

PUBLIC LAW BOARD NO. 7564

Case No. 81/Award No. 81
Carrier File No. 10-17-0115
Organization File No. C-17-D040-19
Claimant: Nicholas O. Ralston

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

Statement of Claim:

By letter dated December 9, 2016, Mr. Nicholas O. Ralston was issued a 30 Day Record Suspension with a one-year review period for alleged violations of MWSR 12.5 Seat Belts and MSWR 14.1.2 Seat Belts. The January 31, 2017 claim from the Organization, Jim L. Varner, Vice General Chairman stated that "The discipline is excessive and without merit and must be removed immediately."

Facts:

By letter dated November 4, 2016 Claimant Nicholas O. Ralston was informed that:

An investigation has been scheduled at 0800 hours, Friday, November 11, 2016, at the conference Room, 3700 Globeville Road, Denver, CO 80216, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to wear a seatbelt while operating a company vehicle on October 29, 2016. The date BNSF received first knowledge of this alleged violation is October 30, 2016.

Carrier Position:

The Carrier insists that the investigation was fair and impartial and that the required sufficient proof was obtained with the Claimant's admission. The notice of investigation (NOI) was sufficient as it included specifics to be investigated. The Organization asks for leniency, which is the province of the Carrier and not the Board.

Organization Position:

The Organization noted that the Claimant had been honest and that he was concerned for public safety in an area where the public routinely put themselves at risk when trespassing across the track as a shortcut. The Claimant, admittedly without his seatbelt on while hy-railing, moved slowly for only a short distance. The absence of the Drive Cam video meant that not all of the salient facts were known. The Drive Cam policy had been improperly implemented. Mitigation was not considered. The investigation was not fair and impartial because the rules allegedly violated had not been made a part of the record during the investigation.

Findings:

The Claimant was hired on April 5, 1999 and until the discipline considered herein, had a spotless disciplinary record. It is undisputed that the Claimant was not wearing a seatbelt while hy-railing on a company vehicle on October 29, 2016. Drive Cam still shots and the Claimant's admission provide more than the required substantial evidence needed to prove the charge. After an investigation conducted on November 11, 2016 by Allan Breden, the Claimant was issued notice of an unsigned Level S 30 Day Record Suspension with a one-year review period over the signature block of Darrin S. Bolton, Director of Administration. The notice indicates the Claimant's violation of MWSR 12.5 Seat Belts and MWSR 14.1.2 Seat Belts. Neither MWSR was made a part of the record during the investigation. MWSR 12.5 is quoted in General Director Heenan's June 16, 2017 declination of the claim.

The Board will not consider the merits of this dispute or all but one of the contentions for reasons noted below. Among the Organization's contentions is that the rules allegedly violated were not made a part of the record during the investigation. This Board has found on several occasions that the failure to specify rules allegedly violated is a violation of Rule 40.A because the investigation has not been fair and impartial. The Carrier is not required to specify the specific rules allegedly violated in the NOI, but, with rare exceptions, must specify the rules and enter copies of them during the investigation. PLB 7564, Award No. 72 is an earlier decision in which a claim was sustained because the rules violated were not made a part of the record during the investigation. That decision includes the following:

Rules need not be mentioned in the Notice of Investigation (NOI), but with rare exception the Rule(s) must be mentioned during the investigation and entered into the record so that the Claimant and his representative know with precision what they must defend against. Moreover, if discipline is assessed and the matter is progressed to a Board for final determination, the Board must know the Rule(s) allegedly violated because the Rule(s) becomes the standard against which the allegedly faulty behavior must be measured.

The responsibility here is the Carrier's and it remains the Carrier's even without an Organization prompt at the investigation in the form of a protest. Nor is the failing cured by the inclusion of the Rule(s) in the on-property correspondence once discipline is

assessed and a claim results. Identification of the allegedly violated Rule at that point does the Claimant and the Organization no good whatsoever insofar as the investigation is concerned.

A more recent decision, PLB 7564, Award No. 79, states:

The second, more serious due process violation stems from the absence of EI 15.1 Governing Policies and Procedures. The Board does not take issue with General Director Labor Relations Heenan's statement in his June 6, 2017 denial of the Organization's claim that "Engineering Instruction 15.1 states that the BNSF's Vehicle Policy and Procedures Manual govern (sic)." But it is EI 15.1 that is incorporated in the disciplinary notice, not the aforementioned manual. Lest somebody believes that the Board is splitting hairs and ruling on a technicality, the Board finds that a fundamental due process right has been ignored. While the Carrier is not obligated to make explicit in the NOI the rule, instruction or policy allegedly violated, it **must** during the investigation make a part of the record the rules, instructions or policies that may thereafter underlie a decision to discipline. Once discipline is issued, the Claimant and his representative have a due process right to know before submitting a claim all bases on which the discipline is premised. Moreover, a Board sitting in judgment of the claim has a right to read the actual, relevant documents and not to learn of critical language only from Carrier responses denying the claim. Even though the admission is arguably not critical in [the Claimant's] case, such an omission can be critical in other cases and constitutes such a fundamental denial of due process that the investigation cannot be viewed as fair and impartial as required by Rule 40.A. Moreover, this Board is unwilling to issue an Award that contains support for a future contention that this critical due process element may be ignored, depending on the circumstances. The due process failings require that the claim be sustained without consideration of the substance of the allegation. The discipline must be removed from the Claimant's records.

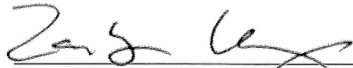
There is no need for this Board to add to what appears in the aforementioned Awards. The discipline cannot stand following an investigation that was not fair and impartial as required by Rule 40.A.

Award:


Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made, with the discipline to be removed from the Claimant's records. The Carrier is to make the Award effective on or before thirty (30) days after the Award is adopted.



Zachary Voegel, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
January 21, 2019