

PUBLIC LAW BOARD NO. 7564

Case No. 85/Award No. 85
Carrier File No. 10-18-0072
Organization File No. C-18-D040-11
Claimant: Matthew Wilderson

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

Statement of Claim:

By letter dated January 2, 2018, Maintenance Welder Matthew Wilderson was assessed a Standard Formal Reprimand and a One (1) Year Review Period for a violation of the three MWSRs listed in the Notice of Investigation set forth below. The discipline prompted the Organization's claim, Randy S. Anderson, Vice General Chairman, on the Claimant's behalf, requesting that the "discipline be overturned and Mr. Wilderson's record cleared of any mention of this investigation."

Facts:

By letter dated October 13, 2017 Maintenance Welder Matthew Wilderson was informed that:

An investigation has been scheduled at 0900 hours, Friday, October 20, 2017, at the BNSF Railway Roadmaster's Office, 111 S. Bennington, Kansas City, MO, 64123, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to safely operate and properly back vehicle, when you allegedly failed to position someone near the back of the vehicle to guide movement, resulting in damage to the vehicle near KCT MOW Headquarters, Kansas City, KS, at approximately 0800 hours, October 13, 2017 while assigned as a Welder.

This investigation will determine possible violation of MWSR 12.8 Backing, MWSR 1.2.3 Alert and Attentive and MSWR 12.1 Operation of Motor Vehicles.

The investigation was mutually postponed on October 19, 2017 and again on November 13, 2017 and was held on December 7, 2017 at 0900 hours at the original location.

Carrier Position:

The Carrier posits that Welder Wilderson received a fair and impartial investigation, that the Safety Issue Resolution Process (SIRP) opened after an earlier accident did not relieve the Claimant of responsibility to comply with the MWSRs, that the Carrier had a right to introduce the DriveCam evidence, that the Claimant's admission provided the required substantial evidence, that the discipline was in accordance with the Policy on Employee Performance Accountability (PEPA) and that leniency is within the province of the Carrier, but not the Board.

Organization Position:

The Organization contends that the Claimant was not provided a fair and impartial investigation that honored his due process rights. Not only did the Carrier not respond to the SIRP opened after a previous accident involving the same van, but the back-up camera on that van was not "returned to proper working order." Use of the DriveCam violates federal law and the Carrier's safety agreement with the Organization and has been used to provide selective evidence. The accident occurred in a confined, difficult location and resulted in "minimal damage to the vehicle and to the pole." The Claimant was alert and attentive, was not careless, reckless or egregious as Roadmaster Molgren so testified. The accident happened at a time when the Claimant's Welder Trainee was unavailable for assistance. The Carrier has not proven the charges; thus, the discipline is unjustified and excessive.

Findings:

The Board finds nothing in the record to support the contention that the investigation was not fair and impartial or that the Claimant's due process rights were ignored. While the organization contends that use of the DriveCam violates federal law, that contention is without support, as the evidentiary record is devoid of documentation that establishes a violation of federal law and there is no reference to any prior awards, on-property or otherwise, that prohibit the Carrier's use of the DriveCam technology. In fact, in this case, as explained below, the DriveCam evidence works in the Claimant's favor.

MWSR 12.8 Backing requires that "When backing vehicles, including vans . . ." the driver is to "(p)osition someone near the back of the vehicle to guide movement, when available." As he reported to Roadmaster Molgren, the Claimant backed a Carrier passenger van into a pole, causing minor damage to the van and the pole. The Claimant testified that the Welder Trainee he was working with had gone to the latter's personal vehicle to get personal protective equipment. The Trainee's absence from the depot for a brief period did not make him unavailable, and the Claimant forthrightly testified that there was no reason that he could not have waited for the Trainee to return. There is substantial evidence that the Claimant violated MWSR 12.8.

MWSR 1.2.3 states, "Assure that you are alert and attentive when performing duties." At p. 24 of the investigation transcript, Roadmaster Molgren, the Carrier's sole witness, testified that the DriveCam evidence showed that the Claimant was looking in the rearview mirror when he backed the van. When asked if he thought that the Claimant was being alert and attentive, the Roadmaster responded "Yeah, I would I would agree. He is being alert and attentive. I don't

believe that's what caused this accident." Moreover, DriveCam evidence showed that the Claimant was backing the vehicle at minimum speed and Roadmaster Molgren testified that he did not believe that the Claimant was reckless, careless or guilty of egregious behavior. Not only has the Carrier failed to provide substantial evidence of a violation of MWSR 1.2.3, but also the existing evidence exonerates the Claimant.

MWSR 12.1 requires, among other things, that motor vehicles be operated "in a careful and safe manner." While the Claimant was remiss in not waiting for the Welder Trainee to return and serve as a lookout, the above-noted testimony that the Claimant was not reckless, careless or guilty of egregious behavior applies to this MWSR as well. There is no substantial proof of a violation of this Safety Rule.

The Claimant's violation of MWSR 12.8, standing alone, constitutes "a violation which does not subject an employee or others to potentially serious injury or fatality and does not meet other criteria for a Serious or a Stand Alone Dismissible violation, as provided herein" (in PEPA). However, the disciplinary notice must be rewritten in accordance with the Findings above so that only the MWSR 12.8 violation is noted. Moreover, the Claimant's personnel records must be corrected to show the modification of the discipline notice.


Award:

Claim denied.

Order:

This Board, after consideration of the dispute identified above, hereby orders that the claim be denied but that the disciplinary notice and personnel records be revised in accordance with the Findings.


Zachary Voegel, Organization Member


Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
April 29, 2019