

**SPECIAL BOARD OF ADJUSTMENT NO. 7564**

Case No.: 30/Award No.: 30  
Carrier File No.: 10-13-0012  
Organization File No.: C-13-D040-3  
Claimant: Denny L. Tate

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

The Carrier violated the Agreement when on October 26, 2012 Claimant Denny L. Tate was issued a Level S thirty (30) day record suspension and a three (3) year review period for violation of EI 12.4.2 Vegetation Control Contractor and MOWOR 11.4 Job Briefing.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimant's personnel file.

**Facts:**

The Claimant was directed to attend an investigation on September 25, 2012 "for the purpose of ascertaining the facts and determining your responsibility, if any, in conjunction with your alleged failure to participate in a job safety briefing after conditions changed when the weed spray truck that was being piloted caused an approaching train to apply emergency brakes to avoid striking the weed spray truck at Rhodes St., Big Rock, IL near MP 50.23 on the Aurora Subdivision Chicago Division at approximately 1656 hours on 9/6/12." After a mutually agreed to postponement the investigation was conducted on October 3, 2012.

**Carrier Position:**

The Organization's procedural arguments are moot because there is no showing of prejudice to the Claimant. The investigation was fair and impartial because the Organization's recess requests were granted, witnesses were cross examined and exhibits were allowed. The Conducting Officer's evaluation of evidence and credibility must be accepted by the Board. The Notice of Investigation was specific as to the behavior alleged and was not required to include specific rules violated. The Claimant, who was ultimately responsible for the safety of those he escorted did not initially adequately brief the contractors. In essence, the Organization is asking for leniency, but that is the prerogative of the Carrier, not the Board, as the Board should not substitute its judgment for that of the Carrier.

**Organization Position:**

The investigation was not fair and impartial because it was simply a formality to cover prejudgment of the Claimant, because the Organization's request to review exhibits before the investigation was refused and because the rules allegedly violated were not included in the notice of investigation. The Carrier has not provided substantial evidence because the testimony and exhibits show that the Claimant properly briefed the contractors and thus should not be held responsible for their actions as the contractors were to have known the rules and to have taken responsibility for their actions. Furthermore, the Claimant briefed again when conditions changed. He was forthright and honest about the incident and should not be punished for bad decisions made by supposedly qualified contractors. The Carrier has lost an opportunity to take positive action to eliminate such incidents.

**Findings:**

The investigation was fair and impartial. The Claimant's due process rights were not ignored by the Carrier's unwillingness to provide documents for the Organization's inspection prior to the investigation. As this Board has noted in several cases arising under Special Board of Adjustment No. 7564, the Agreement between the parties, unlike some agreements in the industry, does not mandate discovery and therefore the Carrier is not obligated to provide pre-hearing documentation to the Organization. The Organization's requests for recesses to review documents were granted as part of the Carrier's obligation to provide a fair and impartial hearing.

The Board, as it has in prior cases, accepts the proposition that unless unusual circumstances exist, the credibility determinations and evaluation of the evidence of the Conducting Officer are to be accepted. However, there are two problems existing in this case. First, Conducting Officer Heille did not issue the discipline. Division Engineer

East Morehouse did, contrary to what the Carrier itself has said in prior cases is the better practice of having the Conducting Officer issue the discipline. In this case it is impossible for the Board to know what role, if any, Conducting Officer Heille's determinations played in the decision to discipline the Claimant. Did Conducting Officer Heille and Division Engineer Morehouse consult with one another? Did Conducting Officer Heille simply brief Division Engineer Morehouse? Was Division Engineer Morehouse the sole evaluator of the evidence and the one who made the credibility determinations? Under the circumstances with which the Board is faced in this case, there is no basis for accepting Conducting Officer Heille's determinations since it is impossible for the Board to know what role, if any, his determinations played in the Carrier's decision to discipline the claimant.

Second, the Carrier has turned a blind eye to evidence that supports the Organization's position and requires an award in the Claimant's favor. The Carrier is not required to specify the policies and/or rules alleged to have been violated in the notice of investigation, but the Carrier is required to be specific about the Claimant's behavior that has been found wanting. This investigation occurred because of the Claimant's "alleged failure to participate in a job safety briefing after conditions changed. . .". It is crucial to note that, in essence, the charge is failure to conduct a second briefing. The charge is not that of conducting a shoddy or incomplete briefing but rather, Claimant is charged with conducting no briefing at all. The Organization, and ultimately this Board, has the right to insist that the Carrier prove and then discipline based on the specific shortcoming(s) alleged in the Notice of Investigation and not some revised shortcoming(s) that were seen to have arisen out of the investigation.

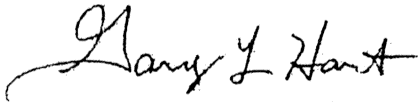
The evidence, including the form signed by the contractors, establishes that the Claimant conducted an initial briefing. Roadmaster Goy, in response to a question from BMWED Representative Loveland, acknowledged that it was a "proper job briefing." The Claimant testified that he gave another briefing in which he told the contractors to back up and set off at Rhodes Avenue. The Claimant's September 7, 2012 e-mail to Roadmaster Goy that gives the approximate order of events puts the briefing at 1640 hours. This was confirmed by the September 7, 2012 e-mail from one of the contractor's employees to Roadmaster Goy and additional e-mail messages. The evidence establishes that, contrary to the Carrier's allegation, the Claimant conducted a briefing when the conditions changed. Not only is the Carrier's case lacking substantial evidence, the evidence irrefutably supports the Organization and the Claimant. The Board makes no judgment about the quality of the second briefing because the Claimant was charged with making no briefing—not with making an incomplete or poor briefing. In view of the evidence, the Board's failure to find for the Claimant would constitute a gross miscarriage of justice.

**Award:**

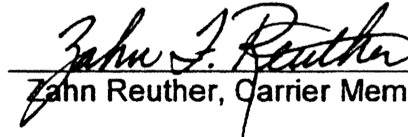
Claim sustained.

**Order:**

This Board, after consideration of the above-noted dispute, hereby orders that an award favorable to the Claimant be made so that the Level S thirty (30) day record suspension and three (3) year review period are set aside and expunged from the Claimant's personnel records. The Carrier is to make the award effective on or before thirty (30) days following the date the award is adopted.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas  
February 12, 2014