

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 143, (Case No. 143)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Joy E. Mendez, Carrier Member
David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing May 1, 2013, when Claimant, Jeffery S. Boinski (1647635), was disciplined with a Level S 30-day Record Suspension for his alleged failure to use a seatbelt on April 12, 2013 at approximately 1120 hours while hrrailing in BNSF vehicle 22822 near milepost 6.7 on the Cajon Subdivision resulting in him being observed standing on the vehicle's running boards without using a seatbelt while the vehicle was in motion. The Carrier alleged violation of Maintenance of Way Safety Rule (MOWSR) 12.5 Seat belts and MOWSR 14.1.2 Seat Belts.**
- 2. As a consequence of the violation referred to in part the Carrier, shall remove from the Claimant's record this discipline and he be reinstated, if applicable, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 1, 2013, continuing forward and/or otherwise made whole."**
(Carrier File No. 14-13-0255) (Organization File No. 180-SF13S1-1319)

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On April 17, 2013, Claimant was directed to attend a formal Investigation on May 1, 2013, concerning in pertinent part the following charge:

"for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to use a seatbelt on April 12, 2013 at approximately 1120 hours while hyrailing BNSF vehicle 22822 near milepost 6.7 on the Cajon Subdivision. As a result, you were observed standing on the vehicle's running boards without using a seatbelt while vehicle was in motion.

This investigation will determine possible violation of MOWSR 12.5 Seat Belts and MOWSR 14.1.2 Seat Belts."

On May 17, 2013, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a one year review period.

It is the Organization's position that the Carrier erred in disciplining the Claimant. It argued that the Claimant was denied a "fair and impartial" Investigation because of the multiple roles played by Mr. William Forbes, Roadmaster, who was the Charging Officer, key witness against the Claimant and the Disciplinary Officer who found the Claimant guilty and assessed the discipline. Additionally, it argued that the Hearing Officer disallowed a line of questioning, on page 47 of the transcript, that would have shown that Claimant's alleged activity was part of an accepted culture among Track Supervisors and condoned by the Carrier. Because of the alleged procedural errors the Organization reasoned that the claim should be sustained without reviewing the merits. Lastly, it asserted that if the Board chose to examine the merits it would discover that the Carrier did not meet its burden of proof and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record shows that Claimant was guilty as charged as two Managers testified they witnessed the Claimant driving his hyrail vehicle down the track, without his seatbelt on, and standing on the running board of the truck while it was in motion.

The Carrier further argued that contrary to the Organization's assertions the multiple roles held by Roadmaster Forbes did not deny the Claimant a "fair and impartial" Hearing. It suggested that Public Law Board No. 6457, Award 1, held that it was harmless that the Officer who charged the Claimant and decided his guilt was also the first-level appeals Officer; and in Public Law Board No. 5555, Award 5, it was decided the fact the same Carrier Officer who initially reviewed this claim was also later a prosecution witness was not prejudicial to Claimant. It concluded the discipline was appropriate and it asked that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that we must address the issue of whether or not the Claimant was afforded a "fair and impartial" Hearing because of the multiple roles played by Roadmaster Forbes.

Almost identical arguments were made by the same parties to this dispute in Public Law Board No. 7048, Award Nos. 30 and 55. In Award No. 55 the Board determined the following:

"...The Awards relied upon by the Carrier are not directly on points whereas Award No. 30 of this Board addressed a similar issue in pertinent part as follows:

"The issue of Hearing and Charging Officer's improperly holding multiple roles in formal Investigation process has been the subject of countless Awards and authority can be found on both sides of several issues raised in the instant case. Consistent with the reasoning expressed in Third Division Award No. 31774 we find no language in the parties Agreement which prohibits the officer who initially rendered the discipline prior to the Investigation from issuing the same after the Hearing. However, in this instance there is an additional element, as that same officer was also a witness against the Claimant. In Third Division Award No. 24476 the Board discussed the multiplicity of roles that can be held by a Hearing Officer and it stated in pertinent part the following:

"...We do look askance, however, when the same hearing officer also serves as a witness since this very action pointedly destroys the credibility of the due process system..."

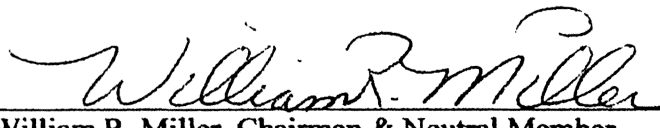
We believe that same reasoning applies in this dispute as well. The Agreement guarantees the employee a right to "due process". That right was not afforded the Claimant because the decision maker assumed the role of judging witnesses credibility including his own. On its very face the process was fundamentally flawed and unfair and could have easily been corrected by having someone other than one of the witnesses against the Claimant act as the judging officer. Therefore, the Board finds and holds that the discipline must be set aside without even addressing the merits." (Underlining Board's emphasis)"

The Board has determined in the instant case as it did in Award Nos. 30 and 55 of this same tribunal the Roadmaster issued the charges, was a prosecution witness and trier of fact who reviewed his own testimony. As previously stated in Award No. 55 that unfair process could have been easily avoided and remedied by having the Hearing Officer render the decision, as many Boards have ruled that the Hearing Officer is in the best position to judge credibility. Therefore, in a effort to maintain consistency, the reasoning of Award Nos. 30 and 55 will be

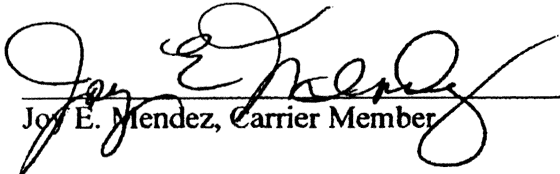
applied in this case as well. The Board finds and holds that the discipline must be set aside without addressing the merits and the claim is sustained as presented. Claimant is returned to his prior disciplinary status in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: July 10, 2014