

**SPECIAL BOARD OF ADJUSTMENT NO. 7564**

Case No.: 26/Award No.: 26  
Carrier File No.: 10-12-0624  
Organization File No.: C-12-S090-2  
Claimant: Everett W. Porter

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

The Carrier violated the Agreement when on July 30, 2012 Claimant Everett W. Porter was issued a Level S thirty (30) day actual suspension and a three (3) year review period for violation of EI 23.1.2 Foreman's Roles, Responsibilities and Expectations; MOWOR 11.4 Job Briefings and MOWOR 6.3.1 Track Occupancy.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimant's personnel file and make him whole for wages and benefits lost.

**Facts:**

By letter dated July 5, 2012 the Claimant was directed to attend an investigation on July 12, 2012 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged releasing of Track & Time Authority 58, on Sunday, July 1, 2012 at/or near MP 56.3 on the Angora Subdivision without confirming that all equipment and employees were clear and reported clear of the track, while assigned as a Foreman on TRPX0005, temporarily headquartered at Sidney, Nebraska. First knowledge was July 3, 2012." After a mutually agreed to postponement, the investigation was held on July 13, 2012. Claimant Porter had been notified that he was being withheld from service pending results of the investigation.

**Carrier Position:**

The investigation was fair and impartial as the Claimant was present, able to cross-examine witnesses, examine the evidence and make a closing statement. The Organization's requests for recesses were granted. There is precedent for allowing written statements as exhibits without the testimony of the statements' authors. The Organization could have asked for the presence of the authors as witnesses. The statements, the testimony of Truck Driver Lee and the Claimant's own admission

constituted substantial evidence that the claimant released Time & Track Authority without establishing that members of the skeleton gang and the track were clear. In accordance with strong precedent, the Conducting Officer's determination that evidence supporting the charges was credible is not to be questioned by the Board. The Claimant was not prejudged when he was withheld from service. Rule 40B allows this and the Carrier's prerogative to invoke Rule 40B is well established. In view of the evidence, the Organization is asking for leniency, which is the prerogative of the Carrier because precedent dictates that the Board not substitute its judgment for that of the Carrier. If the Board should sustain the claim, there is precedent for offsetting back pay with interim earnings.

**Organization Position:**

The hearing was not fair and impartial because the Conducting Officer ignored contradictions in the testimony, because the Carrier did not meet its burden of proof, because the Conducting Officer admitted statements over the Organization's objection and thus deprived the Claimant of the right to cross examine witnesses, because the Claimant's guilt was prejudged when he was withheld from service without reason and his testimony disregarded, because the Organization's objections were dismissed and because the Organization could not review the Claimant's personnel record on which the Carrier relied but which was not in evidence. Based on the evidence, there very well could have been an initial and an ending briefing. The Claimant testified that he saw that the gang was all in the clear and not working between the siding and the main track and that he told the gang that he had released Time & Track Authority. No protection was necessary simply to cross the main line. It is difficult to believe anybody was in danger when nothing was said to the Claimant or to Assistant Roadmaster Smith on July 1, 2012 and it was two (2) days later when the incident was brought to the Carrier's attention.

**Findings:**

The investigation was fair and impartial. The Carrier has shown precedent for the admission of written statements in these investigations. If the Organization felt that it was necessary to do so, it could have requested a recess to arrange for one or more of the authors to appear as witnesses, but no request was made. Clearly the Conducting Officer considered the statements credible and the Board is not in a position to ignore that determination.

The Organization cannot agree to include Rule 40B in the Agreement, therefore acceding to arrangements for withholding an employee from service, and thereafter argue convincingly that the application of Rule 40B is *per se* evidence of prejudgment. For the Board to allow the contention to prevail would, in essence, nullify Rule 40B. This is the approach taken consistently by this Board in prior cases arising under Special Board of Adjustment No. 7564.

In view of the history between the parties, it is impossible for the Board to consider that the Carrier's reliance on the Claimant's personnel file came as any surprise

to the Organization. The Board sees no reason why the Organization could not have anticipated this and asked that a copy be made an exhibit. The absence of an opportunity to review the Claimant's personnel file as part of the investigation is not seen as prejudicial to the Claimant.

The Claimant's own testimony establishes the lack of a briefing when he released Time & Track Authority at 2:30 PM on July 1, 2012. He testified that he did not call everybody together to tell them of the release, but that he simply told those around him. That is less than a formal briefing and, based on the evidence, did not come close to ensuring that he was heard by all in the skeleton gang. Truck Driver Lee testified that she did not hear the Claimant say anything about the release. The statements of gang members Summers and Rupaner explicitly said that the Claimant did not tell them of the release of Track & Time Authority. The statements of gang members Smith and Gibbons indicate surprise that Track & Time Authority had been returned. The Conducting Officer has accepted the verbal and written evidence as credible. Beyond that, there is no basis for the Board to believe that these employees conspired to make up a series of untruths with the hope that the Claimant would be disciplined as a result. There is substantial evidence that, even though the incident was not reported to the Carrier until two days later, gang members were surprised and concerned by the release of Time & Track Authority and did not consider themselves clear of the track. The evidence supports the charges that the Claimant violated EI 23.1.2 Foreman's Roles, Responsibilities and Expectations; MOWOR 11.4 Job Briefings and MOWOR 6.3.1 Track Occupancy. The evidence does not contradict the Claimant's testimony that he provided an initial safety briefing, but that does not absolve him of the violations.

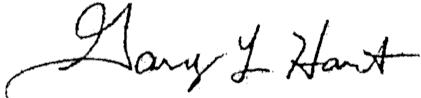
This is an inherently dangerous industry, which accounts for the myriad of rules governing expectations, responsibilities and operations. The rules are designed to prevent injury, loss of life and property damage. There is no room for less than absolute compliance with the rules, as less than absolute compliance increases the chances of injury, death or property damage, as it did on July 1, 2012. The Claimant must understand the need to conform absolutely to all relevant directives.

**Award:**

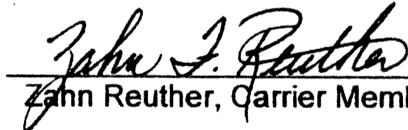
Claim denied.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas  
February 12, 2014