

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

NMB Case No. 178

**Claim of A. Romero**

Level S 30-Day Record  
Suspension - Failure to  
Wear Seatbelt

and

**UNITED TRANSPORTATION UNION**

**STATEMENT OF CLAIM:** Request on behalf of Southwest Division Trainman A. Romero requesting the removal of a 30-day Level S Record Suspension, and pay for any time lost.

**FINDINGS OF THE BOARD:** The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on October 10, 2014, in Washington, D.C. Claimant was not present at the hearing.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings.

On March 16, 2013, Claimant, who was hired on January 17, 2011, was working as a Conductor at Winslow, Arizona. His assignment that day was to relieve a crew whose hours of service had expired, for which he needed to be transported by van from Winslow to Flagstaff. At approximately 12:50 p.m., as Claimant's van was approaching the crew's train in Flagstaff, the drive cam device in the van was triggered. The Carrier's first knowledge of the incident occurred on March 21, 2013, when the contract crew hauling Manager for Winslow contacted BNSF and shared a 20-second video clip recorded by the drive cam device on March 16. The video clip showed that neither Claimant nor his engineer were wearing their seatbelts. According to testimony during the investigation, the clip showed that at no point during the 20-second clip did either Claimant or his engineer attempt to put their seatbelts on or make any observable attempt to communicate to the van driver to have her stop the van's movement.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of GCOR Rules 1.1 (Safety), 1.3.1 (Rules, Regulations, and Instructions) and 1.6 (Conduct - Careless) and TY&E Safety Rules S-1.2.10 ("Bill of Rights" Relative to Employees Riding in Transport to Vehicles) and S-12.5 (Seat Belts) and assessed him a Level S 30-day record suspension.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

**POSITIONS OF THE PARTIES:** The Carrier argues that it met its burdens to prove Claimant's violation of the Rules and the appropriateness of the penalty. It contends that there is no dispute that Rule S-12.5 requires that employees wear a seatbelt "while . . . riding in moving equipment or vehicles." BNSF asserts that, although Claimant did not remember taking his seatbelt off, the video is unmistakable that he was not wearing a seatbelt while the van was in motion and that he did not attempt to put it on at any time during the 20-second clip. It points out that Claimant admitted that he was not wearing his seatbelt.

BNSF maintains that the Organization's procedural arguments are without merit. It asserts that there was no need to call the van driver as a witness because the clear evidence of the video indicates that Claimant, for at least 20 seconds, was observed riding in a moving vehicle without his seatbelt on and without attempting to put it on. BNSF maintains that is a violation that is in no way attributable to the actions of the driver. BNSF also contends that the Organization's claim that, when a Company officer has multiple roles in the discipline process - such as in the instant matter where the Hearing Officer also issued the discipline - there is denial of a fair and impartial hearing, is without merit. It asserts, citing a prior award, that multiple roles are of no consequence unless some type of harm can be proved, which was not done in this case.

As to the Organization's argument, the Carrier contends that, even if the van driver stopped at some point and that, as a result, Claimant and his engineer removed their seatbelts as the Organization suggests, an abrupt departure of the van was *not* the event that triggered the drive cam device to start recording. It points out that, had such an abrupt departure triggered the video recording, the preceding 10 seconds would have shown the van stopped and the departure would have then been recorded.

As to the penalty, the Carrier argues that a Level S 30-day record suspension for Claimant's violation is in line with PEPA. It maintains, citing prior awards, that such a penalty is appropriate specifically for failing to wear a seatbelt.

The Carrier urges that the Claim be denied as without merit.

**The Organization** argues that the Carrier failed to meet its burden to prove Claimant's violation by substantial evidence. It contends that the Carrier failed to provide Grievant with a fair and impartial hearing and that Claimant and his co-worker had their seatbelts on at all times.

As to procedure, the Organization points out that the Hearing Officer was the same individual who issued the discipline against Claimant. It asserts that many arbitrators have held that one person cannot serve as both judge and jury, and that he should have excused himself or allowed someone else to review the transcript and issue the discipline. The Organization points out, as well, that the Carrier did not call the van driver to testify or provide a statement. It contends that the van driver would have stated that she was disciplined for suddenly pulling forward and that her testimony could have kept Claimant from receiving discipline.

As to the merits, the Organization argues that both crew members repeatedly stated that they had their seatbelts on at all times and that they only removed the seatbelts in order to get out of the van when the van stopped. It asserts that, although the video may have shown the crew without their seatbelts on, they were expecting to get out of the van when the van driver suddenly and unexpectedly moved the van forward. The Organization maintains that something out of the ordinary must have occurred for the video camera to come on and that, in this case, it was the unexpected movement that was made by the van driver.

The Organization urges that the Claim be sustained and the Level S 30-day record suspension expunged from Claimant's record and that he be made whole for wages and benefits lost.

**DISCUSSION AND ANALYSIS:** The Board is persuaded that the Carrier met its burden of proving Claimant to have been in violation of the Rules and of proving the penalty imposed not to have been arbitrary or excessive. Safety Rule S-12.5 requires that all employees must wear seatbelts "while operating or riding in moving equipment or vehicles that are equipped with them." It is clear, notwithstanding the Organization's protestations to the contrary, that Claimant, during the 20-second clip in the record, was not wearing a seatbelt and was not attempting to put it on.

The Board has carefully considered, but is not persuaded by, the Organization's challenges to the discipline imposed. As to its procedural arguments, the Board is convinced that the investigation was conducted in a fair and impartial manner. Although it is, of course, possible that officers acting in multiple capacities may exhibit prejudice toward a claimant, an allegation of prejudice must be supported by evidence of actual prejudice. In the instant

case, there is nothing in the record to support the Organization's contention that the Carrier, by allowing the Hearing Officer to also issue the discipline, prejudiced Claimant. In the instant case, the Organization merely assumes that acting in multiple roles is by definition prejudicial. The Board notes that it is not unusual for Carrier officers to play multiple roles at hearing and the Organization has not identified any particular action, statement or ruling of the hearing officer that demonstrated any prejudice toward Claimant. The Board is also not persuaded that the failure of the Carrier to have the van driver testify was prejudicial. The video evidence is definitive; her testimony would not have materially altered the record.

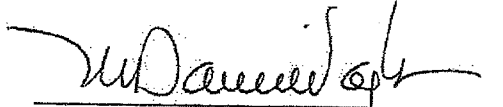
As to the merits, the Board is not persuaded that the van driver was at fault. Even assuming that the Organization's explanation is correct - that Claimant and his co-worker took off their seatbelts only after the van stopped and that, as a result, their seatbelts were disengaged at the moment the van lurched forward - that explanation does not account for the fact that Claimant, for the ten seconds prior to the triggering event and for the ten seconds after the triggering event, did not have on his seatbelt. While the van may have suddenly moved forward, the video system was activated by some other event. By the time that second event occurred, Claimant, even assuming he had previously removed his seatbelt, had time either to put on the seatbelt or, at a minimum, to begin to put on his seatbelt. The video makes clear that, whatever the triggering event was, it was not the forward lurch that the Organization presumes and that, during that 20-second period of the video, Claimant was not wearing his seatbelt.

As to the penalty, the Board is persuaded that Claimant's violation was serious and that the record suspension was neither harsh nor capricious.

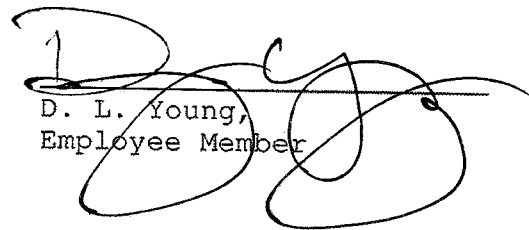
Given the serious nature and circumstances of Claimant's violation but in recognition of his otherwise clean disciplinary record, the Board concludes that the penalty was within the range of reasonableness. The Award so reflects.

**AWARD:** The Carrier met its burdens to prove Claimant guilty of the charges and to prove that the suspension imposed was an appropriate penalty. The claim is denied.

Dated this 5<sup>th</sup> day of November, 2014

  
\_\_\_\_\_  
M. David Vaughn,  
Neutral Member

  
\_\_\_\_\_  
Jason Ringstad,  
Carrier Member

  
\_\_\_\_\_  
D. L. Young,  
Employee Member