

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42875
Docket No. MW-43678
18-3-NRAB-00003-160425**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S thirty (30) day record suspension and three (3) year review period] imposed upon Mr. C. Focken, by letter dated April 13, 2015, for allegedly failing to wear a seat belt on Thursday, March 5, 2015 at Mile Post 60 on the St. Joseph Subdivision was unwarranted and without just cause and in violation of the Agreement (System File C-15-D040-13/10-15-0167 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Focken shall have the discipline overturned and have his record cleared of the charges.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers 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 Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On March 5, 2015 Roadmaster Ristau observed the Claimant operating a rail heater without his seat belt on while moving from the hole to the work site. Following a March 16, 2015 Investigation, the Claimant was disciplined as noted above for violations of Maintenance of Way Safety Rules (MWSR) 1.4.9 Seatbelts, 12.5 Seatbelts and 14.1.2 Seatbelts. When the resulting claim on Machine Operator Focken's behalf was not resolved on the property, the matter was referred to the National Railroad Adjustment Board for arbitration.

The Carrier believes it has proved the violations with substantial evidence, as there was no reason for Carrier witnesses to give false testimony. The Board should accept the Conducting Officer's credibility determination. The discipline was proper for this Serious violation, with leniency the province of the Carrier, not the Board. The Investigation was fair and impartial. The Organization has not shown that alleged procedural violations prejudiced the Claimant. Should the claim be sustained, it is required only that the discipline be expunged from the Claimant's record, as no wages were lost.

The Organization indicates that the Carrier has not proven the charges, as the evidence shows that the rail heater was traveling over rough track including switches and possible wide gauge. The Claimant needed to stand so that his view was not obstructed. MWSR 14.1.2 allowed him to remove his seat belt. If there was a violation, the discipline was arbitrary, excessive and unwarranted because the rules had not been consistently enforced. In his 15 years of operating the machine, the Claimant has never been instructed to wear his seat belt. The Claimant had 20 years of service and a clean disciplinary record, making the discipline punitive rather than corrective.

Of the rules that the Claimant has been charged with violating, the Board focuses on MWSR 14.1.2 Seatbelts. While all three rules require that, if available, seat belts be worn, MWSR 14.1.2 provides the exception that belts "may be removed when: The field of view is obstructed and it is necessary to stand to obtain a clear view of the surroundings. . ." Accepting the Claimant's testimony that he was operating in low mode, it is still undisputed that he was coming out of the hole on his

way to the day's work site. In other words, the Claimant was traveling regardless of the speed at which the rail heater was moving, with the route involving going over switches and over possible rough track. And, while the Claimant testified that he has derailed while going through switches and that he needed to stand to see the switches, also in the record is Roadmaster Ristau's testimony that he observed the Claimant sitting while going through switches and that when the Claimant stopped the machine and got out of his seat, he was not wearing a seat belt. The Board assumes that implicit in the Carrier's decision to impose discipline is a conclusion, which the Board accepts, that Roadmaster Ristau testified credibly. The Board further notes the possibility that the Claimant stood while traversing some switches and remained seated while traversing others, so that both men testified credibly. Substantial evidence supports a conclusion that the Claimant violated the aforementioned safety rules, with which he acknowledged familiarity.

With the violation established, the Board must consider the Carrier's disciplinary response. The general rule regarding disciplinary matters is that the employer must 1) make the rules of conduct known to the employees and 2) must enforce these rules consistently, taking into account an employee's past record and mitigating and extenuating circumstances. If enforcement is lax or inconsistent, the implicit message to the work force is that the particular rule at issue is unimportant and, while on the books, will not be enforced. In the case now before the Board, the Claimant, 20 years of service and no prior discipline, provided credible testimony consistent with the record that in the 15 years he has been operating a rail heater, he has never been disciplined for not wearing his seat belt. The Board does not believe that this is because the Claimant has never failed in the past to wear his seat belt while seated or that his supervisors have never seen him without his seat belt while seated. Rather, the Board reasonably assumes that enforcement of the seat belt rules at a minimum has been lax and possibly non-existent. Under the circumstances, by making an example of the Claimant without prior warning that the seat belt rules will be strictly enforced amounts to discipline that is "unwarranted and without just cause." The Board could have easily characterized the discipline as "arbitrary and excessive."

There is precedent for modifying discipline, not on a leniency basis, but on the bases characterized above. See Third Division Award 41038, an on-property case, Second Division Award 6485 and PLB 5229 Award No. 8. The Board finds that, all circumstances considered, a Formal Reprimand with a 12 month review period will serve the necessary corrective function and put the Claimant, as well as

others, on notice that safety rules relating to seat belts will henceforth be enforced consistent with the MWSR 14.2.1 exception.

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(s) 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of January 2018.