

BNSF Railway (Former Burlington Northern Railway)
- and -
Brotherhood of Maintenance of Way Employes

Public Law Board No. 7585
Case No. 16
Award No. 16
Carrier File No. 10-12-0498
Organization File No. C-12-D040-16
Claimant: Greg Faeh

FACTS:

On March 27, 2012, Claimant Greg Faeh, his foreman Erick Bettin and co-worker Gary Derosiers returned to their pick up truck. It had been borrowed and re-parked by a welding foreman. Bettin got into the driver's seat and Faeh was in the passenger seat with Derosiers in the back. Bettin put the vehicle in reverse, turned the wheel and hit the safety posts protecting a fire hydrant on the passenger side of the truck. The repair cost was \$1222.22.

The Carrier alleges Claimant Faeh was responsible for a failure to hold a job safety briefing under MOWOR 1.1 and for alleged negligence in the operation of a company vehicle. He was issued a Standard Formal Reprimand with a one-year review period. The Notice of Investigation dated April 2, 2012 stated as follows in pertinent part:

An investigation has been scheduled at 1000 hours, Tuesday, April 10, 2012, 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 negligence in operation of company vehicle 20565 causing damage to vehicle near MP 6.1 on the Golden Subdivision at approximately 1400 hours on March 27, 2012 while assigned to the Surfacing Gang.

The Notice of Reprimand, dated May 29, 2012 states as follows:

As a result of investigation held on April 30, 2012 at 1000 hours at Conference Room, 3700 Globeville Road, Denver, CO, 80216 you are hereby assessed a Standard Formal Reprimand for your negligence in operation of company vehicle 20565 causing damage to vehicle near MP 6.1 on the Golden Subdivision at approximately 1400 hours on March 27, 2012 while assigned to the Surfacing Gang.

In addition, you are being assessed a One (1) Year Review Period that commences on May 29, 2012. Any rules violation during this review period could result in further disciplinary action.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MOWSR 1.1 Job Safety Briefing and MOWSR 25.1 Job Safety Briefing.

CARRIER POSITION:

The Carrier maintained the hearing was fair in that Claimant was present at all times, and evidence was presented and heard. That evidence showed that there was no job briefing and Claimant violated both cited rules.

ORGANIZATION POSITION:

The Organization takes strong issue with the fact that the Notice of Investigation makes no mention of a failure to brief under MOWOR 25-1. It maintains the testimony of Claimant's supervisor, Alton Fry, should be stricken as untruthful because he was wrong about the truck being half on and half off the asphalt. Claimant was not operating the vehicle, the Organization maintains. Hence, he cannot be held responsible for its operation. It also protests consideration of Claimant's personnel record when it was not provided as an exhibit during the hearing.

DECISION:

The record does not support a conclusion that the hearing lacked fairness or impartiality, nor that Fry's testimony should be completely stricken because he got one fact wrong.

The facts of the case are both relatively simple and uncontested: Bettin put the vehicle in reverse and hit the safety post while Claimant was in the passenger side. The rule against negligent operation of a vehicle simply is not reasonably interpreted as applying to passengers. Operation of a vehicle is performed by an operator, and a passenger has no wheel or pedals. It follows that Claimant cannot be disciplined for negligent operation of the vehicle when he had no control of it.

The Carrier changed offenses when it issued the Notice of Reprimand to include an offense with which Claimant was not charged prior to investigation: failure of job safety briefing. The Board notes the impropriety of disciplining an employe for an offense that was not announced as the subject of the investigation. Both the employe and the Organization have a right to notice of the alleged offense being investigated. It is inherently unfair to discipline an employee for an offense he has never been charged with.

In order to discipline an employe, that employe must be found in violation of a known rule. He or she must be on notice that the conduct in question could result in disciplinary

action. That was not the case here. There is no reasonable rule that can make a passenger responsible for the actions of the driver.

AWARD:

The claim is sustained. The discipline shall be removed from Claimant's record.

ORDER:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

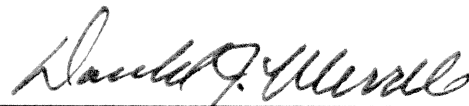
August 30, 2013; Cleveland, Ohio



Patricia T. Bittel, Neutral Member



Gary J. Hart
Gary Hart, Organization Member



D. J. Merrell
D. J. Merrell, Carrier Member