

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
v.)
BNSF RAILWAY COMPANY)

Carrier File No. 11-13-0304
Organization File No. S-P-1743-G

Claimant — Kelsey Klein

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on July 2, 2013, when it issued a Level S Record Suspension to Claimant, Kelsey Klein, for violation of MWSR 1.4.9 Seat Belts, MWSR 12.5 Seat Belts, MWSR 12.1 General Requirements and MWSR 12.1 Operation of Motor Vehicles, in connection with Claimant's violation that occurred at or near Balmer Yard, Seattle, Washington, while you were working as Track Inspector (TINS0376), leading to Drive Cam exception event 32774, recorded at approximately 1033 hours, May 30, 2013, of the driver in vehicle 18973 not wearing a seatbelt.
2. As a consequence of the violation referred to in part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.

BACKGROUND:

The Claimant entered service with the Carrier on May 30, 1995. At the time of the incident that resulted in his discipline, he was working as a Track Inspector in the Seattle area.

The facts of what occurred are not in serious dispute. On May 25, 2013, the Claimant, in the course of his normal job duties, was backing a pickup truck over a self-guarded frog in the Balmer Yard in order to get on the Hyrail, which caused significant jostling motion in the truck. The motion was enough to activate the truck's internal DriveCam, which showed that the Claimant was not wearing his seat belt. Other monitoring equipment in the truck established that he was traveling at all times at less than four miles per hour. Claimant had been getting in and out of his truck and had not put his seat belt back on so that he could move as needed to see better what was happening behind him. He testified that if he had been driving a regular truck, he would have been standing on the running board in order to see behind as he went over the rails, but the truck he was driving had a box that holds torches on the side so he was having to try to see out the back from mirror. The DriveCam photos clearly show Claimant craning to see behind the vehicle. It was not until after this incident that he realized that the seat belt alert indicator on the truck had been de-activated, and he reactivated it. The Drive Cam system alerted the Carrier to what had happened.

The Carrier sent Claimant a Notice of Investigation dated June 6, 2013, indicating that an investigation would be held "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with" the alleged seatbelt violations. The hearing took place June 13 and, following an agreed postponement, was completed on June 17, 2013. Claimant testified to the difficulty of backing up over a self-guarded frog in a truck with no back-up camera. The frogs have been known to derail trucks. Being able to see exactly where the wheels of the truck are is critical—and almost impossible to do while wearing a seatbelt. In addition to the testimony that was introduced, the Organization also submitted a copy of an e-mail string the subject of which was "Seat Belts when setting on to Hyrail." In the string, the Organization asked "When a MOW attempts to set their vehicle on the tracks to hyrail, is there an exemption from the seatbelt requirement? Most employees cannot properly determine the placement of their hyrail wheels in relation to the tracks while wearing the seatbelt." The response from the Carrier's Rules Group was: "Good question.... We had an exception drawn up for this, but between Eng Safety and the MW Rules Team it was decided that if someone were observed or caught on DriveCam unbelted while performing this operation it would [be] dropped during an initial BNSF Rules review of DriveCam footage, if DriveCam were activated during the process... There are cases where operators need to unbelt when reaching keypads. These cases would be handled similarly. In both examples the operator needs to re-belt immediately re-secure the seat belt upon completion of the operation." The Organization forwarded the response to a variety of management employees, including the Supervisor of Signals. When asked at the

hearing, the Carrier's witness stated that the e-mail established an exception to the normal seatbelt rule.

By letter dated July 2, 2013, Claimant was notified that he had been found in violation of MWSR 1.49, MWSR 12.5, MWSR 12.1.1 and MWSR 12.1. The discipline assessed was a Level S 30 Day Record Suspension and a one-year review period.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

The evidence from the DriveCam establishes that Claimant was not wearing his seat belt, and the Claimant has acknowledged that he was not. Claimant's violation of MWSR S-12.5, Seat Belts, and S-14.9, Seat Belts, is thus established. Safety rules are among the most important to be enforced. However, the unique circumstances of this case operate to mitigate the seriousness of Claimant's infraction. He could not see to back up his truck while wearing a seat belt. He was traveling at less than 4 miles per hour. Given the difficulty of backing up over the self-guarded frog without adequate rear vision, Claimant testified that he believed he was performing the maneuver as safely as he could. The Carrier assessed a Level S Record Suspension, for a Serious Violation, presumably for "Violation of any work procedure that is designed to protect employees, the public and/or others from potentially serious injury(s) and fatality(s)." The evidence is that the Claimant was caught between the proverbial rock and hard place: backing over a self-guarded frog was known as an action that could derail the truck. Being able to see to back up was critical, but Claimant could not see adequately while wearing a seat belt. So his choice was to try to back up blindly—which could have derailed the truck and caused him injury—or to unbuckle the seat belt in order to obtain better vision, which presented less of a chance that the truck would derail but exposed him to the possibility of injury if something else happened. All things considered, the level of discipline assessed against the Claimant was not warranted. At the time of the incident, Claimant was an employee with an unblemished record of almost 18 years' service. He made a reasoned decision about how best to approach a difficult maneuver where there was no obvious good solution to the problem of backing up. While Claimant did violate the seatbelt rules, under the circumstance he should not have been assessed discipline at Level S Serious.


In summary, Claimant's discipline shall be reduced to a Standard violation. The Level S Record Suspension on his record shall be removed and replaced with a formal reprimand and a one-year review period pursuant to the progression set forth in the PEPA.

AWARD


Claim sustained in accordance with the Findings.

ORDER

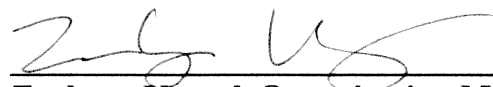
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member



Joseph Heenan, Carrier Member



Zachary Voegel, Organization Member

5/25/16

Date