

PUBLIC LAW BOARD NO. 7564

Case No. 57/Award No. 57
Carrier File No. 11-15-0187
Organization File No. B-M-2813-E
Claimant: Jason C. Petersen

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

Statement of Claim:

By letter dated November 6, 2014, Machine Operator Jason Petersen was given a Level S Actual Suspension of 30 days and a one-year review period for an alleged violation of MOWOR 1.6 Conduct and MOWOR 1.19 Care of Property. The November 25, 2014 claim from the Organization, Shawn M. Ellestad, Vice General Chairman, appealing the discipline, includes the request that the Claimant "be cleared of all charge (sic), made whole for all loss incurred as a result of this unjust and arbitrary hearing . . ."

Facts:

By letter dated October 6, 2014 the Claimant was informed that "An investigation has been scheduled at hours (sic), Wednesday, October 15, 2014 in Dickinson, ND, 58601, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misconduct while tampering with a safety device, that resulted in damage to a drive cam system and the windshield of BNSF vehicle 21820, while working on gang TUCX0004, on Thursday, October 2, 2014. The date BNSF received first knowledge of this alleged violation is October 3, 2014.

On October 7, 2014, a corrected notice was sent noting the time of the investigation as 0900 hours, the date of the investigation as October 12, 2014 and the location of the investigation as Williston, N.D. The corrected notice also informed Claimant Petersen that he was being withheld from service pending the results of the investigation.

A notice dated October 10, 2014 indicated mutual agreement to hold the investigation on October 17, 2014 in Williston, ND.

Carrier Position:

The Carrier asserts that the charges have been proven by the required substantial evidence as there is no dispute that the Claimant kicked and broke the windshield and that he offered to pay for the damage, which he would not have done had he not damaged the vehicle. The Carrier believes that the Organization's and its members dislike for the DriveCam system provided the likely motive for the Claimant's neglect, if not intentional destruction. The Organization has not shown that procedural or due process failings, if any occurred, prejudiced the Claimant, who was not prejudged in this matter. Should the claim be sustained, Machine Operator Petersen should be made whole for lost earnings less any outside earnings made during the period he was suspended.

Organization Position:

The Organization insists that the Carrier has proven neither guilt nor intent. Damage to the windshield was accidental. Assertions about the Claimant's motivation are improper. Moreover, Assistant Director Maintenance Production Shuland, who was not the Conducting Officer and who did not attend the investigation signed the suspension letter. He could not have made the necessary credibility determinations. The Claimant's due process rights were violated when the Carrier ignored evidence. Due process rights were ignored when rules were not entered as evidence, when the Conducting Officer recessed the investigation to procure a document and when the Claimant was withheld from service so that the Carrier could start the clock on the investigation on a new date. The Organization must simply show that these procedural defects occurred and not that they harmed or prejudiced the Claimant. The suspension was an abuse of the discipline process because the Claimant was an 18-year employee with a good record who was well liked.

Findings:

The Board will not address the Organization's contentions that relate to procedural defects because the Carrier's case fails on the merits. In essence, the Claimant has been accused of deliberately breaking the windshield of vehicle 21820 and in so doing damaging the DriveCam. As this Board has written in prior decisions, separating the roles of the Conducting Officer and the signer of the notice of discipline is not the best practice, but it is not prohibited by the labor agreement. The Board has further noted that the Carrier officer who signs the notice of discipline becomes part of the investigation and, assuming that the signer and not the Conducting Officer made the decision about the discipline, the signer is bound by Rule 40.A to discharge responsibilities in a fair and impartial manner. Among other things, being fair and impartial means considering all of the evidence gathered during the investigation—that evidence which weighs against the claimant and that evidence that is exculpatory, in the Claimant's favor.

In the instant case, Assistant Director Maintenance Production Shuland, who signed the notice of discipline but was not the conducting Officer, seemingly ignored exculpatory evidence. The Carrier's own witness, Roadmaster Strickland, testified that the inspector who reinstalled the DriveCam after the broken windshield was replaced told him that "there was no apparent damage" to the DriveCam. This was repeated when Vice General Chairman Ellestad questioned the Roadmaster on the Claimant's behalf. There is no other evidence in the record that sheds doubt

on Roadmaster Strickland's testimony. Not only has the Carrier failed to prove that the Claimant damaged the DriveCam, it has disproved its own charge.

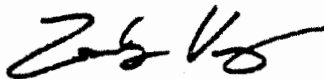
The Claimant, who apparently is a large man of above-average height, explained that the broken windshield occurred when, while sitting in the front passenger seat, he straightened his leg to try to avert a cramp that he began to experience. In so doing he accidentally broke the windshield with the steel-toed boot he was wearing. The record establishes that he immediately offered to pay for the damage. Foreman Sofie's initial, inaccurate explanation for the broken windshield does not alter the reality of the situation. The evidence establishes the Claimant as an excellent employee, with one record suspension being the only discipline in his 18-year employment history with the Carrier. Roadmaster Strickland stated that the Claimant is not a risk to himself or others. Foreman Sofie characterized the Claimant as "outstanding"—a 12 on a 10-point scale. The Carrier speculates that the Claimant deliberately kicked the windshield because the Organization objects to the use of DriveCam technology. The Claimant does not like the technology, but the speculation, seemingly particularly ill-founded in this case, does not equate to substantial evidence and would not even if the speculation were well-founded. All things considered, the Board finds no basis whatsoever for the discipline.

Award:

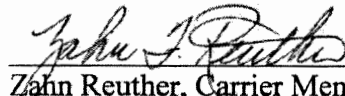
Claim sustained.

Order:

The Board, after consideration of the dispute identified above, hereby orders that the discipline be removed from the Claimant's record and that he be compensated for lost wages from being withheld from service and from the suspension. Compensation should include overtime that the Claimant reasonably would have worked, paid at the overtime rate. Money from outside earnings that the Claimant would not have earned had he not been suspended will be used to offset money due as a result of this award. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.



Zachary Voegel, Organization Member



John Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
August 15, 2017