

**PUBLIC LAW BOARD NO. 7564**

Case No. 3/Award No. 3  
Carrier File No. 10-11-0550  
Organization File No. C-11-D040-32

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

The Carrier violated the Agreement when on July 8, 2011 Claimant Fernando R. Reyes was assessed a Level S 30-Day Record Suspension and a 3-year review period for violating EI 1.10 LOTO (Lockout Tagout) Procedures.

As a consequence of its violation, the Carrier should expunge the discipline from the Claimant's personnel record and make him whole for wages lost on June 2, 2011.

**Facts:**

By letter dated June 3, 2011 the Claimant was directed to attend a June 14, 2011 hearing "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to follow proper LOTO (Lockout Tagout) procedure while you were observed adjusting TPI machine without having the power switch properly disabled and protected at MP 163.2 on the Chillicothe Sub on June 2, 2011 at 0750 hours while assigned as a machine operator TP07." The above-noted discipline was issued on July 8, 2011.

**Carrier's Position:**

A thoughtful and respectful hearing was conducted with a showing of a thorough investigation of the incident. General Director Upward's credible testimony was that he saw the violation and was certain of it. Both hearsay evidence and telephone testimony have been found acceptable, as has the issuance of discipline by a Carrier officer other than the hearing conductor. The Board must accept the credibility determination of the hearing conductor.

**Organization's Position**

Testimony, not all able to be transcribed, and exhibits were poor and did not prove the charge. General Director Upward was 300 to 500 feet away, was not certain

what was going on, and did not see the Claimant using any tools. The Claimant provided credible testimony, supported by statements, that he had followed LOTO procedure and was simply doing a walkaround when seen. The Carrier stated that consideration was given to the Claimant's prior disciplinary history but the prior record was not made an exhibit and therefore the Claimant could not review it for discrepancies.

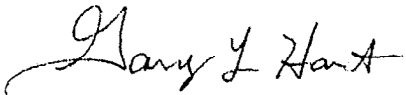
**Findings:**

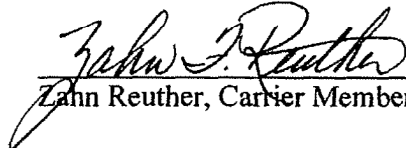
The Claimant received a fair and impartial hearing despite the breaks in the hearing transcript. There is no basis for according telephone testimony less legitimacy or weight than the in-person testimony simply because the telephonic witness could not be seen. Particularly in the multicultural society we live in, "body language" is not necessarily an accurate indicator of credibility.


In essence, this is a "he said, she said" case that turns on an assessment of credibility. The hearing conductor has determined that the Carrier witnesses were the more credible and the Officer assessing the discipline has obviously accepted that determination. There is strong precedent for this Board to accept the credibility determination and the proof of the charge that flows from that determination.

**Award:** Claim denied.

**Order:** The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.

  
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Gary Hart, Organization Member

  
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Zahn Reuther, Carrier Member

  
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I. B. Helburn, Neutral Member

Austin, Texas  
November 1, 2012