

**PUBLIC LAW BOARD NO. 7564**

Case No. 45/Award No. 45  
Carrier File No. 11-14-0022  
Organization File No. B-M-2715-E  
Claimant: John C. Burr

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

1. The Carrier violated the Agreement on September 27, 2013 when it assessed Claimant, John C. Burr, a Level S 30-day Record Suspension, with a 1-year review period, for alleged violation of GNOPT-359-5 Vehicle/On-Track Equipment Operation, for alleged failure to fasten seatbelt while operating a Jackson 6700 Tamper, machine number X5400277 in work mode surfacing a switch on the Hettinger Subdivision, on Wednesday, August 7, 2013.
2. As a consequence of the violation referred to in part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.

**Facts:**

By letter dated August 9, 2013 the Claimant was informed of an investigation on August 21, 2013 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to fasten seatbelt while operating a Jackson 6700 Tamper, machine number X5400277 in work mode surfacing a switch on the Hettinger Subdivision, on Wednesday, August 7, 2013." By mutual agreement the investigation was postponed until August 29, 2013.

**Carrier Position:**

Because the Agreement contains no discovery language, the Carrier was not obligated to list witnesses in the Notice of Investigation. The Organization had the opportunity to have a recess to review witness testimony and exhibits. The Notice also contained the

date the incident took place and the Subdivision where it occurred. Manager, Operating Rules Hunter provided the specific location. This was sufficient knowledge for the Organization and Claimant. The Conducting Officer provided a fair and impartial investigation, allowing for recesses, questioning of Carrier witnesses and the introduction of exhibits by the Organization.

The Carrier provided substantial evidence of the violation of rules, as the Claimant admitted not wearing his seat belt. No more was needed. The admission moots the Organization's procedural arguments. Neither the Organization nor the Claimant were prejudiced by the investigation, with any technical procedural violation no cause for reversal. The transcript shows that the Foreman provided ground protection so that it was not necessary for the Claimant to stand to obtain a better view. The Board is not to substitute its judgment for that of management or to usurp management's prerogative of leniency. If the claim is sustained, no back pay should be provided since the record suspension did not deprive the Claimant of work or earnings.

**Organization Position:**

The investigation was not fair and impartial because the Carrier did not indicate the names of witnesses so that the Organization could determine what witnesses it would need and because the request to produce surfacing gang members was ignored and the Foreman was not produced as a witness. Furthermore, the location of the incident was not specified in the Notice of Investigation, again compromising the Organization's ability to prepare a defense. The Carrier has not produced substantial evidence showing that the Claimant's view was not obstructed and therefore standing to get a better view was unnecessary.

**Findings:**

Because the claim is sustained, the Board sees no need for an extended discussion of the Organization's procedural objections. This Board has previously written that the absence of discovery language in Rule 40 eliminates any obligation that the Carrier would have to provide a witness list and documents prior to the investigation, which was fair and impartial. The Notice of Investigation provided sufficient detail to allow an adequate defense.

There are two reasons, both standing alone providing sufficient justification for sustaining the claim. While the Carrier is not required to specify in the NOI the rule that has allegedly been violated, a fair and impartial investigation generally requires that the rule be introduced during the investigation so that the Claimant has an opportunity to see exactly what must be defended against. GNOPT-359-5 Vehicle/On-Track Equipment Operation was not produced as part of the investigation. Neither the Claimant nor the Board has been made aware of the standard to which the Claimant is being held, nor is there an argument from the Carrier that the missing rule is essentially the same as MWSR S-14.1.2.

MWSR S-14.1.2 Seat Belts is a part of the investigation record. That rule requires seat belts to be worn "while operating or riding in equipment or vehicles that are equipped with them." The rule allows the removal of seat belts when the operator's "field of view is obstructed and it is necessary to stand to obtain a clear view of the surroundings." The Carrier has provided substantial evidence through the testimony of Manager Operating Rules Hunter and the Claimant's admission that the latter was standing without his seat belt on. The Carrier contends that the Foreman provided ground protection such that the Claimant did not need to stand, but that contention has not been proven with substantial evidence. Manager Hunter, who observed the Claimant standing in the Tamper, said nothing about the placement of the Foreman or any interaction between the Foreman and the Claimant. Roadmaster Koepplin, who was not an eyewitness, testified that the Claimant's view was obstructed but communication with the Foreman made standing unnecessary. The Foreman did not testify, leaving the Board to speculate about where the Foreman was located relative to the switch being tamped and what, if any, communication took place between the Foreman and the Claimant. Nor does the Board know how the Foreman would have evaluated the situation. The Claimant testified that an obstructed view made standing necessary. Roadmaster Koepplin concurred that the view was obstructed. There is only hearsay testimony that suggests that the Claimant had no need to stand because of the presence of the Foreman and hearsay testimony does not rise to the level of substantial evidence.

**Award:** Claim sustained.

**Order:** The Board, after consideration of the dispute identified above, hereby orders that the Claimant receive the remedy called for in Rule 40G, which will not include back pay since no work was lost. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas  
November 30, 2015