

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44666  
Docket No. MW-46400  
22-3-NRAB-00003-200656**

**The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.**

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

**PARTIES TO DISPUTE: (**

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [Level S thirty (30) day record suspension and a one (1) year review period] imposed upon Mr. C. Carlson, by letter dated December 28, 2018, for violation of MWOR 12.5 Seat Belts was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-5859-M/ 11-19-0327 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Carlson shall have his record cleared of the charges leveled against him and be compensated for all wage loss suffered and any and all benefits.”**

**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.

The Claimant, Assistant Foreman Chas Carlson, has been employed by the Carrier since July 28, 2014. He was assessed a Level S 30 Day Record Suspension and a one-year review period on December 28, 2018, for violating the Maintenance of Way Safety Rule ("MWSR") S-12.5, Seat Belts, on September 5, 2018, and following an Investigation held on November 28, 2018. The Carrier alleged that the Claimant was observed by Division Engineer Jeremy Van Pelt not wearing his seat belt as required while riding as a passenger in moving equipment.

Before reaching the merits of the dispute, the Board addresses the Organization's procedural objections that the Carrier violated Rule 40D when it failed to provide a disciplinary decision within the 30 days following the Investigation and that the hearing officer failed to ensure the Claimant was afforded a fair and impartial hearing. A review of the record does not support the Organization's allegations. The Carrier's notice of discipline was issued on December 28, 2018, which is the 30<sup>th</sup> day following the Investigation of November 28, 2018. Lastly, nothing in the record indicates the hearing officer exhibited any prejudice toward the Claimant or failed to provide a fair and impartial investigation.

In discipline cases, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of its discretion. Upon review of all evidence adduced during the on-property investigation, the Board finds that the Carrier has met its burden of proof that the Claimant violated the applicable rules when he was not wearing his seat belt before the equipment came to a stop on September 5, 2018. However, given the unique circumstances described in the record, we find the penalty imposed excessive.

Machine Operator Richard Michalski provides credible testimony that the Claimant put on his seat belt when he first boarded the equipment. However, we also find that Division Engineer Van Pelt provides equally credible testimony that he did not see the Claimant wearing the seat belt before the equipment came to a stop. The record indicates that on September 5, 2018, after being informed of the violation by Mr. Van Pelt, the Claimant did not deny the allegation. It is undisputed

that the Claimant was moving quickly to exit the cab of the equipment as it was coming to a stop in his effort to rush to the restroom. Based on the Claimant's testimony that the seat belt did not have a "push button" device but instead, a latch which was not easy to take off, we find Mr. Van Pelt would have seen him removing the seat belt after the equipment came to a stop.

It is well established by arbitral precedent that the Carrier's credibility determinations of witnesses who testified during the hearing and investigation are not to be disturbed absent substantial evidence that its conclusions are arbitrary. A review of the record here does not provide a basis to ignore the Carrier's assessment of the testimony. The Board sits in review of the Carrier's determinations made on the property and does not make *de novo* findings. We do not find that the Carrier ignored Mr. Michalski's testimony but instead relied on Division Engineer Van Pelt's observations in those final moments before the equipment came to a complete stop. Based on the testimony, we find the Claimant was not wearing his seat belt while the equipment was still moving.

Leniency is reserved to the Carrier where there is no abuse of discretion. The Carrier applied discipline in accordance with its Policy for Employee Performance and Accountability. However, previous on-property awards have found, where mitigating circumstances existed with similar charges, the same penalty imposed by the Carrier here was reduced to a reprimand and one year review period. Given the Claimant's unblemished performance record in his four years of service and the particular facts described hereinabove, and not as an exercise of leniency, the Board comes to the same conclusion.

The Board finds that the Carrier has met its burden of proof with substantial evidence, but the penalty imposed is excessive and therefore, reduced to a Formal Reprimand and a one-year review period.

**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 28<sup>th</sup> day of January 2022.**