

**PUBLIC LAW BOARD NO. 7564**

Case No. 101/Award No. 101  
Carrier File No. 10-19-0129  
Organization File No. C-19-D040-8  
Claimant: Stephen R. Little

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

By letter dated December 6, 2018 Foreman Stephen R. Little was assessed a Level S 30 Day Record Suspension and a one-year review period for an alleged violation of MWOR 6.3.1 Track Authorization. The January 29, 2019 claim from the Organization, Jim L. Varner, Vice General Chairman stated that the “discipline . . . without merit, excessive and unjustified . . . must be removed immediately.”

**Facts:**

By letter dated October 15, 2018 the Claimant was informed that “An investigation has been scheduled at 1000 hours, Friday, October 26, 2018, at the BNSF Railway Co., 260 E. 44<sup>th</sup> Avenue, Denver, CO 80216, for the purpose of ascertaining the facts and determining your responsibility, if any, when you were allegedly foul of the main track without proper authority on October 13, 2018 while assigned to Weekend Section in Denver, Colorado. By mutual agreement the investigation was postponed until 1200 hours on November 13, 2018 at the same location.

**Carrier Position:**

The Carrier posits that the Organization’s claim that the investigation was not fair and impartial was untimely, but nonetheless insists that the investigation met the requirements of Rule 40. The Carrier has shown that the Claimant violated MWOR 6.3.3 Visual Detection of Trains – Lone Workers/Lookouts because Foreman Little “did not have proper authority to foul the main track to perform work on the south siding switch at Hogan’s Alley” because his actions affected the movement of BNSF 8217. Moreover, the Carrier has shown that the Claimant improperly operated under lookout protection rather than authority under Track and Time or Form B in violation of MWOR 6.3.1 Track Authorization. The resulting discipline was in accordance with the Policy on Employee Performance Accountability (PEPA) so that the claim must be denied.

**Organization Position:**

The Organization contends that the investigation was not fair and impartial, that the Claimant was denied due process and that the outcome was prejudged. Furthermore, the Notice of Investigation was vague as to the location of the incident and said nothing about the movement of BNSF 8217 being disrupted. The Claimant was not charged with violating MWOR 6.3.3 and the Carrier has not shown a violation of MWOR 6.3.1.

**Findings:**

The discipline and claim arose from an incident on October 13, 2018 when gang TSEC0321 consisting of Foreman Little, Truck Driver Rick Darrow and Laborer Stephen L. Carrouth were assigned to inspect and repair a switch that was impeding the movement of a work train out of siding at South Hogan's Alley. Following the investigation, the Claimant was the only member of the gang disciplined because neither Mr. Darrow nor Mr. Carrouth had touched the switch.

The Board finds that the investigation was fair and impartial and that there was no denial of due process. Nor was there evidence of prejudgment, particularly when two of the three gang members were not disciplined. The Notice of Investigation was not a model of specificity, but there is no indication that the Claimant and his representative were confused about the incident under investigation. Therefore, the Board does not find that the Notice prejudged the Claimant.

The Carrier has the right to decide if an investigation is necessary, to conduct the investigation, to decide which, if any, rules and regulations have been violated and to impose discipline. While the Carrier can make these decisions, it must live with its conclusions and if challenged by the claims/appeal process, justify actions taken. The Notice of Discipline issued to the Claimant states that he violated only MWOR 6.3.1 Track Authorization. MWOR 6.3.3 Visual Detection of Trains – Lone Workers/Lookouts is not shown as a basis for the Level S Record Suspension. The Board will not consider and cannot find that the claimant violated a rule which is not shown as a basis for the imposed discipline.

When Assistant Roadmaster David Dunn entered MWOR 6.3.1 as Exhibit 5A during the investigation, he highlighted Section B. The first sentence of Section B states that "The employee in charge must ensure that equipment and employees do not occupy or foul the track until authority is received." The Carrier now contends that because the use of visual detection impeded BNSF 8217, the Claimant had not received authority. However, because the Carrier did not charge the Claimant with a violation of MWOR 6.3.3 it cannot properly or convincingly argue that the rule was violated. The Board can only conclude that the Claimant worked under proper authority.

It is further noted that the gang worked for almost two (2) hours with the Claimant as the lookout and no problems were encountered. When the Claimant attempted to throw the switch that would allow the work train to proceed out of the siding, resulting in BNSF 8217 having to halt, he did so because of a good faith miscommunication between himself and the Dispatcher. While the Dispatcher intended to indicate that the switch should be lined for main line travel, the gang was called out because the switch was impeding work train movement. The Claimant interpreted the conversation as authority to line the switch so that the work train could leave the

siding. The confusion was unfortunate, but perfectly understandable. There is no basis for concluding that the Claimant violated MWOR 6.3.1. The discipline cannot stand and must be removed from the Claimant's records.

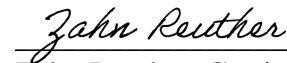
**Award:**

Claim sustained.

**Order:**

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be entered. The Carrier is to make the award effective on or before thirty (30) days after the award is adopted.

  
Zachary C. Voegel, Organization Member

  
Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas  
Date: July 30, 2020