

**PUBLIC LAW BOARD NO. 7564**

Case No. 9/Award No. 9  
Carrier File No. 11-11-0097  
Organization File No. S-P-1560-G

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

The Carrier violated the Agreement when on October 18, 2010, Claimant William R. Kelton was assessed a Level S 30-Day Record Suspension and a 1-year review period for a violation of CROR General Rules A.ix.2.

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

**Facts:**

By letter dated August 10, 2010, the Claimant was directed to attend an August 19, 2010 investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with alleged violations that occurred at approximately 1930 hours on August 6, 2010, at Bridge 69, at or near MP 127.6 on the New Westminster Subdivision, LS 56, at or near Surrey, British Columbia, resulting in damage to the bridge, including conduct, while you were working as Bridge Tender (BBOX0129), headquartered at White Rock, British Columbia, on duty 1500 hours." After agreed upon postponements, the investigation was conducted on September 23, 2010. Thereafter the above-noted discipline was assessed on October 18, 2010.

**Carrier's Position**

There was a fair and unbiased investigation without procedural irregularities that prejudiced the Claimant. Substantial evidence was presented to show that rules were violated. The Claimant was not looking at the bridge alignment as he had his back to the wall pushing the bypass valve and he drove the wedges without initially using the flapper; thus the wedges were not properly aligned. While the bridge was old, it had operated without problems. The resulting discipline was fair and appropriate.

### **Organization's Position**

There was no fair and impartial hearing because the Claimant was not specifically charged and because there was an initial investigation with no representation for the Claimant. Also, the transcript was of poor quality because of many inaudibles.

The Carrier has not provided substantial evidence of wrongdoing or negligence. The bridge is 60 years old and had not been properly maintained by the Carrier. It is impossible to say what caused the accident as the repairs included fixing a hydraulic leak. If the bypass switch was not intended to be used, it would have been removed or disabled. And, while the Carrier stated that the Claimant should have used the flapper, even though that is not part of the instructions, the Claimant has been faulted for using the bypass switch, which also is not part of the instructions. Furthermore, the repair included a motor that now runs at bypass speed. The Claimant's testimony that Supervisor Roper said to use his discretion with the bypass switch was not refuted and thus exonerates the Claimant. The Claimant was unable to see with certainty that the bridge was aligned.

The Claimant is an experienced, knowledgeable Bridge Tender with an exemplary record. There was no willful negligence on his part, but yet he was assessed excessive discipline.

### **Findings:**

The Carrier conducted a fair and impartial investigation. The August 10, 2010 letter directing the Claimant to attend the investigation made clear that the Carrier's concern was the accident that disabled Bridge 69. Thus Claimant and the Organization knew what was at issue and what the thrust of the investigation would be and could thus develop an appropriate response. The investigation that took place immediately following the accident, in which a statement was obtained from the Claimant, did not violate Rule 40 as it did not compromise the right to an investigation in accordance with Rule 40. Nor did the "inaudibles" in the transcript make that document unusable or even remove understanding to the point that critical elements of the incident were left in doubt.

The facts establish that Bridge 69 was old, but there is no basis for a conclusion that the age of the bridge or lack of upkeep had led to operational problems prior to August 6, 2010 that resulted in a failure to properly line up the bridge for rail traffic. And, whether or not the Claimant acted properly when he used the bypass valve, testimony does not support a conclusion that the use of the valve to speed up the bridge resulted in the damage. Claimant noted that he had used the bypass valve on earlier occasions without incident. Nor was the speed with which the bridge moved at fault given that the repaired bridge now moves at the speed that previously could be obtained by use of the bypass valve and there is no evidence of an additional problem resulting in damage.

The difference between the operation on August 6, 2010 and earlier operations was the neglect to initially use the flapper to hold the bridge in alignment once it had been aligned. The Claimant was an experienced Bridge Tender so that whether or not the flapper was listed on the instructions, he knew that the flapper could not be used to align the bridge but could be used to hold the alignment in place once that had been accomplished. The evidence supports the Board's conclusion that the initial failure to set the flapper was the operational error that led to the damaged bridge.

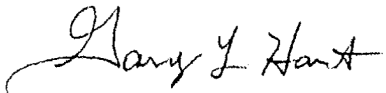
Even though the accident may not have caused as much down time and disruption as testified to by Structures Supervisor Gordon, the Board finds that the negligence and thus the rule violation fell within the meaning of "Any serious violation. . ."


**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.

  
Gary Hart, Organization Member

  
Zahn Reuther, Carrier Member

  
I. B. Helburn, Neutral Member

Austin, Texas  
November 1, 2012