

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 497 – Award No. 497 – Abrudan
Carrier File No. 14-18-0540
Organization File No. 0493-SL13S1-1840

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following appeal on behalf of Samuel Abrudan (0317396) Seniority Date 07-21-2014 for the removal of the Claimant's Level S 30 Day Record Suspension and Three (3) Year Review. In addition, we request all record of discipline removed from the Claimant's record with seniority rights and entitled benefits restored.¹ The Claimant shall be made whole as a result of the Carrier's violation, including the following compensation(s):

1. straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the Claimant while wrongfully removed from service);
2. any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the Claimant was out of service, including any and all 401k contributions including any market adjustments;
3. overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been removed from service;

¹ including vacation, health insurance benefits and 401k contributions with market adjustments if applicable.

4. All notations of the discipline should be removed from all Carrier records.

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, Samuel Abrudan, has been employed by the Carrier since 2014. On April 20, 2018, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure, on April 16, 2018, to be properly secured in a BNSF vehicle by a seat belt. The Carrier claimed first knowledge on April 17, 2018. The Carrier stated that the investigation would determine possible violation of Maintenance of Way Safety Rule (MWSR) 1.2.5 Safety Rules, Mandates, Instructions, Training Practices and Policies, MWSR 12.1.1 General Requirements, and MWSR 12.5 Seat Belts.

Following the investigation, the Carrier found Claimant guilty of the charges and assessed him a Level S record suspension with a three-year review period.

Claimant's personal record shows a Level S record suspension issued on November 14, 2017 for failure to comply with the posted speed limit.

This matter arises out of an incident involving what is known as the Carrier's DriveCam program, implemented in 2014 to reduce at-risk driving behaviors and accidents. The DriveCam is a digital recorder mounted behind the rearview mirror of Carrier vehicles. When the vehicle experiences an event such as hard braking, swerving, or a collision, the camera records the eight seconds prior to the triggering event and the four seconds afterward. The Carrier employs Lytx, a contractor, to review DriveCam events and forward video to the Carrier when an event captures a potential rule violation and/or a safety concern.

On April 16, 2018, at approximately 11:24 a.m., Claimant, a mechanic, was driving Carrier vehicle 2466 through a residential area in Paola, Kansas. The vehicle's DriveCam was triggered, apparently because it hit a pothole. On April 17, 2018, Lytx forwarded the video to the Carrier, flagging the potential rule violation of Claimant's failure to wear his seatbelt. Carrier Supervisor of Roadway Equipment Robert Ashe reviewed the video and agreed that Claimant was in fact operating the vehicle without wearing a seatbelt. The instant investigation ensued.

The DriveCam video was played at the investigation, and still shots derived from it were entered into the hearing record. Mr. Ashe, who presented the evidence, acknowledged that the still shots were not as clear as the video. He described that Claimant was wearing a black hoodie somewhat faded to gray. The seatbelt, he stated, was black and should have been visible on the photos had he been wearing it.

Claimant testified at the that he was properly wearing his seatbelt at the relevant time and maintained that it could be seen on the video and photos. The Organization entered a separate photo of the hoodie Claimant had been wearing at the time of the incident. In that photo, the darker seatbelt can be seen against the jacket.

The Carrier's evidence in this matter consists of the photographs derived from the DriveCam video. While the photographs certainly could have been clearer, they show, as the Carrier points out, that Claimant was wearing an orange safety vest with what appears to be white reflective striping at the relevant time. We agree with the Carrier that had Claimant been wearing the seatbelt, the color contrast between the black seatbelt and the orange safety vest would be visible. As the Carrier further notes, the photographs show, clearly visible against the vest, that Claimant had a black radio receiver attached near his left breast pocket. The seatbelt would have been similarly visible in the same area, and it was not. The Organization's argument that Claimant's black jacket camouflaged the vehicle's black seatbelt is therefore unconvincing, especially as the seatbelt is clearly visible against the jacket in the separate photograph of the jacket and seatbelt entered into the record by the Organization, and it does not show the reflective vest and radio Claimant was wearing at the time of the incident. The Carrier has proven Claimant's guilt of violating serious Rules, intended to safeguard employee safety, by substantial evidence.

With respect to the penalty, we note that the Carrier's Policy for Employee Performance Accountability (PEPA) that an employee who commits a serious violation during an active review period for a previous for a previous serious violation may be subject to dismissal. Claimant was assessed a Level S violation for speeding on November 14, 2017 and the incident at issue took place less than six months later. The Carrier's assessment of the lesser penalty of a record suspension cannot be deemed an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine the appropriate disciplinary sanction. We therefore deny the claim.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



SAMANTHA DAIGLE
Carrier Member



LOUIS R. BELOW
Organization Member

Dated this 9th day of June, 2021.