

PUBLIC LAW BOARD NO. 7564

Case No. 100/Award No. 100
Carrier File No. 10-19-0065
Organization File No. C-19-D040-5
Claimant: Michael C. Ward

BNSF RAILWAY COMPANY)
)
 -and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION)

Statement of Claim:

By letter dated November 29, 2018 Machine Operator Michael C. Ward was issued a Standard Formal Reprimand and a one year review period for an alleged violation of MWSR 12.5 Seat Belts. The January 11, 2019 claim from the Organization, George L. Loveland, Vice General Chairman, requests that “the discipline of Mr. Ward be overturned, he be compensated for any time lost, made whole for any losses associated with the outcome of this investigation, any future losses that may arise as a result of this investigation being used for progressive discipline and that this discipline be removed from and no mention of this be placed on his personnel record.”

Facts:

By letter dated October 5, 2018 the Claimant was informed that “An investigation has been scheduled at 1000 hours, Friday, October 12, 2018, at the BNSF Conference Room, 101 East Route 66, Flagstaff, AZ, 86001, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to wear your seatbelt as a passenger in vehicle 27405 (DriveCam Event ETSF90645) on September 28, 2018 at approximately 1230 near Flagstaff, AZ. The date BNSF received first knowledge of this alleged violation is September 29, 2018. After a mutually agreed to postponement, the investigation was held on October 31, 2018 at 1000 hours at the Barstow TOB Conference Room #3, 200 N Ave H, Barstow, CA 92311.

Carrier Position:

The Carrier insists that the Claimant received a fair and impartial investigation and that the DriveCam video, shown twice during the investigation, and the single screen shot in evidence, provide the required substantial evidence that the Claimant violated MSWR 12.5. Leniency, which was given the Claimant by the Carrier, is within the Carrier’s province but not the Board’s. Rule 40.D, requiring that “A decision be rendered within thirty (30) days following the investigation . . .” was complied with when the written notice was placed in the mail within thirty (30) days of the

investigation The requirement to “render” the decision does not require receipt within thirty (30) days.

Organization Position:

The Organization asserts that the Claimant received arbitrary and excessive discipline following an investigation that was not fair and impartial. Use of the DriveCam is controversial. The DriveCam video was not placed in evidence. Production Roadmaster Craig Cole offered biased and incomplete testimony. The written notice of discipline was not received within thirty (30) days so that Rule 40.D was violated, which standing alone, requires that the claim be sustained.

Findings:

The discipline and claim grew from an incident on September 28, 2018 when the Claimant, riding as a passenger in a company vehicle driven by Richard E. Huss, Jr. removed his seat belt momentarily because the belt had locked up and, in the Claimant’s words, was choking him. At the precise moment when the Claimant had removed the belt to readjust it, a car pulled out in front of the company vehicle, causing Mr. Huss to brake to avoid an accident. The braking triggered the DriveCam video that pictured the Claimant without his seat belt on.

A close reading of the investigation transcript reveals a fair and impartial investigation. It may be that in a future case, failure to include DriveCam video as an evidentiary exhibit so prejudices a Claimant as to require that the claim be sustained, but this is not such a case. The video was shown twice during the hearing, the still shot in evidence captures the “beltless moment,” and the evidence makes clear the context in which the event took place.

The Organization’s displeasure with the Carrier’s installation and use of the DriveCam technology is made clear in this case and has been emphasized in prior cases decided by this Board. However, the claim before this Board concerns discipline and the Board sees no need to address the broader DriveCam issues raised by the Organization. The technology is accepted as a given.

Rule 40.D was not violated. The investigation was held on October 31, 2018 and the notice of discipline was issued on November 29, 2018, within the Rule 40.D. thirty (30) day requirement. The Board agrees with the Carrier’s assertion that “render” refers to the Carrier’s responsibility to complete and issue the notice of discipline and not to a requirement that the notice be received within thirty (30) days.

Turning to the incident itself, the Board finds credible Mr. Huss’ written statement that the Claimant was wearing his seat belt before it seized up and that he continued to wear the seat belt after he readjusted it. MWSR S-12.5 Seat Belts states in relevant part “Wear seat belts while operating or riding in equipment or vehicles that are equipped with them.” At best we are faced with a technical violation of the Rule that occurred because of the defective seat belt in the company vehicle. The evidence establishes that the Claimant had every intention of complying with the safety rule and was out of compliance for a few seconds at most. Under the circumstances,

the Board finds even the formal written reprimand as arbitrary and excessive. It must be removed from the Claimant's records.

Award:

Claim sustained.

Order:

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.

Zachary C Voegel
Zachary Voegel, Organization Member

Zahn Reuther
Zahn Reuther, Carrier Member

A handwritten signature in blue ink, appearing to read "I. B. Helburn", followed by a horizontal line.

I. B. Helburn Neutral Referee

Austin, Texas
June 25, 2020