

**PUBLIC LAW BOARD NO. 7564**

Case No.: 16/Award No.: 16  
Carrier File No.: 11-10-0448  
Organization File No.: S-P-1542-G  
Claimants: Tim A. Forbes  
James F. Eoff

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BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES DIVISION - IBT )  
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**Statement of Claim:**

The Carrier violated the Agreement when on May 29, 2010 Claimants Tim A. Forbes and James F. Eoff were issued Level S 30 Day Record Suspensions and one (1) year probations for violating MOWOR 10.3 Track and Time and MOWOR 6.3 Track Authority.

As a consequence of the violation, the Carrier should expunge the discipline from their records and make the Claimants whole for any and all losses.

**Facts:**

By letter dated April 26, 2010 the Claimants were directed to attend a May 4, 2010 investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your failure to stay within your authority limits, at approximately 1600 hours, April 22, 2010, when hy-railing on the Bellingham Subdivision, at or near MP 69.9, near Station Burlington, while working as Track Inspectors (TINS1565), headquartered at Burlington, Washington, and TINS1567, headquartered at Bellingham, Washington, respectively, on duty 0700 hours."

**Carrier Position:**

There was a fair and impartial investigation and the discipline assessed was consistent with the Policy for Employee Performance Accountability (PEPA). The Organization has not shown a violation of Rules 1, 40 or 80. Both Claimants told Roadmaster Owen that they had exceeded their authority and had to back up to see the signal post that marked the limits of their authority and to silence the HLCS alarm. There was no proof that the HLCS was not working properly. The Carrier has shown by the

required substantial proof that authority was exceeded and thus the discipline for this serious violation was proper.

**Organization Position:**

The Carrier violated Rules 1, 40 and 80 and therefore did not provide the Claimants with a fair and impartial hearing. Objections were overruled and part of an exhibit remained even though there was agreement that it would be excluded. The author of some of the documents in evidence could not be questioned. Roadmaster Owen could not identify the limits of the authority and was mistaken when he said that both Claimants had told him that their authority had been exceeded. Instead, they had told Roadmaster Owen that the dispatcher has said that the authority had been exceeded. Rather, they said that they saw the signal post and could not have gone beyond their authority, but backed up so that the alarm would shut off. The Claimants did not receive a warning signal as they approached authority limits and later learned that their radio was not functioning properly. The Carrier has not proved the charges and imposed discipline based on the Claimants' personnel records, which were not entered in evidence. Discipline was inconsistent with PEPA, which also was not a part of the record.

**Findings:**

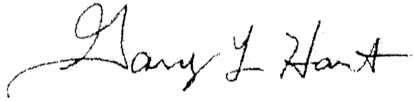
There is no need for an extended discussion of all contentions in this case because there is one overriding consideration. There is a difference in the testimony of Roadmaster Owen and that of the Claimants as to what they said to Roadmaster Owen about being out of Authority. The Conducting Officer, who issued the discipline, made an implicit credibility determination when he accepted Roadmaster Owen's testimony that the Claimants said that they were beyond authority, rather than that they told him that the dispatcher told them they had exceed the limits of their authority. Whichever version represents the truth, the discipline cannot stand in this case because of the faulty equipment on the hy-rail. Mr. Osborn's statement that there was no proof that the HLCS was not working properly ignores reality. First, there is no reason to disbelieve the Claimants' testimony that they received no warning signal as they approached the limits of their authority. Had they received such a signal, arguably they would have taken steps to ensure that they stayed within their authority. Second, the record establishes that the radio used by the Claimants was not working properly and after the incident had to be sent off for repair. Even if authority was violated, the possibility that it happened because of faulty equipment cannot be ignored. The Carrier cannot send employees out with faulty equipment and then discipline for infractions of MOWORs that might have been due to equipment failure rather than human failure. For that reason, the Carrier has not provided substantial evidence of a violation and therefore has improperly disciplined the Claimants.

**Award:**

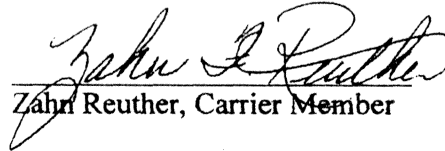
Claim sustained.

**Order:**

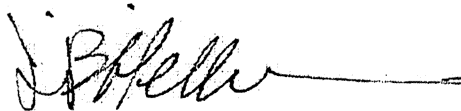
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants be made and that the Level S 30 Day Record Suspension and the one (1) year probation for violating MOWOR 10.3 Track and Time and MOWOR 6.3 Track Authority be expunged from the Claimants' personnel records.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas  
June 28, 2013