

**PUBLIC LAW BOARD NO. 5850**

**Case No. /Award No. 567**

**Carrier File No.: 14-21-0259**

**Organization File No.: 2417-SL13C5-2123**

**Claimant: E. Montoya**

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**BNSF RAILWAY COMPANY** )  
**(former Burlington Northern Railroad Company)** )  
 )  
**-and-** )  
 )  
**BROTHERHOOD OF MAINTENANCE** )  
**OF WAY EMPLOYEES DIVISION- IBT** )  
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**STATEMENT OF CLAIM:**

**“We Present the following claim on behalf of Edward Montoya, {0133694), Seniority Date 08-06-2012, for the removal of the Claimant's Standard Formal Reprimand and 1 Year Review Period. In addition, we request all record of discipline be removed from the Claimant's record. The Claimant shall be made whole as a result of the Carrier's violation, including the following compensation(s).”**

**CARRIER POSITION:**

**On July 21, 2021, Claimant Montoya was issued a Formal Written Reprimand with a One-Year review period for dishonesty regarding his statement regarding employees fouling the track on May 26, 2021.**

**The Notice of Investigation was first issued on June 14, 2021 for an Investigation on Friday June 18 at the BNSF Conference Room in Flagstaff, AZ. A second Notice was issued on June 15, changing the date of Investigation to June 25, and a third Notice dated June 23 changed the location of the Investigation to the Doubletree Hilton.**

**The Carrier asserts that the date of first knowledge was June 10 when it finally had statements from all the employees who were involved. As Roadmaster Baiamonte**

testified, the first date that all of the statements were available for review was June 10, not June 2 or 3 as alleged.

**JASON BAIAMONTE:** Okay. So on for uh Mr. Gonzales, on the 2nd I received his so that would be June 2nd. I received another one from Jeff Gentry on the 3rd of June. Edward Montoya the 3rd of June. Uh Art Baca the uh the June June 3rd. Uh Matt Ramirez June 2nd. And then I know I received uh Mr. Johnson's on June 10th. I do not have a date for Mr. Hardy's, but I know it was between the 3rd and Mr. Hardy was between the 3rd it was actually 2 between the 3rd and and the 10th I received Mr. Hardy's, but it wasn't after the 10<sup>th</sup>. TR 27-28.

**JASON BAIAMONTE:** on June 10th when I received uh Mr. Johnson's uh statement uh there was one statement that uh was really conflicting with what his statement had on there. So that's when I knew that there was something going on uh when when this uh conflicted with other on the statements. TR 28

According to Baiamonte, once all of the individual statements were presented, it became evident that an investigation into the situation would be necessary because the statements contained conflicting assertions. The Carrier concludes that first knowledge of the case was June 10, when the final statement was provided, and there was no breach of procedural deadlines in the case.

As the Carrier sees it, the Conducting Officer is the person responsible for determining credibility, and therefore his finding should stand undisturbed.

The Carrier further disputes the Organization's contention that Claimant should be compensated for his time spent in the Investigation. It contends Claimants were not withheld from service nor dismissed. Because they were not pulled from service, they did not suffer a loss in wages and the Carrier reasons no compensation for the day of Investigation is due.

#### **ORGANIZATION POSITION:**

The Organization references Rule 13 of the Agreement, which states as follows:

**13(a) – Investigations.** An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held no later than fifteen (15) days from the date of occurrence,

except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule.

The Organization maintains that multiple Carrier officials knew about the track being fouled well in advance of the 15-day time limit, yet they failed to investigate the alleged incident in a timely manner. It references J. Baiamonte's testimony that both he and Division Engineer S. Miller knew a Safety Hotline Call was made on May 28, 2021. Nonetheless, the Investigation was not held until June 25, 2021, twenty-two days from the date information was obtained.

The Organization does not agree with the level of discipline levied against Claimant and argues that a Standard Formal Reprimand with a One (1) Year Review Period is both extreme and abusive.

## **DECISION:**

The first indication of a problem was when the Safety Hotline Call came in. However, a single call is inadequate to prompt the Carrier to take action; it is obliged to look into the facts of a situation before implementing measures. The Carrier did just this, and requested statements from the employees involved.

On June 2, W. Gonzales provided a statement that he heard "yelling to get off the track." This statement is consistent with there having been a close call with an eastbound train. That same day M. Ramirez provided a statement describing a "close call." His statement was particularly graphic: "And all of a sudden Edward was standing across from me from myself as I had my back away from the train and Edward was facing me and yelled facing the train and yelled hot rail, get off the track. I looked back and literally had to run off the track, barely missing this train by at least 1.5 to 2 seconds to where if I had ripped tripped on the rails it would've ended really badly."

On June 3, Baca provided a statement said Johnson was "yelling at us to get off the track repeatedly [sic]." That same day J. Gentry submitted a statement saying people "scrambled" to get off the tracks. Also on June 3, E. Montoya turned in his statement that people were "yelling" to get off the track as an east bound train was coming. All of these statements were submitted after the May 28 Safety Hotline Call. A video showing two employees fouling the track was obtained on May 28, though the identity of the employees could not be determined from it. The Carrier had enough information on June 3 to determine that there was an incident, but it still had not heard from an arguably critical person: the foreman.

Baiamonte testified that he trusted Johnson and intended to rely on him to describe what really happened. He reasoned that he could not consider himself to be “informed” until Johnson’s statement was submitted. But Johnson’s statement said “I informed the section guys and Jeff Gentry on the backhoe that there was going to be a eastbound. Once the train showed up it was not at 25. We cleared the tracks and had a job briefing with Gonzales.” According to Baiamonte, Johnson told him there had been no close call.

Johnson was the foreman, and he was the individual most responsible for the safety and welfare of the employees involved. In Baiamont’s assessment, no fact-gathering regarding the incident would be complete without adding the foreman’s statement to the information on which a decision to charge or not to charge would be made. According to Baiamonte, “I did not personally know of the incident May 26th because when I asked the Foreman, he told me it never happened, there was no close call. He said there was no close call. That's what he told me, that never happened. There was no close call.” TR 48

There is no explanation for the tardiness of Johnson’s statement submission. Management knew it had 15 days to hold the Investigation, and was responsible for getting the statement in.

Under Rule 13, the Carrier had 15 days after acquiring “information” regarding an incident in which to hold the Investigation. As of June 3, the Carrier had enough “information” to make charging decisions; it had the May 28 Safety Hotline Call plus reasonably consistent statements from five employees, all of which describe a close call. Had Johnson also described a close call, there would still be an Investigation. Had Johnson denied the close call, there would still be an Investigation. The Carrier did not need Johnson’s statement to realize an Investigation was in order. This means that the 15-day clock began running on June 3, and expired on June 18. Because the Investigation was not held until June 25, the 15-day deadline was not met.

We do not find the procedural arguments made in this case to be persuasive. We now turn to the merits of the case. Claimant’s statement is quoted verbatim below:

To Whom It May Concern,

On May 26<sup>th</sup>, 2021, Flagman Gonzales had a form b at Dennison to replace ties on the main one track under the frog. Arriving to the location a job briefing was conducted for the task at hand, the equipment to be used, and about the protection for the project. I remember the topic of restricting the trains speed brought up also during the job briefing. After all the information work began for the task. Jeff Gentry was the operator on the backhoe removing and

inserting the ties. The section work group switched off on the various tasks for the project. Numerous trains were cleared through the form b once work began. Foreman Johnson was told an east bound train was calling and informed the work group. I acknowledged about the east bound train and continued to work removing ballast. I do not recall if it was being cleared through at max or restricted speed. I recall being in between the main one track rails after acknowledging about the east bound train. As I continued with what I was doing I then heard loud voices yelling to get off the track as well as the train whistle. I looked up and noticed Matt Ramirez was facing me and I approached him quickly to get him off the track. We stepped off the track and checked on one another as well as the rest of the work group. We stopped all work and briefed on what had occurred. I heard that notification was given to Roadmaster Baiamonte and that he had spoken with the flagman as well as the foreman. Once all discussion was done and everyone was okay we discontinued work and finished the tie that was being worked on. After that tie we seized all work for the day and reported clear of the form b.

This statement is the best to my recollection of the incident occurring that day. This statement is being given a week after the incident occurring.

It is not clear to this Board why the Carrier determined that Claimant was being dishonest. It does not explain what part of Claimant's statement it finds to lack credibility. The Carrier's submission states: "A review of the record proves Claimants violated MWOR 1.6 – Conduct when they did not make sure that all men and equipment were clear and was dishonest about the near miss that occurred on May 26, 2021." But Claimant Montoya in no way denied the near miss. He said he heard the yelling, looked up and saw Ramirez on the track. He rushed to get him off. This is a description of a near miss, and though more subdued in tone, it coincides precisely with the statement submitted by Ramirez. Hardy heard the train horn and people yelling and stepped away. Baca heard yelling to get off the track and did. Gonzales heard yelling to get off the track but was in his truck at the time.

The Carrier is correct in its assessment that the Conducting Officer is typically in the best position to make credibility determinations, and in most instances the Board will leave such credibility determinations undisturbed. The reason for this deference is that the Hearing Officer is the trier of fact, and is therefore in the best position to evaluate voice, appearance, behavior and gestures during testimony. In our assessment, this well-established and totally appropriate deference should not be distorted to give a Hearing Officer license to misuse the Investigation platform in

order to discredit written statements which appear to be true, all without oral testimony or other credible evidentiary basis.

A charge of dishonesty requires proof that the individual intentionally and volitionally put forward a known falsehood, a finding which goes far beyond a simple finding that testimony lacks persuasive value. We cannot find adequate support in the record to uphold a charge of dishonesty against Claimant Montoya; no falsehood has been or can be identified. Claimant Montoya affirmed his statement at the Investigation, and did not add to it.

Claimant's statement is not markedly different from the statements of other employees. A charge of dishonesty requires proof that the individual intentionally and volitionally put forward a known falsehood, a finding which goes far beyond a simple finding that testimony lacks persuasive value. We are not persuaded that there is adequate support in the record to uphold a charge of dishonesty by Claimant Montoya.

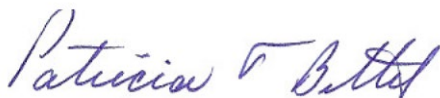
**AWARD:**

The claim is sustained in full. The Carrier shall immediately remove the discipline from Claimant's record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident, including any pay lost as a result of Investigation.

**ORDER:**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

**Dated: May 3, 2023**



**Patricia T. Bittel, Neutral Member**



Jeffery L Fry, Labor Member



Logan McKenna, Carrier Member