

**PUBLIC LAW BOARD NO. 7564**

Case No. 7/Award No. 7  
Carrier File No. 11-10-0430  
Organization File No. S-P-1526-G

-----  
BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES DIVISION - IBT )  
-----

**Statement of Claim:**

The Carrier violated the Agreement when on May 6, 2010 it assessed a Level S 30-Day Record Suspension and a 1-year probation period against Claimant Lonnie P. Dykstra for violating MOWOR 1.1.2 Alert and Attentive and MOWSR 1.2.3 Alert and Attentive.

As a consequence of the contractual violation noted above, the Carrier should be required to expunge the Claimant's personnel record of the discipline and make him whole for any and all losses.

**Facts:**

By letter dated March 4, 2010, the Claimant was instructed to attend an investigation on March 12, 2010 "for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your alleged failure to be alert and attentive, when you allegedly failed to protect men and equipment during a swing move while operating an excavator on March 1, 2010 at approximately 0940 hours, at or near Whalen Road MP 117.3 on Seattle subdivision while working as a machine operator." After agreed-upon postponements, an investigation was conducted on April 7, 2010. On May 6, 2010 the Carrier assessed the above-noted discipline.

**Carrier's Position:**

There is no evidence of an unfair or partial investigation and no harmful procedures or irregularities. The Organization has not shown how any of the contractual rules were violated. The Claimant admitted that while operating an excavator, he focused on overhead lines and signal apparatus and did not see Mr. Breck – the employee the Claimant struck. The Claimant's prior disciplinary history was considered as the serious injury suffered by Mr. Breck could have resulted in the Claimant's dismissal. The

Organization's objection to references to the rules violated has no basis because the notice of investigation referred to the Claimant's failure to be alert and attentive, which is what the rules require.

#### **Organization's Position**

The investigation was not fair and impartial because two foremen, who were to brief employees, were exonerated and the Claimant was prejudged. Evidence was withheld and the Claimant was charged with a violation of rules not included in the notice of investigation and not a part of the record. The investigation was brief and uncovered few facts supporting the charges. There is no evidence that the Claimant was not alert and attentive as the event itself was not sufficient proof of his wrongdoing. Mr. Breck may have caused the injury by entering the circle of safety without alerting the Claimant, but the Carrier did not produce Mr. Breck as a witness. The Claimant is an experienced, respected, safe operator with an unblemished record, thus the discipline was too harsh and excessive. The discipline was issued by other than the conducting officer, who was most aware of the transcript and exhibits. This further prejudged the Claimant.

#### **Findings:**

There are no elements of the investigation that rendered it unfair and/or partial. Rule 40(C) requires the Carrier to specify the charges against the affected employee prior to the investigatory hearing. The Claimant was charged with failure to be alert and attentive. MOWOR 1.1.2 requires employees to "be alert and attentive when performing their duties and plan their work to avoid injury." MOWSR 1.2.3 Alert and Attentive essentially repeats the requirement of MOWOR 1.1.2. The Carrier has presented a *prima facie* case that the Claimant was not fully alert and attentive at the time in question. He was operating the excavator that hit Mr. Breck and resulted in injury.

With the existence of a *prima facie* case, the burden shifts to the Organization to show that the Claimant was not at fault or was only partially at fault because somehow Mr. Breck contributed to the incident. The Carrier was not obligated to call Mr. Breck under the circumstances and the Organization has not shown that it attempted to call Mr. Breck as a witness or, alternatively, obtain his statement, and that the injury or other intervening circumstances prevented the Organization from doing so.

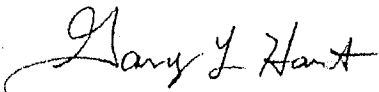
This is not a complicated fact situation. The Carrier has presented sufficient facts to support the charge and has properly noted that a violation of the rules leading to serious injury may result in dismissal but did not in this instance because of the Claimant's clean disciplinary history prior to the accident. Whether the Board, left to its own discretion, would have imposed the same discipline as the Carrier is not the question. The Board does not consider the discipline that was imposed to be an abuse of the Carrier's discretion that would justify a Board imposed alternative. Nor does the fact that the discipline was imposed by other than the hearing conductor justify Board intervention. As the Carrier itself has noted, this may not be the best practice, but in this instance it has not prejudiced the Claimant.

**Award:**

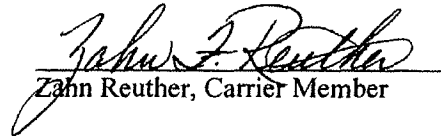
Claim denied.

**Order:**

The Board, after consideration of the dispute identified above hereby orders that an award favorable to the Claimant not be made.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Member

Austin, Texas  
November 1, 2012