

PUBLIC LAW BOARD NO. 7564

Case No. 47/Award No. 47
Carrier File No. 10-14-0125
Organization File No. C-14-D040-5
Claimant: Daryl J. Boyer

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

Statement of Claim:

1. The Carrier violated the Agreement on December 4, 2013 when it assessed Claimant, Daryl J. Boyer, a Level S 30-day Record Suspension, with a 3-year review period, for alleged violation of MWSR 1.4.9 Seat Belts, for alleged failure to wear a seat belt while driving a company vehicle at approximately 1415 hours on October 21, 2013 at or near Keokuk, IA, while assigned to TSEC 1313.
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 October 22, 2013, the Claimant was informed of an investigation on October 31, 2013 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to wear a seatbelt while driving a company vehicle at approximately 1415 hours on October 21, 2013 at or near Keokuk, IA, while assigned to TSEC 1313." By letter dated October 24, 2013, the investigation was postponed until November 14, 2013 by mutual agreement.

Carrier Position:

The investigation was fair and impartial, with no proof of prejudice to the Claimant. Substantial proof of the rules violation was obtained with the Claimant's admission, thus nothing else was needed. Rules entered into evidence during the investigation were essentially identical to MWSR 1.4.9 Seat Belts. On-property awards establish that not wearing a seat belt is considered a serious violation. In essence, the

Organization is asking the Board for leniency, but leniency is the province of the Carrier. The Board should not substitute its judgment for that of the Carrier. If the claim is sustained, the Claimant should receive only that called for in Rule 40G.

Organization Position:

The investigation was not fair and impartial as the Claimant was pre-punished by not being paid to attend the investigation and to help gather relevant facts. The Conducting Officer simply set out to prove the charge and noted but did not rule on objections. The Claimant's due process rights were not observed. Because MWSR 1.4.9 was not introduced during the investigation, the Claimant could not properly defend himself.

The Carrier did not provide substantial evidence of a violation. The Foreman did not use the Approaching Others technique. Welding Supervisor Dillard claimed he could lip read when he only assumed what was being said in the vehicle Claimant was driving. Supervisor Dillard's testimony about what Foreman Rea told him was hearsay and should be omitted, as the Foreman did not testify. In fact, Supervisor Dillard testified that he was at the investigation to punish the Claimant. Discipline was excessive and arbitrary, as the Claimant was driving when that was not his normal activity and he simply lost focus for a brief period of time. There was no demonstration of a marked disregard for the rules.

Findings:

Having carefully reviewed the investigation transcript, the Board does not find that the requirement to conduct a fair and impartial investigation was violated by Supervisor Dillard's unfortunate indication that he was there to punish the Claimant. Supervisor Dillard was neither the Conducting Officer nor the officer who issued the discipline. Nor did the absence of pay to the Claimant for his attendance at the investigation mean that the hearing was not fair and impartial. The Conducting Officer simply noted objections raised by the Organization, but objections were not sustained. No prejudice to the Claimant was found.

The Board is very concerned that MWSR 1.4.9 Seat Belts was not introduced during the investigation. As a general rule, due process should require that the Organization and the represented Claimant be provided a copy of the rule allegedly violated at the time a defense against the alleged violation is made. This has been and can be a fatal shortcoming depending on the nature of the case. In this case, the Carrier's failure to provide MWSR 1.4.9 Seat Belts is not viewed as fatal because the omission has not prejudiced the Claimant's ability to defend against the allegation. It is not necessary to consider Supervisor Dillard's lip-reading ability or testimony about what Foreman Rea said to Supervisor Dillard. Substantial evidence exists of a violation because the Claimant has admitted he did not have the belt on and because Supervisor Dillard witnessed the Claimant without the belt on while operating the vehicle. Accepting the Organization's contention that the Claimant lost focus for a brief period of time does not

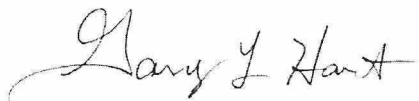
eliminate the violation. The Claimant was a short-term employee at the time. Hopefully the discipline will impress upon him the critical need to work safely and be alert at all times in what is an inherently dangerous work environment.

Award:

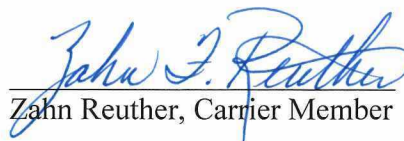
Claim denied.

Order:

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
November 30, 2015