

PUBLIC LAW BOARD NO. 7585

**Case No. 50/Award No. 50
Carrier File No.: 11-14-0114
Organization File No.: B-M-2729-E
Claimant: Ronald J. Pogany**

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION - IBT)

FACTS:

The Carrier alleges that Claimant Ronald J. Pogany exceeded the limits of track authority 242-70 between WBCS Cut Bank West switch yes and EBCS Cut Bank West switch yes at MP 1091 near Cut Bank MT while assigned as Machine Operator on Gang UC04, working the Hi Line subdivision.

On November 25, 2013, Claimant was assessed a Level S 30-day Record Suspension with a 3-year review period for this incident. The rules alleged to have been violated are MOWOR 6.3.1 – Main Track Authorization, MOWOR 10.0 – Rules Applicable Only in Centralized Traffic Control and EI 23.1.2 – Foreman's Roles, Responsibilities and Expectations.

CARRIER POSITION:

Structure Supervisor Bryon Gibson testified that he was with Bridge Inspector Jason Luse on October 14 when they saw an Undercutter Lead Machine coming into their 243-84 authority, headed right at them. At the time Gibson and Jason Luse were walking down the main track inspecting ties on the Cut Bank Bridge. They stepped off the track as the machine went by at about five miles an hour. They tried to radio the operator, without response. Shortly thereafter, the machine went by again in the other direction. When Foreman Gill advised that the group was on channel 45, Gibson was able to contact the operator and asked what his authority was. According to Gibson, the response was confusing. Gibson received a subsequent call confirming that the group had joint authority. This contact was made at 1507, after the machine had passed twice.

Surfacing Gang Foreman Gerald Gill testified he was in charge of getting track and time. He stated there was miscommunication on the radio and he learned of the problem when he was asked for his track and time authorization. He said he got authority 242-70 at 1447. The limits were on the main track between the westbound

control signal Cut Bank West Switch yes and the eastbound control signal Cut Bank West Switch yes. The authority was joint with the work train until 1515. Then at 1452, authority 243-85 was granted between eastbound control signal Cut Bank West Switch no and eastbound control signal Cut Bank West Switch no. Those limits were joint with Luse. Joint limits require a briefing and Gill said his briefing with employees between Cut Bank West and Cut Bank Center occurred at 1507. After the briefing, he notified his gang that they could enter authority 243-85.

Gill claimed he briefed with his surfacing gang, stating he gave them track authority over the radio and received a repeat from the trailing Spiker, Alex Pepos. "I did not have a direct conversation with the track and time limits with Mr. Pocany. I'm assuming he heard the conver- the limits copied over the radio." (TR 67). Claimant Pogany was the lead machine operator at the time. According to Gill, it was Pogany's responsibility to repeat back the authority. If an operator does not understand the limits of authority, he should ask a question, Gill said. He admitted that when Pepos wrongly repeated back the information, he did not catch it. "I did not get a verbally transmitted copy acknowledge from each and every one of the gang members," he said. (TR 73). None of the gang had questions after he radioed the authority. Pogany did not repeat back the authority, nor did he raise questions.

ORGANIZATION POSITION:

Pepos testified that after Gill gave the authority over the radio, he gave a good copy back but no one else did. According to Pepos, Gill read it too fast, and he had to ask him to repeat. Pepos said he repeated the authority back to Gill and received confirmation of a good repeat. The surface gang traveled all the way through and parked outside their limits before Claimant proceeded. He admitted it is the employee's responsibility to understand his authority and to ask questions about it. However, in his view, once authority is established and confirmed there is no reason to ask questions.

Claimant Pogany testified that his gang was working west of the Cut Bank Bridge that day, and had to wait for the surface gang to get authority to return to the hole. They got "the same authority that we were supposed to have," he said. (TR 101). The surface gang crossed the bridge and headed back. Claimant waited and once the authority was given and repeated by Pepos, he proceeded at walking speed but saw personnel, was stopped and told to back up. He said it was done this way because "Alex Pepos was normally the lead machine and he always repeated it back. Nobody ever questioned it." (TR 102). There was a lot of confusion all day long, he said. "The limits that we were given was the limits that Mr. Pepos wrote down, which was westbound control signal Cut Bank West Switch yes and eastbound control signal Cut Bank East Switch yes." (TR 107). Pepos wrote them down incorrectly but Claimant thought they were correct because there was confirmation of a good repeat.

Claimant admitted he did not repeat the authority or ask questions. As foreman, Gill was responsible for copying the authority and briefing the gang. However, according to Claimant, Gill never briefs with individual members of the gang. Claimant said he did copy down the authority and confirmed it by listening to the repeat. He had no reason to

doubt the authority repeated by Pepos and okayed by Gill. Claimant said he was not aware that the authority was joint.

Warren Windyboy testified that he heard Gill give the authority over the radio and it did not sound like he was having trouble. He did not hear the first part, but heard Pepos reading it back and Gill said he had a good repeat.

Sectionman Mark Gipson said he pilots the undercutter. Pepos read back the authority and Gill said it was a good repeat. Gill got his authority using his cell phone and not the radio, so the gang did not have a chance to hear the authority as it was given by the dispatcher. He recalled that the switch network and CTC coverage were not covered during the morning briefing even though it was the first day working in this location.

UC04 Tie Crane Operator Chris Deyle said the authority was read back incorrectly by Pepos and Gill responded that it was a good repeat. After that he thought the limits were as repeated by Pepos. He then said he was not sure afterwards and raised a question, but Gill had already moved to another channel and he got no answer. He said they got fourteen authorities to go two miles from four different dispatchers that day.

DECISION:

The investigation in the instant matter was originally scheduled for October 25, 2013. On October 23, 2013 Vice General Chairman Shawn Elleslad sent the Carrier an email requesting that certain witnesses be present for the October 25 hearing. This email stated: "Please inform me to any changes made in the notice issued and I will plan accordingly." The parties convened on October 25, but the requested witnesses were not present and the hearing was postponed until October 30.

Rule 40 states as follows in pertinent part:

- A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such an investigation shall be set to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this Rule.

The Organization claims breach of the fifteen day limitation. The Board does not agree. The initial hearing was set within the Rule 40 time constraints and was postponed to accommodate the Organization's request. There was no objection at that time to the rescheduling. In the opinion of the Board, the rule only requires that the investigation "be set"; the language of the rule does not require that the hearing be completed within the fifteen day limitation. It follows that no breach of Rule 40 has occurred.

The Organization protests that the Carrier failed to identify its witnesses, thereby creating a barrier to its ability to construct a defense. There is no contractual

requirement for witness identification prior to an investigation. The Board finds no denial of due process in this regard.

At the time of the incident, the consist was in a reverse move. Pepos was in what had been the lead Spiker, but was now the trailing machine. Gill, who bore prime responsibility for communication and implementation of the authority, relied on Alex Pepos to repeat the authority instead of Claimant. Even though Claimant was in the lead, Gill did not seek confirmation from him. Pepos read an incorrect authority into the transcript and Gill confirmed that it was a "good repeat." Claimant followed the authority as confirmed and exceeded his limits.

Though each and every employee in the consist is responsible for assuring that (s)he is operating within applicable limits, Claimant did this. Once the authority was repeated and confirmed, he not only had the right to rely on that authority, he bore responsibility to strictly abide by its limits. He could not reasonably be expected to ask questions when he had just written down the authority, then heard it confirmed as entirely accurate. The Carrier in this case is correct that best practices would call for Gill to seek repetition of the authority from Claimant before moving. The Board sees this as the foreman's function. More importantly, however, employees cannot be disciplined for failure to execute best practices; they can only be disciplined for rules violations. Claimant was not derelict in his duties, and as such, he was not properly subject to discipline.

AWARD:

The claim is sustained in full. The Carrier shall immediately remove the 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.

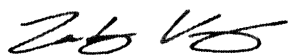
ORDER:

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.

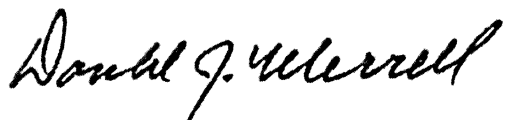
July 15, 2015

A handwritten signature in cursive script, reading "Patricia T. Bittel".

Patricia T. Bittel, Neutral Member



Zachary Voegel, Labor Member



D. J. Merrell, Carrier Member