

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 207, (Case No. 207)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing May 16, 2016, when Claimant, Rizaldy Acquino (1790690), was dismissed for failure to properly wear his seatbelt while driving vehicle 26156 on February 11, 2016 while working as a Bus Driver on TTPX0009. The Carrier alleged violation of Maintenance of Way Safety Rule 12.5 --- Seat Belts.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant’s record this dismissal and he be reinstated, if applicable, with seniority, health insurance benefits, vacation, all rights unimpaired and pay for all wage loss including overtime commencing May 16, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.
(Carrier File No. 14-16-0255) (Organization File No. 493-SL13S1-168)**

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.

The facts indicate that on February 11, 2016, Claimant was working as a Bus Driver on TTPX0009 on the Springfield Subdivision when the Drive Cam in his Carrier vehicle indicated he

might not have been wearing his seatbelt correctly and because of that allegation the Claimant was directed to attend a formal Investigation on February 26, 2016, 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 properly wear your seatbelt (Drivecam Event EYS47411) while driving vehicle 26156 on February 11, 2016 at approximately 1720 while working as a Bus Driver on TTPX0009. The date BNSF received first knowledge of this alleged violation is February 12, 2016.”

On May 16, 2016, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because the Hearing Officer had prior knowledge of some evidence to be presented during the Hearing and he led and directed witnesses in their testimony. Based upon the aforementioned procedural errors the Organization argued that the discipline should be removed without reviewing the merits.

Turning to the merits, it asserted the Carrier did not meet its burden of proof. It argued that the evidence shows that the Claimant had his seat belt secured across his lap and buckled. The Organization also suggested that the Claimant was subject to disparate treatment because the other employee in the vehicle had his seatbelt buckled in the same fashion as the Claimant and no charges were brought against that employee. Claimant admitted he did not have the seat belt strapped across his shoulder and he explained that he did not have it across his shoulder and it was behind his back because it was rubbing sores and bothering his neck, therefore, the Organization reasoned the Claimant had a legitimate reason for the manner in which he wore the seatbelt. The Organization also pointed out that the Carrier Witness testified on page 19 of the transcript that he had never trained employees on the correct way to harness the seatbelt. It concluded there was no basis for discipline and requested that the discipline be rescinded and the claim sustained as presented.

It is the Carrier’s position that there were no procedural errors on the part of the Hearing Officer during the holding of the Claimant’s formal Investigation. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that testimony and a video-cam snapshot were entered by Roadmaster C. H. Morgan, which revealed that on February 11th the Claimant was operating a Carrier Vehicle as a Bus Driver and was not properly wearing his seat belt because it

was not over his shoulder and secured properly per the manufactures recommendation. Lastly, it argued that the discipline was appropriate for the proven offense and Claimant's prior disciplinary record. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. Examination of the transcript does not find the Organization's arguments to be persuasive. The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was afforded his "due process" Agreement rights. The case will be resolved on its merits.

There is no dispute between the parties that on February 11, 2016, the Claimant had his seatbelt secured across his lap, but it was not across his shoulder as it was designed to be used. Organization argued that the Carrier was derelict in its duties to train its employees as to how to properly wear the seatbelt. That argument lacks substance as it is common knowledge of licensed drivers that the police can pull over a driver that is not wearing a seatbelt and the only seatbelt that the police can observe while driving their vehicle is a combination lap and shoulder belt. The Board notes that the Manufacturer's Instructions are consistent with requirements of being a licensed driver. The argument also flies in the face of the Claimant's testimony on page 9 of the transcript wherein he acknowledged that he was not wearing the shoulder seatbelt in the prescribed manner. Assuming for the sake of argument that the Claimant's shoulder was sore and the shoulder portion of the belt was bothering him the Claimant would have been wise to put a protective pad on his shoulder and/or brought this matter to the Carrier's attention after which the Carrier might have been able to make some modification in the belt. It is clear that the Carrier met its burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately six years of service and during his employment he had three prior discipline events. The subject incident was the Claimant's second Serious Level S discipline event within his 36 month review period. April 17, 2014, Claimant signed Waiver accepting Level S 30-day Record Suspension with a 36 month review period for movement of on-track equipment out of his limits. In Award No. 79 of this Board it was determined that the Carrier's Policy for Employee Performance Accountability (PEPA) explains that two serious Level S offenses within a 12 or 36 month review period may be considered grounds for dismissal under Dismissible Violations. However, that is not a mandatory requirement as each case must be measured on its individual merits and in this instance the Board finds and holds that discipline

P.L.B. No. 7048

Award No. 207, Case No. 207

Page 4

was excessive and it is reduced to a lengthy suspension which is corrective in nature and in accordance with the spirit of PEPA. Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back-pay. Claimant is forewarned that he needs to be careful to abide by all Carrier Rules and Policy following reinstatement.

AWARD

Claim partially 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



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 1/5/18

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 289, (Case No. 289)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Louis R. Below, Employee Member

REQUEST FOR INTERPRETATION of P.L.B. No. 7048, Award No. 207:

On March 3, 2020, the Organization advised the Neutral Member of the Board that a dispute had arisen over the implementation of Award No. 207 because the Carrier on March 5, 2018, chose to assess an additional 36-Month Review Period for the incident that was subject of the Award.

The instant dispute was a dismissal case wherein it was determined that the Carrier met its burden of proof that Claimant was guilty as charged, but the discipline was excessive. Award No. 207 was adopted on January 5, 2018, and it concluded as follows:

“...the Board finds and holds that discipline was excessive and it reduced to a lengthy suspension which is corrective in nature and in accordance with the spirit of PEPA. Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back-pay. Claimant is forewarned that he needs to be careful to abide by all Carrier Rules and Policy following reinstatement.”

The Question at Issue: **“Was the Carrier’s assessment of a 36-month review period to the Claimant’s Disciplinary Record upon Claimant’s reinstatement in accordance with Award No. 207?”**

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.

The facts indicate that on May 16, 2016, Claimant was notified that he had been found guilty as charged and was dismissed on that date. Claimant's dismissal was appealed through the normal process and eventually was appealed to this arbitral tribunal where the claim was partially sustained.

It is the position of the Organization that the Carrier went beyond the Findings of Award No. 207 when it placed a 36-Month Review Period on the Claimant's Disciplinary Record upon Claimant's reinstatement as it goes beyond the penalty assessed the Claimant. It requested that the 36-Month Review Period be removed from the Claimant's Disciplinary Record.

It is the Carrier's position that it was within its right to place that Review Period on the Claimant's record as it reinforces the Board's forewarning to the Claimant that he should be careful to adhere to all Carrier Rules and Policy. It asked that the Organization's request be denied.

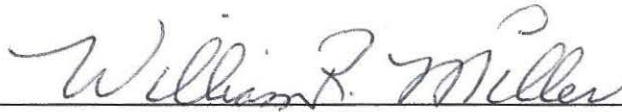
The Board has been requested to issue an interpretation of Award No. 207 which is the third of five Interpretation Requests to this Board during its ten plus years of existence. The only issue in the instant case is whether or not the assessment of a 36-Month Review Period upon Claimant's reinstatement was in accordance with Award No. 207.

The Board determined that Claimant's dismissal was excessive. That penalty was reduced to a lengthy suspension with no back-pay and a forewarning to the Claimant to be careful to meet all responsibilities associated with being a Carrier employee. Claimant's suspension was the penalty assessed the Claimant for his May 16, 2016, offense. Carrier's assessment of a 36-month review period to the Claimant's Disciplinary Record upon his reinstatement was contrary to the Findings of Award No. 207 as it was an additional assessment of discipline not contemplated by the Award.

The Board finds and holds that the Organization's argument set forth in its Request for Interpretation of Award No. 207 was correct and is sustained. The Carrier is directed to remove the 36-Month Review Period from the Claimant's Disciplinary Record.

AWARD

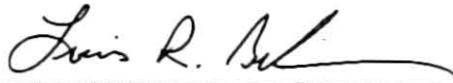
Interpretation Request sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman and Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: 10-14-20