

**PUBLIC LAW BOARD NO. 7564**

Case No.: 19/Award No.: 19  
Carrier File No.: 10-12-0246  
Organization File No.: C-12-D040-9  
Claimant: Dennis O. Horn

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BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES DIVISION - IBT )  
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**Statement of Claim:**

The Carrier violated the Agreement when on February 17, 2012 Claimant Dennis O. Horn was issued a Level S Thirty (30) Day Record Suspension and a three(3) year review period for violating MOWOR 1.6 Conduct and MOWSR 12.0 Motor Vehicles and Trailers.

As a consequence of the violation, the Carrier should expunge the discipline from their records and make the Claimant whole for any and all losses.

**Facts:**

By letter dated November 23, 2011 the Claimant was directed to attend a December 1, 2011 investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your alleged failure to operate BNSF motor vehicle 24011 in a careful and safe manner when this vehicle was involved in a collision at the intersection of highway 35 and highway 81 outside of Lancaster, WI at approximately 0300 hours on 11/22/2011 while assigned as truck driver of TMGX1293 maintenance gang." By mutual agreement, the investigation was postponed until January 24, 2012

**Carrier Position:**

There was a fair and impartial investigation that provided substantial evidence to support the charges. The Agreement does not require the Carrier to provide a witness list or documents prior to the investigation. Nor must the Carrier list rules violated in the notice of investigation. The Conducting Officer handled himself properly and there was no indication of prejudice toward the Claimant or prejudgment. No proof was needed beside the claimant's admission. He committed a serious violation and, in essence, the

Organization is asking the Board for leniency. However, it is well established that leniency is the prerogative of the Carrier and not the Board.

**Organization Position:**

The investigation was not fair and impartial because of the conduct of the Conducting Officer, because the Carrier did not provide documents or a list of witnesses to the Organization for pre-hearing review and because the Claimant was prejudged. In addition, the Carrier did not specify the rules violated in what was an unspecific notice of investigation. The Carrier attempted to diminish the significance of the photographs of the intersection provided by the Claimant, who has been honest about the accident and who did the best he could under the circumstances, after having stopped at the intersection. Supervisor Seagraves, who did not witness the accident, was allowed to speculate about what happened. The discipline was assessed by Division Engineer Morehouse, who was not at the investigation, based on the Claimant's personnel record. However, that record was not in evidence and thus the Organization could not review it for accuracy. The Carrier has not met the required burden of proof.

**Findings:**

The investigation was fair and impartial. It is well settled that discovery is not required. The notice of investigation was very specific in what the Claimant had to defend against. If he were able to successfully defend against the alleged behavior, than the presence or absence of specific rules is irrelevant. The Conducting Officer's investigation did not prejudice the Claimant. Ms. Moody-Gilbert, the Claimant's representative, had an opportunity to present all witnesses she wanted, to ask all the questions she wanted and to enter all the exhibits she wanted.

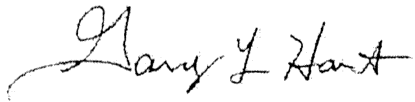
Obviously, the Claimant would have preferred that the accident had not occurred. He reported the accident timely and has cooperated with the investigation. That does not obscure the fact that the oncoming Camaro had the right of way. The photographs show no stop signs on Highway 35. The claimant's testimony that he stopped as required is not questioned and, while the lack of additional witnesses means that the exact reasons for the accident remain unknown, it is still obvious that the claimant failed to yield the right of way, as was the charge by the investigating police officer. This was a very serious accident that apparently resulted in a totaled Carrier vehicle and fortunately did not result in serious injury or even death. The Carrier properly assessed the accident as a serious rules violation and levied discipline on that basis. Having determined that substantial evidence showed that a violation of MOWSR 12.0 and MOWOR 1.6 occurred, it is not the Board's place to substitute its judgment for that of the Carrier by providing leniency in the form of lesser discipline.

**Award:**

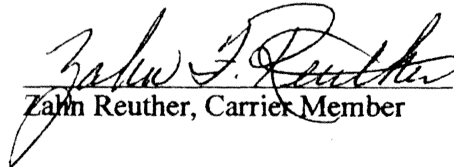
Claim denied.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas  
June 28, 2013