

**SPECIAL BOARD OF ADJUSTMENT NO. 7564**

Case No.: 31/Award No.: 31  
Carrier File No.: 10-13-0011  
Organization File No.: C-13-D040-2  
Claimants: Jeremy A. Kruskie  
Charles L. Klutts

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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 9, 2012 Claimant Jeremy A. Kruskie was issued a Level S thirty (30) day record suspension and one (1) year review period for violation of MOWOR 6.50 Movement of On-Track Equipment.

The Carrier also violated the Agreement when on October 9, 2012 Claimant Charles L. Klutts was issued a Formal Reprimand and a one (1) year review period for violation of MOWOR 1.1.2 Alert & Attentive.

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

**Facts:**

By letter dated September 4, 2012 the Claimants were directed to attend an investigation on September 12, 2012 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert & attentive and check switch position while traveling Stabilizer, BNX 8600050, in a safe manner from main track 2 to main track 1, causing the stabilizer to derail at/or near cross over 95.5, main track 2, at approximately 1600 hours on August 29, 2012, while assigned as Machine Operator and Foreman on gang TUCX0001 temporarily headquartered in Douglas, Wyoming."

**Carrier Position:**

The investigation was fair and impartial as both Claimants were present throughout, allowed to examine all evidence, question witnesses, provide testimony and make closing statements. There was no showing that the conduct of the investigation

prejudiced the Claimants or that they were prejudged. There is precedent for admitting the statement of Mr. Daniels and the photographs taken by Supervisor Newton without their testimony. The Organization did not provide contradictory evidence. The Carrier has met the burden of providing substantial proof. A large piece of ballast prevented the switch from lining and locking. Neither Claimant looked closely enough to determine that this was the case. Had they followed the Operating Rules, there would have been no derailment. Both assumed that the Dispatcher had lined and locked the switch, but neither Claimant walked the switch to verify this. Claimant Kruskie acknowledged that the ultimate responsibility for ensuring that the switch was lined and locked was his and admitted that he failed to stop within half-range vision as required. Claimant Klutts admitted that he was responsible for verifying that the switches were lined and locked and that he had not walked the switches to verify this. He did not inspect after the derailment. The Organization has provided no context for the contention that a worn out or defective switch was at fault, but tried to make the Dispatcher a scapegoat. In view of the evidence, the Organization is asking for leniency, but that is the prerogative of the Carrier rather than the Board. If the award were to favor the Claimants, the appropriate order is simply the removal of the discipline from the Claimants' personnel records since neither lost wages because of the discipline.

**Organization Position:**

The investigation was not fair and impartial because the Conducting Officer was intent on twisting the testimony in order to prove guilt, because the Conducting Officer submitted evidence and asked leading questions, because the Conducting Officer gave her own opinion of actions and admitted the statement of Mr. Daniels and the photographs of Supervisor Newton although the two could not be cross examined and because in the final analysis, the investigation was a required formality before the issuance of a preconceived judgment. Clearly the Stabilizer derailed, but cause has not been established. The photographs were taken after the derailment and do not prove conditions that existed at the time. Roadmaster McCoy had no first-hand knowledge of the derailment, making his testimony speculative. A failing switch machine that needed replacement could have been a factor. Claimant Klutts owned the track at 15:51 so that thereafter the Dispatcher should not have tried to lock the switch and should have told the unsuspecting Claimant Klutts that the switch would not lock. Furthermore, Claimant Klutts did not supervise Claimant Kruskie at the time of the derailment and did not operate the Stabilizer. Claimant Klutts was alert and attentive in copying Time and Track Authority. Claimant Kruskie complied with all rules by stopping and verifying that the switch points were lined even after Assistant Foreman Arnold confirmed that this was so. Claimant Kruskie was honest in his written statement and testimony. Both Claimants were in compliance with all relevant rules.

**Findings:**

The investigation was fair and impartial as nothing the Conducting Officer did prejudice the Claimants. There is precedent for including exhibits without testimony; thus the statement of Mr. Daniels and the photographs of Supervisor Newton are properly

a part of the investigation. Furthermore, having reviewed the contents of the statement and the information that the photographs were taken at some point after the derailment and therefore do not establish the conditions at the time of the derailment, neither exhibit is viewed as advancing the Carrier's case.

In fact, the case fails because of a glaring technicality, making it unnecessary to consider the testimony and exhibits that comprise the record of investigation. It is the Carrier's prerogative and responsibility to decide when an investigation is necessary, to conduct a fair and impartial investigation after informing the employee specifically why the investigation is being held, although the Notice of Investigation need not include the specific rule(s) alleged to have been violated. Following the investigation, the Carrier has the prerogative of deciding if the evidence warrants discipline. If discipline is assessed, the notice of said discipline must be specific as to the rule(s) supposedly violated. Assuming the discipline is appealed and the appeal is not resolved, the Carrier must prove to a Board with substantial evidence adduced at the investigation that the discipline was warranted.

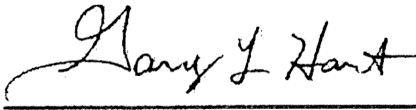
In order to assure itself that discipline was warranted, the Board must know precisely the rules alleged to have been violated. Without having the rules as specific standards of conduct against which the Claimants must be measured, analysis of the transcript and exhibits is simply guesswork. Claimant Klutts was disciplined for violating MOWOR 1.1.2 Alert and Attentive, but the Board does not have before it the precise standard to be applied. Claimant Kruskie was said not to have been alert and attentive, but the notice of discipline referred only to MOWOR 6.50 Movement of On-Track Equipment. Neither of these rules were included as exhibits entered by the Carrier or read into the record by Roadmaster McCoy, the Carrier's sole witness. The Board will not assume that the rules were violated without having the precise standards to which the Claimants supposedly were held. For this reason alone, irrespective of the testimony and exhibits, the Carrier has failed to show by substantial evidence that the Claimants were deserving of discipline.

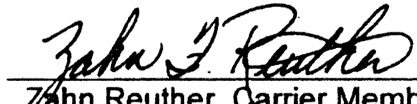
**Award:**

Claim sustained.

**Order:**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to Claimant Kruskie be made and that the Level S thirty (30) day record suspension and one (1) year review period for violation of MOWOR 6.50 Movement of On-Track Equipment be expunged from his personnel records. The Board further orders that an award favorable to Claimant Klutts be entered and that the Formal Reprimand and a one (1) year review period for violation of MOWOR 1.1.2 Alert & Attentive be expunged from his personnel records. The Carrier is to make these awards effective on or before thirty (30) days following the date the awards are adopted.

  
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Gary Hart, Organization Member

  
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Zahn Reuther, Carrier Member



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I. B. Helburn, Neutral Referee

Austin, Texas  
February 12, 2014