

PUBLIC LAW BOARD NO 5850

**Award No.
Case No. 130**

PARTIES TO DISPUTE:
**(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad**

STATEMENT OF CLAIM:

- 1. That the Carrier's decision to issue a level S actual Suspension for thirty (30) days for J.S. Asencio and T.M. Devenport was unjust.**
- 2. That the Carrier now rescind their decision and expunge all discipline, and transcripts and pay for all wage loss as a result of an investigation held 9:00 a.m. July 7, 1999 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, credible evidence that proved that the Claimant violated the rules enumerated in their decision, and even if Claimant violated the rules enumerated in the decision, suspension from service is extreme and harsh discipline under the circumstances.**
- 3. That the Carrier violated the Agreement particularly but not limited to Rule 13 and Appendix 11, because the Carrier did not introduce substantial, credible evidence that proved the Claimant violated the rules enumerated in their decision.**

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On March 12, 1999, a company van with five employees was involved in an accident caused by another car losing control after hitting an icy spot on the road.

An Investigation was scheduled for April 8, but postponed and finally held on July 7, 1999.

Of the five employees, two were found at fault by the Carrier for not wearing a seat belt, and were assessed a Level S 30 day suspension retroactively.

The two Carrier officials who testified arrived at the scene after the accident. One arrived 20 to 25 minutes after, and the other about one hour later.

Neither could testify as to whether the two found at fault were wearing seat belts at the time. One (Devenport) was sitting up on the side of a hill away from the accident, the other (Asencio) was sitting on the van floor with his feet dangling out the van door.

The only testimony came from the employee who occupied the second seat by himself. The two who were found at fault were sitting in the third seat. All seats had belts, with the third seat having both shoulder and waist belts but each had to be attached separately.

The pertinent testimony from the passenger in the second seat was, as follows:

"...we stopped at Mooreland to get some items for lunch. We were loading back up. I, everybody said 'seat belts on' and I looked behind me, I noticed Tom and the driver had their seat belts on....I physically turned around and seen Toby (Devenport) and Jesse (Asencio) did not have their seat belts on...."

Question:

"...and during this time between Mooreland and the accident, you're absolutely sure that they didn't, that Mr. Asencio and Mr. Devenport did not use a seat belt?"

Answer:

"...I am positive. There is no physical way if you have your seat belt on where you can lean forward and do like Toby was doing, sitting up on the seat like that...."

Claimant Asencio testified he could not honestly say whether he was wearing a belt or not, but it later developed, while he was in the emergency ward, that the doctor stated he did have a bruise from the seat belt strap.

Claimant Devenport was not in attendance at the investigation, allegedly because of leg problems stemming from the accident.

This Board has held that it is the charged employee's right to attend or not attend, but

by being absent, he offered nothing that would counter the testimony of the employee who sat in the second seat. But this Board has also held that even if the Claimant opts not to attend, the evidence adduced must be substantial to support the discipline.

There is no doubt that when the van left Mooreland that neither Claimant was strapped in. There is evidence after the accident that Claimant Asencio suffered a chest bruise attributable to the strap. Thus, sometime after the departure from Mooreland but prior to the accident, Claimant Asencio must have at least secured the shoulder strap and who's to say that Claimant Devenport did not at least have the waist strap secured.

Although both Claimants were disciplined for violating a specific Rule, the Rule was not quoted within the text of the Investigation, and thus it is not clear as to what that Rule requires- i.e, both shoulder and waist straps or just a reference to seat belts.

The Carrier has not met its burden of furnishing substantial evidence of either Claimant's culpability for the charges assessed.

All traces of the investigation are to be removed from each Claimant's file, and if either lost time because of the discipline assessed, each is to be compensated as provided for in the Agreement.

AWARD

Claim sustained.

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 date the award is adopted.

Robert L. Hicks
Robert L. Hicks, Chairman & Neutral Member

Rick B. Wehrli
Rick B. Wehrli, Labor Member

Thomas M. Rohling
Thomas M. Rohling, Carrier Member

Dated: November 9, 1999