

Award No. 43
Case No. 43
NMB Case No. PLB-07602-000043

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

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

Carrier File No. 10-14-0333
Organization File No. C-14-Do4o-25

Claimant — Trevor R. Evans

BACKGROUND:

This Claim challenges the Carrier's imposition on the Claimant of a Level S 30-Day Record Suspension with a three-year review period for failing to wear his seat belt while traveling in a Company vehicle. The Claimant entered service with the Carrier on April 7, 2014.

As a safety measure, Carrier vehicles are fitted with DriveCam video cameras that can record what is happening inside the vehicle when it is in motion. While the cameras are actually in operation all the time, the actual recording function is only triggered by certain "G-force" events, such as hitting a large bump in the road or taking a corner too sharply. When the DriveCam is activated, it records for eight seconds. The Carrier regularly reviews the DriveCam footage; if employees are seen to be violating any of the Carrier's rules, someone will investigate.

On July 14, 2014, the Claimant was working as a Gang Trackman near Guernsey, Wyoming, on the Canyon Subdivision. He and several other employees were traveling from one work location to another in a Carrier van when the

DriveCam recording system in the van was activated, at about 0903 hours.¹ The next morning, on July 15, 2014, the Carrier's Auditor of Rules, Russ Williams, e-mailed Craig Hill, Assistant Director of Maintenance Production and the supervisor of the gangs on the Powder River Division, to inform him that in reviewing the DriveCam footage for the van, it appeared that the Claimant and another employee were not wearing their seat belts. Williams instructed Hill to investigate.

Hill reviewed the DriveCam video and concluded that the Claimant and the other employee were not wearing their seat belt. On July 16, 2014, the Carrier sent a Notice of Investigation informing them that an investigation into their "alleged failure to wear a seat belt while riding as a passenger in BNSF vehicle 18309, which was in motion at approximately 0903 hours, CST, July 14, 2014, at/or near BNSF right-of-way near 762 Wendover Road, Guernsey, Wyoming..." would be held.

Following a mutually agreed postponement, the investigatory hearing was held on July 29, 2014. Mr. Hill testified regarding his conclusions from the video footage and submitted into the record a still photograph from the video. Upon the Organization's request, the video was shown and viewed several times during the hearing. The Organization asked that the video be entered into the record. However, it appears that DriveCam retains a proprietary interest in video footage taken by its video recorders. The footage has to be accessed on-line—in other words, the Carrier does not have its own copy of the recording. More importantly, DriveCam prohibits downloading any of its video footage. According to Mr. Hill's testimony, the policy is for privacy and security reasons. The Organization asked to have a screen shot of another part of the recording made and entered into the record, which was done. The Claimant testified that he *was* wearing a seat belt when the video was taken.

Following the investigation, by letter dated August 6, 2014, the Carrier found that the Claimant was in violation of MWSR 1.4.9 Seat Belts; MSR 12.5, Seat Belts; and MSR 14.1.2, Seat Belts. The Claimant was assessed a Level S 30 Day Record Suspension with a three year review period commencing August 6, 2014.

¹ The Organization objected to testimony at the investigatory hearing about how the DriveCam was activated. That is actually irrelevant; the important fact is that for whatever reasons, it was activated.

The Organization filed an appeal, and the parties having failed to resolve the matter mutually, it has been appealed to the Board for decision.

According to the Carrier, the DriveCam video and photographs establish that the Claimant was not wearing a seat belt as required by Carrier rules. Because of the possibility of serious, even fatal injury that could occur when someone is not wearing their seat belt while a vehicle is in motion, failure to wear a seat belt while underway is considered a serious safety violation and categorized as a Serious violation under the Policy for Employee Performance Accountability, or PEPA. The Claimant was assessed the correct discipline for a first Level S violation. The Organization contends that the Carrier has not met its burden of proof: the photographs in the record are inconclusive at best and there was no eye-witness testimony to what happened except Claimant's strong affirmation that he was wearing his seat belt. The Organization also protests that the determination that the Claimant had violated the seat belt rules was procedurally tainted, in that the official who issued the discipline was not present at the investigation and did not watch the video. Therefore he had no basis for making informed judgments about credibility, which is at issue in this case, and the discipline should be reversed for this serious procedural flaw.

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 Claimant was found to have violated MWSR 1.4.9, MSR 12.5 and MSR 14.1.2. The opening language of all three rules is the same: "Wear seat belts while operating or riding in equipment or vehicles that are equipped with them." The safety benefits of wearing seat belts are so well-known that they need no explication by the Board, and prior decisions of the Board have recognized the Carrier's right to treat employees' failure to buckle up as serious safety violations, warranting discipline under PEPA at Level S. While the seat belt rules have the same opening sentence, MSR 12.5 and MWSR 1.4.9 also set forth certain circumstances that operate as

exceptions.² None of those exceptions are present under the facts of this case, however. As a result, if the Claimant was not wearing his seat belt when the DriveCam was triggered in the van he was riding in on July 14, 2014, a Level S 30 Day Record Suspension was appropriate, with a three-year review period, given Claimant's short length of service.³

The critical question before the Board is, therefore, whether the Carrier met its burden of proof to establish that the Claimant was not wearing his seat belt when he was filmed by the DriveCam. The video that was played several times at the hearing is not in the record before the Board. There are, however, two photographs taken from the video, one submitted by the Carrier and one submitted by the Organization. They both show a straight camera view from the middle of the front dashboard to the rear of the van.

In both photographs, Claimant is sitting alone in the second row of seats, on the passenger side of the van behind another employee who is sitting in the front passenger seat. In both photographs, the driver's fastened shoulder belt is clearly visible, while it is equally clear that the front seat passenger is *not* wearing a shoulder belt. It is not possible to tell if either man is wearing a lap belt. There are two other employees sitting in the third row of seats, but the picture quality is not clear enough to determine whether they are wearing seat belts or not. In the Carrier's photograph, it appears that the Claimant is not wearing a seat belt. In comparison to the driver, there is no visible shoulder belt crossing his chest. The Organization's photograph purportedly shows the edge of the upper portion of the shoulder belt angling up from the middle of Claimant's chest to his left shoulder. The Claimant testified at the hearing that the lap belt was broken and only the only the shoulder belt was operational.

The Board does not have the advantage of being able to watch the actual video, which was played at the hearing. The video, even though it was only eight seconds long, would have shown how the Claimant was moving in the van, which might make it more clear whether he was wearing the shoulder belt. Without the video to review, it

² For example, MSR 12.5 establishes an exception for when employees are operating vehicles while performing train inspections or coupling air hoses.

³ Under PEPA, three years is the standard review period for Level S (Serious) violations; employees who have not had prior discipline within the past five years qualify for a shorter one-year review period. As the Claimant had only been employed by the Carrier for a few months, he would not qualify for the shorter review period.

is difficult for the Board to make an independent determination of the facts. In the ordinary course of things, the Board would defer to the decision of the Hearing Officer as the original trier of fact. However, there are certain details in both photographs that convince the Board that the Carrier was correct in concluding that the Claimant was not wearing his seat belt when the DriveCam filmed him. Specifically, shoulder belts typically fasten in different directions on opposite sides of a vehicle because the belts are attached to the side interior walls. Shoulder belts on the driver's side will run from the driver's or passenger's left shoulder diagonally across and down to fasten at his right hip. Conversely, shoulder belts on the passenger side will run from the passenger's *right* shoulder diagonally across and down to fasten at his *left* hip, in other words at a different angle altogether. The angle of the supposed shoulder belt in the second photograph follows the *same* angle as the driver's shoulder belt—which is the opposite angle to how it would normally fasten. Moreover, a close look at the side pillar to the Claimant's right appears to show a seat belt coming down from a small opening near the ceiling and laying flat against the pillar, which it would not be doing if the belt were fastened around the Claimant. (There is a similar shoulder belt visible on the left pillar at the other end of the second seat, behind the driver. Also, in the second photograph, one can see the shoulder belt mounting on the pillar by the head of the passenger in the front seat, which suggests that the belt for the Claimant's seat would similarly be mounted on that side as well.)

The evidence in the record is sufficient to conclude that the Carrier met its burden of proving that the Claimant was not wearing his seat belt when filmed by the DriveCam on July 14, 2014. Given that seat belt violations are treated as serious safety violations, the Level S 30 Day Record Suspension with a three-year review period that was assessed against the Claimant was consistent with the progressive discipline set forth in the PEPA. The Board will not disturb the Carrier's conclusion that the Claimant was in violation of the seat belt rule or its determination of the appropriate penalty.

AWARD


Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.


Andria S. Knapp, Neutral Member


Nathan Moayyad, Carrier Member


Zachary Voegel, Organization Member

3/15/17
Date