

**PUBLIC LAW BOARD NO. 7585**

**Case No. 9/Award No. 9  
Carrier File No.: 11-12-0010  
Organization File No.: S-P-1614-C  
Claimant: M. Holland**

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**BNSF RAILWAY COMPANY** )  
**(former Burlington Northern Railroad Company)** )  
 )  
-and- )  
 )  
**BROTHERHOOD OF MAINTENANCE** )  
**OF WAY EMPLOYES DIVISION - IBT** )  
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**FACTS:**

On Aug. 3, 2011, James Jacobson was Employee In Charge with track authority which included switch 1425 East at milepost 90.3 on the Yakima Valley Sub. Claimant Michael Holland was working under his warrant when he threw a switch to unload a truck and forgot to return it to the normal position. He did not indicate this in the paperwork he filed. The next day Conductor Aaron Thompson ran his train over it, stopped and closed the switch and called Jacobson to let him know the switch had been left open. Jacobson did not report the incident and things remained quiet until 1600-0700 on Aug.8 when Manager of Maintenance Planning Paul J. Farley, Sr. received an email from General Director Line Maintenance Michael Theret regarding an anonymous phone call reporting the incident. At that point, Farley began asking questions and interviewed Holland without offering Union representation. Holland admitted to Farley that he had operated the main line switch without returning it to the normal position. Claimant Holland was dismissed. At the time of his dismissal, he was a 16-year employee with no discipline of record.

**CARRIER POSITION:**

The investigation fell within the 15-day contractual limit of Farley being on notice of a potential infraction. None of the alleged procedural flaws in the case resulted in any prejudice to Holland's case. Holland's error was of such potentially devastating and deadly consequences that dismissal was warranted. In January of 2005, an open main track switch in South Carolina led to nine deaths, the release of 60 tons of poisonous gas, 250 people being treated for chlorine exposure and the evacuation of 5,400 residents. In the Carrier's view, the seriousness of the matter cannot be overstated.

## **ORGANIZATION POSITION:**

The statement of the Conductor is clearly dated Aug. 4, 2011, meaning management was on notice of the open switch since that date. As a result the investigation was untimely and under Rule 40.J of the collective bargaining agreement "the charges against the employee shall be considered as having been dismissed."

The Organization further maintains a fair and impartial investigation has been denied since management undertook to investigate the case prior to the scheduled investigatory hearing, and interviewed the employee without offering representation.

Claimant Holland has been entirely honest and forthright at every turn, and has a discipline-free record of no less than 16 years. In its view, none of these important factors has received adequate consideration. The discipline is grossly excessive.

## **DECISION:**

Conductor Thompson's statement is dated Aug. 4, 2011. However, there is no evidence that management had it in hand until Aug. 8 when Farley met with the conductor and interviewed him. He testified that this was when he received the statement. When Farley spoke with Angelos on August 8, Angelos had already spoken with the train crew, indicating he was already aware of the switch issue. Nothing more is in the record; so Angelos could have spoken with the train crew on Aug. 7. Theret's email was extremely early on the morning of Aug. 8, leading to the likelihood that whatever communication Theret received was received the day before. There is nothing in the record to indicate that an official of BNSF was on notice of the open switch until Aug. 7. This would give management until Aug. 22 to conduct the investigatory hearing.

It is troubling that there is information missing from the record. It is quite possible that management knew about the situation prior to Aug. 7. Clearly there was a path of information going to and through Theret that is not recorded in terms of time. We don't know when Angelos spoke to the train crew. Conductor Thompson was not asked when he wrote his statement or who he gave it to. Since there is no clear record of exactly when an official of BNSF was on notice of the violation, there is no proof that management knew of the violation before Aug. 7. Hence, the Arbitrator lacks an adequate factual basis on which to find a timeliness problem.

It is clear from the record that management interviewed Holland prior to the investigatory hearing without offering representation. However, there is no indication that Holland was prejudiced by this. He was honest during the interview and again during the hearing. A representative would hardly counsel him to do otherwise. The facts surfaced prior to the hearing did not change.

The Organization protests that Claimant Holland cannot be disciplined for violation of MOWOR 1.6 because it was not cited during the hearing. The Carrier notes that General Manager Robert Johnson stated in his November 15, 2011 letter that Rule 1.6 prohibiting carelessness and negligence was breached. This argument misses the

point. Holland has acknowledged violating MOWOR 8.2 and 8.3 regarding handling switches. By not following the rules, he has by definition been careless and negligent, but his actions are neither aggravated nor altered in any way by citing Rule 1.6.

The crux of the matter is the tension between the stellar honesty and discipline-free record of this employee and the serious risk posed by having a switch left open. Claimant Holland admits leaving the switch open and failing to report on his paperwork that the switch was left open. The Organization did not and could not argue that an open switch was minor in nature. It did point out that no actual harm occurred.

The problem management has is that it cannot accept risks of this nature. The Carrier was not unreasonable in its determination that open switches constitute an extreme safety hazard. As valuable an employee as Claimant Holland clearly is, the Carrier was within its rights to view his offense as extremely serious in nature.

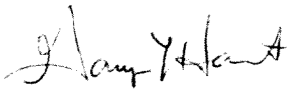
**AWARD:**

The claim is denied.

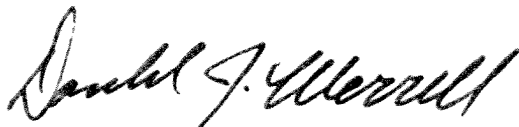
March 18; Cleveland, Ohio



Patricia T. Bittel, Neutral Member



Gary Hart, Labor Member  
March 20, 2013



D. J. Merrell, Carrier Member