 2014. 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.)

Claimant acknowledged at the opening of the investigation that he understood that he had been charged with failure to wear a seatbelt while operating a Carrier vehicle, notwithstanding that his Investigation Notice did not include the specific Rule setting forth that requirement.

Carrier Roadmaster Robert Heintz testified at the investigation that at the relevant time he was Claimant's supervisor. Claimant was working as a foreman of RP02, a rail gang of 36 employees who remove and replace rail. Certain Carrier vehicles, including one Claimant was driving, are equipped with DRIVE CAM, a camera installed on the windshield. When there is a triggering event, such as sudden braking, the camera will activate and download for a set period of seconds before and after the event. He received notification that there had been a triggering event on Claimant's vehicle and received the photographs captured by the DRIVE CAM.

Mr. Heintz testified that the photographs showed Claimant driving but no seat belt was visible. After he received the photographs, he interviewed Claimant, who told him

he had been wearing his seatbelt, but under, rather than over, his shoulder. He explained that Claimant maintained that the belt was alongside his body and then across his waist.

Mr. Heintz acknowledged that if Claimant wore his seatbelt under his shoulder, as he maintained, it would be difficult or nearly impossible for the DRIVE CAM to see the seat belt when it went off due to a triggering event.

Claimant acknowledged at the investigation that the DRIVE CAM does not show his seatbelt, but explained that he wears his shoulder strap under his arm rather than over his shoulder. He said he does this because he broke his collar bone in 1999, and since then it has been uncomfortable to wear the shoulder strap across the collar bone. He stated that he always wears a seatbelt when operating a Carrier vehicle equipped with seatbelts.

Claimant's personal record shows a formal reprimand for failure to perform proper testing on a HLCS system utilized in association with track and time authority.

The Carrier first states that the Organization's procedural objections have no merit. Because the Carrier's first knowledge of the violation was March 3, 2014, the investigation was scheduled within the applicable time limits. The Carrier adds that even if the Investigation Notice did not specify the particular Rules violations at issue, it included enough information for Claimant and his representative to understand what conduct was at issue and prepare a defense.

On the merits, the Carrier states that that this case is not complicated, as testimony and DRIVE CAM snapshots entered into evidence by Roadmaster Heintz show that on February 27, 2014 Claimant was operating a Carrier vehicle when he was not wearing a seatbelt. Claimant's vehicle, the Carrier notes, was equipped with a DRIVE CAM, and the snapshots, the Carrier states, clearly show that Claimant was not wearing the seatbelt. The Carrier asserts that it has proven Claimant's guilt by substantial evidence.

The Carrier concludes that the discipline was assessed in accordance with its Policy for Employee Performance Accountability (PEPA), taking into consideration his personal record, and was appropriate to the offense. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization asserts that the Carrier, in the Investigation Notice, failed to cite the specific Rules Claimant was accused of violating.

On the merits, the Organization contends that Claimant was indeed wearing his seatbelt, but it was not visible on the DRIVE CAM because he was wearing it under, rather than over, his shoulder and then across his waist. The Organization points to Claimant's testimony that although the video does not show a belt over his chest, there is

a reflection off the back side of the mirror right in front of the camera, and he wears the belt low on his waist, because he suffered a broken collar bone in 1999 and the seat belt bothers his collar bone if he wears it over his shoulder. The Organization notes that Claimant's supervisor, Mr. Heintz, conceded that it would be nearly impossible for the DRIVE CAM to observe a seatbelt worn under, rather than over, the shoulder. The Organization further points to Claimant's testimony that even though the seatbelt cannot be seen in the video, he in fact always wears it.

The Organization contends that the Carrier has failed to meet its burden of proving Claimant guilty of the misconduct alleged and further that 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 deprived Claimant his right to a fair and impartial investigation. On the merits, no one observed Claimant driving, so the Carrier's evidence consists solely of what is visible in the DRIVE CAM still shots. Claimant acknowledges that he was the individual in the photographs and the seatbelt is not visible, because, he maintains, he wears it under rather than over his shoulder because he broke his collarbone in 1999 and ever since it has been uncomfortable for him to wear it over his shoulder. In the photos, no seatbelt can be observed across Claimant's chest, and his waist and the location where the seatbelt would be latched are largely obscured by his arm.

The Carrier has the burden of proving Claimant guilty by substantial evidence, and we do not dispute that the offense with which he is charged – violation of a Rule in place to ensure employee safety – is a serious one. However, the Carrier's only witness, Roadmaster Heintz, conceded that it would be difficult or nearly impossible for the DRIVE CAM to capture whether Claimant was indeed wearing his seatbelt as he described. There is no allegation that wearing a seatbelt in this manner violates Carrier Rules, nor is there anything in Rule S-14.1.2 that would suggest any such conclusion. Since the only evidence in this matter is the photographs, and the Carrier's only witness conceded that they could not establish that Claimant failed to wear his seatbelt, we conclude that the Carrier has failed to meet its burden of proving Claimant's guilt. The claim must therefore be sustained.

AWARD

Claim sustained. The Carrier will remove this discipline from Claimant's personal record and make him whole for his losses in accordance with the prevailing practices on this property. The Carrier is directed to comply with this Award within 45 days.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID SCOVILLE
Organization Member

Dated this 12th day of Oct, 2016.