

**PUBLIC LAW BOARD NO. 7564**

Case No.: 17/Award No.: 17  
Carrier File No.: 11-12-0040  
Organization File No.: S-P-1623-C  
Claimants: James E. Snead, Jr.  
Mark R. Fraser

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

**Statement of Claim:**

The Carrier violated the Agreement when on August 26, 2011 Claimants James E. Snead, Jr. and Mark R. Fraser were issued Level S Thirty (30) Day Record Suspensions and three (3) year review periods for violating MOWOR 1.1 Safety, MOWOR 1.3 Rules, MOWOR 1.3.2 General Orders, MOWOR 11.4 Job Briefings, MOWOR 11.5 On-Track Safety Procedures in Effect, MOWOR 6.3.1 Main Track Authorization, MOWOR 8.12 Hand-Operated Crossover Switches and MOWOR 8.12.1 Independently Controlled Switches (ICS).

As a consequence of the violation, the Carrier should expunge the discipline from the Claimants' personnel records and make them whole for the time they were withheld from service.

**Facts:**

By letter dated June 17, 2011 the Claimants were directed to attend a June 24, 2011 investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your alleged failure to properly protect yourself by occupying main track without authority at MP 1066.5 Shelby, MT approximately 1845 hours on Monday, June 13, 2011 while assigned to TC01 System Gang working on the Great Falls Subdivision." After agreed-upon postponements, the investigation was conducted on August 4, 2011. Claimants had been placed out of service on June 13, 2011.

**Carrier Position:**

There is no Organization evidence to show other than a fair and impartial investigation and there is no evidence that the Claimants were prejudged. The notice of

investigation was not defective as the Shelby Yard is at the intersection of the two subdivisions. If procedural deficiencies existed, they did not prejudice the Claimants. Nor is there proof of disparate treatment. The Carrier was not required to produce documents prior to the investigation because the Agreement does not include provisions for discovery. Roadmaster Jilliard was the only eyewitness to the incident; thus other Carrier witnesses were irrelevant.

The Carrier has met the burden of providing substantial evidence of the charges as Mr. Maier admitted that "there's no doubt that the employees did get on a track that they had no authority for" (TR-42).<sup>1</sup> The Claimants occupied Main 2 in the Shelby Yard. They did not follow the rock train onto 3 Track but onto Main 2 without obtaining a new Form B or being told to do so. Occupying track without authority can have deadly consequences. The Claimants were lucky in this instance that the serious violation did not result in serious injury or death. Whether the train crew activities contributed to the move to Main 2 is irrelevant and does not exonerate the Claimants, who could have stopped and checked when they reached the limits of their authority, which ended before the switch, making the switch position irrelevant. The improper drug test procedure occurred after the move to Main 2 and is also irrelevant.

**Organization Position:**

The investigation was not fair and impartial because the Claimants' guilt was prejudged and the notice of investigation did not contain clear and specific charges. There is no MP 1066.5 on the Great Falls Subdivision. Conducting Officer Nilsen acted as chief accuser and did not present all witnesses because Foreman Quinn, EIC Stubbs and none of the rock train crew were called by the Carrier.

This is a case of "damned if you do and damned if you don't." After an initial briefing, the Claimants were later radioed and told to follow the rock train into the 3 Track. There is no evidence that the radio message constituted a proper briefing. The usual entrance to the 3 Track was blocked, so the Claimants followed the rock train, logically believing that they were going to the 3 Track via a different route and not knowing that they were on Main 2. The Claimants believed that they were operating under rock train authority and did not realize that they had moved to Main 2 in the Shelby Yard. There was no reason to question the authority. Furthermore, Claimants were aware that questioning supervisors in the past had resulted in charges of insubordination. Claimant Snead, first behind the rock train, stopped short of the switch and was waived on by Assistant Foreman Highfield. Nobody lined the switch so that the Claimants did not move onto Main 2. There is no proof that Claimants violated the listed rules, as it was supervision that was at fault. However, supervisors were not disciplined. Roadmaster Jilliard's testimony was hearsay, as he did not know immediately if Claimants had the authority to move to Main 2. Even when Claimants were placed out of service and sent for urinalysis testing, they were not told why. And, an out-of-service Claimant was improperly assigned to transport others thereafter.

---

<sup>1</sup> Reference is to the transcript and page number

**Findings:**

The Carrier's approach to this case was that it was only necessary to show that the Claimants exceeded their authority when they moved to Main 2 in the Shelby Yard and thus there was nothing more to be said. In the Carrier's view, what happened was critical but why it happened was irrelevant. This narrowly-conceived view of the events in question resulted in a decision to eliminate any light that might have been shed by Foreman Quinn and EIC Stubbs at a minimum. The investigation, therefore, was incomplete, although for reasons noted below, failure to call Foreman Quinn and EIC Stubbs has actually worked to the advantage of the Claimants.

The notice of investigation was technically incorrect because, as the Organization has pointed out, there is no MP 1066.5 on the Great Falls Subdivision. The error is not fatal because the notice was specific as to the incident of concern and a reading of the investigation transcript makes clear that the Organization was prepared to defend the Claimants against the charge of occupying Main 2 without authority.

The investigation transcript supports a conclusion that the Carrier prejudged the Claimants' guilt, making the outcome a forgone conclusion. This occurred because, as noted above, the Carrier seemed interested only in what happened, but not why it happened. While the Board would be justified in upholding the claims solely because the investigation was not fair and impartial as required by Rule 40, it will not do so because there are additional reasons for granting the claims.

The testimony is consistent that there was an initial briefing and that later in the day there were radioed instructions to follow the ballast or rock train onto the 3 Track, as had been done previously. Roadmaster Jilliard could not say specifically what the Claimants were told by way of radioed instructions and was himself initially unsure of the Claimants' authority. Because Roadmaster Jilliard cannot clarify the radioed instructions and because the individual who gave the instructions was not called as a witness, the Claimants' testimony stands uncontroverted. Claimant Snead said that they were told to follow the rock train onto the 3 Track, but he did not say which route they were told to take to get to the tie-up area. Claimant Fraser recalled that he was told that there was a change in the tie-up position and that he was to follow the rock train onto the 3 Track. Mr. Walls and Mr. Smart confirmed the radioed instructions to follow the rock train onto the 3 Track. None of the Claimants recalled more specific, revised instructions and all of the testimony established the absence of any second briefing other than the radioed instructions. Furthermore, Claimant Snead, the first Claimant behind the rock train, testified that after he "stopped clear of that switch. . . Assistant Foreman Highfield "was hollering at me to, to come on, come on, go, go in clear" (TR-97). While Claimant Snead said that he questioned the instruction, he "thought maybe he had track time wrote down there, you know and just authority to clear" (TR-97).

Claimant Snead's testimony was not contradicted. Assistant Foreman Highfield, who had initially appeared as one of the Claimants, could have been called to give his version of the events in question, but he was not, leaving Claimant Snead's description

intact. There is no evidence that any of the Claimants realized that they had exceeded authority or that they had followed the rock train onto Main 2. The usual route onto the 3 Track was blocked and the Claimants believed that they were following instructions.

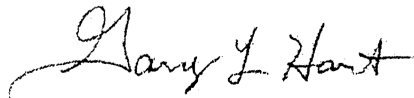
The Carrier correctly stresses the critical need to stay within authority lest serious injury or death result. While the Carrier notes Mr. Maier's admission that Claimants were "in a track that they had no authority for" omitted are the sentences that came next: "But they were set up. . . They did nothing wrong. They followed instructions as they were told" (TR-42). The evidence supports the quoted testimony. The Claimants exceeded authority because they followed the instructions as radioed to them. In a potentially life and death situation, the supervisors had an obligation to provide specific instructions so that nothing was left to chance. This was not done and the supervisor failure set the stage for the inappropriate movement onto Main 2. The Carrier has not provided substantial evidence that the movement past the limits of authority was intentional.

**Award:**

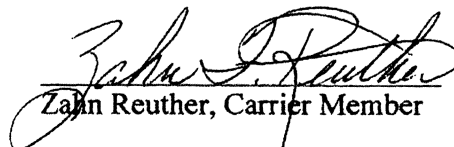
Claims sustained.

**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 Thirty (30) Day Record Suspensions and the three (3) year review periods be expunged from the Claimants' personnel records. The Claimants are to be made whole for wages lost as a result of being withheld from service. The Carrier is to make the award effective on or before 30 days following the date the award is adopted.



Gary Hart, Organization Member



John Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas  
June 28, 2013