

**PUBLIC LAW BOARD NO. 7585**

**Case No. /Award No. 104  
Carrier File No.: 11-20-0363  
Organization File No.: S-P-2351-F  
Claimant: S. Baroch**

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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:**

The Organization alleges BNSF violated the Agreement when Claimant was issued a Level S, 30- day record suspension and a three-year review period as a result of a formal investigation held on February 19, 2020, for Claimant's violation of MWOR 15.2 "Protection by Track Bulletin Form B" for his entering of Form B limits without contacting the EIC in charge of Form B, and with no job safety briefing or authority to do so, while operating a pup tamper (BNX 56-00237) at approximately 1430 hours on February 5, 2020 at MP 1264 on the Kootenai River Subdivision.

**CARRIER POSITION:**

On February 5, 2020, Claimant was assigned to run a pup tamper from Wolf Prairie, MT to Whitefish, MT. As part of his assignment, he would be piloted by employee B. Vandenberg through D. Hanks' Form B, covering the Main Track and Siding from MP 1262.5 through MP 1264.7.2. Claimant and Vandenberg briefed with Hanks, the Employee in Charge (EIC), and were allowed to enter the Form B. At some point, Claimant moved the tamper out of the Form B, and then re-entered the Form B without briefing or receiving permission from EIC Hanks.

The Carrier maintains this constituted a violation of Maintenance of Way Operating Rule 15.2, which reads in pertinent part: "D. Entering Within Limits Before entering the track governed by the track bulletin Form B from any location other than at the beginning of the Form B limits, obtain permission from the employee in charge."

## **ORGANIZATION POSITION:**

The Organization contends Claimant followed the directives of the employees the Carrier designated as his pilot and his employee in charge. Designated employees directed Claimant in all movements of the pup tamper and granted him all necessary authority. Whether the pilot and/or the employee in charge, had properly acquired necessary authority is a separate question.

Charged co-worker Vandenberg was determined by the Carrier to have greater responsibility for the alleged charges than did Claimant, and was withheld from service pending the investigation. The Carrier views this as evidence of the Carrier's predetermination of guilt and responsibility. Prior to initiation of the charges, the Carrier had determined that the unidentified track foreman to whom the Form B had been issued should be absolved of any and all possible wrongdoing. That is additional evidence of the Carrier's predetermination of both fact and responsibility.

The Organization references page 16 of the Investigation Transcript:

Casey Wright: Uh specifically, what was Mr. Vandenberg's responsibility in this investigation?

Corey McReynolds: He was piloting the Pup Tamper; he was getting the track and time protection for Mr. Baroch to travel the Pup Tamper.

Casey Wright: And Mr. McReynolds, would it be Mr. Vandenberg's responsibility to contact the employee in charge of the Form B?

Corey McReynolds: Yes.

There was a radio briefing between Pilot/Truck Driver Vandenberg and Foreman Hanks regarding this matter, yet it was not made a matter of record by the Carrier, even though such main line conversations are taped (Tr. Page 32, Line 12). In fact, while investigating the incident, Roadmaster McReynolds admitted he had not even listened to any radio conversations. In the Organization's view, the content of a taped job briefing conducted over the radio between the two major participants would be critical and essential evidence.

The Organization notes there was no red flag placed on the industry track to restrict entry into the Form B, as would be required by Carrier rule. Further, at no time was Claimant informed by Pilot/Truck Driver Vandenberg that Track Foreman Hanks had cleared them from his Form B authority. There was no such advisement when they entered the industrial track to allow for the passage of a train on the siding track at Twin Meadows. The Pilot/Truck Driver could not have

funneled such information to Claimant because he was never advised that Hanks “cleared” them of his Form B.

Confusion apparently reigned. When questioned by the Hearing Officer “Now if you were cleared off of that multiple group list, would you be allowed to come back out, or would you need to reestablish uh a briefing with the employee in charge?” (TR 36) Witness Dimmit responded: “Honestly, I’m not too sure.” Claimant’s representative asked Witness Faeh: “Did you do you ever feel like if you’re called within the Form B past the red flag and you are within the Form B, then you’ve already briefed and got permission to work as Maintenance of Way Employees with that Form B?” Faeh replied: “I can’t really comment on that. It just depends on the circumstances.”

Claimant was asked several times by the Hearing Officer whether he and co-worker Vandenberg believed they remained on the Form B. Claimant repeated several times in the affirmative. Co-worker Vandenberg entered a written statement into the record stating: “I was under the impression that I already had permission from Mr. Hanks, so I didn’t think I needed to get permission the second time after the westbound train. This is the truth, and I thought that I had done everything correctly. I honestly wasn’t aware that I was supposed to get additional permission.”

The Hearing Officer asked Vandenberg: “...did it ever occur that you would need to contact the employee in charge of the Form B for further authorization?” Vandenberg responded: “No, it did not occur to me that I needed to uh get permission the second time from Mr. Hanks. I assumed or presumed that getting permission the first time from the Wolf Prairie section house was sufficient. As I said earlier when we got sidetracked and had to clear for a train is where the confusion got uh came in.” (TR 79).

As the Organization sees it, Claimant and Vandenberg obtained permission to pass the restrictive red flag and enter the Form B limits. No other red flag was displayed obstructing or limiting the movement of the on-track tamper. No red flag was placed to preclude or restrict entry onto the siding track from the industry track. In their on-track movement with the tamper, Claimant and Vandenberg never passed a green track flag indicating they had reached the limits of or passed from the restrictive Form B order when placing the tamper onto the industry track. The Organization concludes that Claimant cannot be found guilty of any wrongdoing.

## **DECISION:**

There were good reasons for the employees involved in this incident to have been confused about the requirements on re-entering Hanks’ Form B. The

industry spur had no track flags to preclude entry into or designate passage from the Form B. Claimant had no way of knowing he had been cleared of the Form B. No one told him. There was no indication whatsoever.

Without doubt, there was much confusion contributing to this incident. At hearing, it was clear that the situation was, at best, ambiguous to several employees. It is in this context that we review the Organization's assertion that the Carrier's failure to provide the taped briefing constituted a denial of due process. We must find this argument persuasive. The Carrier's obligation was to provide a fair and impartial hearing. Without evidence of communications, the fact finder cannot get a clear picture of what happened, what communications took place and what Claimant's reasonable expectations were. In view of Claimant's limited, if not non-existent, role regarding the Form B on the day in question, the recording of the briefing, in the possession of the Carrier, became a critical piece of the puzzle. Yet the Carrier failed to include it in the investigation. As a result, Claimant was prejudiced by the lack of relevant evidence.

The Organization has also protested that Claimant was denied compensation for the day of his investigation, resulting in a *de facto*, actual one-day suspension. We find this argument persuasive.

#### **AWARD:**

The claim is sustained in full. Claimant shall be compensated eight hours pay for his February 19, 2020 hearing at his rate at that point in time. In addition, the Carrier shall immediately remove the contested 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.

#### **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: December 15, 2021



Patricia T. Bittel, Neutral Member

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**Zachary Voegel, Labor Member**

A handwritten signature in blue ink, appearing to read 'James Rhodes', with a stylized, cursive script.

**James Rhodes, Carrier Member**