

**BNSF Railway (Former Burlington Northern Railway)**  
- and -  
**Brotherhood of Maintenance of Way Employees**

Public Law Board No. 7585  
Case No. 17  
Award No. 17  
Carrier File No. 11-12-0041  
Organization File No. B-M-2458-M  
Claimants: Jerry Walls and Jerald Smart

**FACTS:**

On June 13, 2011, a ballast work train came into Great Falls where the Great Falls and Hi Line Subdivisions come together at Shelby, Montana. A surfacing train gang followed them in. Jerry Walls was operating the third machine in the lineup, and Jerald Smart brought up the rear with the Tamper. Both employees had been instructed to follow the rock train onto Track 3. They were following the rock train when they were surprised by a radio call advising that they were outside their limits. Both employees were given Level S 30-day record suspensions with three-year review periods.

**CARRIER POSITION:**

The Carrier asserts there is no evidence in the transcript of partiality or unfairness in the hearing. It denies that essential witnesses were missing because eyewitnesses were there. There is no right of discovery, it maintains, so introduction of documents at the investigation breaches no duty.

It notes that both Walls and Smart occupied Main 2 in Shelby without authorization; they followed the rock train onto the wrong track. Occupying track without authority can have deadly consequences, it notes. In the Carrier's view, this constitutes violation of MOWORs 1.1, 1.3, 1.3.2, 11.4, 11.5, 6.3.1, 8.12 and 8.12.1. It points out that none of the Claimants even inquired when they went a way they had not gone before.

**ORGANIZATION POSITION:**

The Organization makes a number of arguments in this case, both procedural and substantive.

It contends the hearing was anything but impartial and fair, noting the Hearing Officer attempted to give testimony and prejudged the case. In addition, the Organization maintains significant witnesses with important information were not called and the Carrier entered rules that have nothing to do with the charges. It asserts the Notice of Investigation failed to identify the charges being made, the Hearing Officer relied on hearsay testimony, the Union was not afforded time to review documents and information before the hearing and the decision was not rendered by the Conducting

Officer but by someone who did not hear any of the testimony. The Organization concludes that the compilation of procedural problems in the case adds up to a breach of Rule 40.

The Organization goes on to point out that the train crew was responsible for maintaining track authority. The employees in question were directed to follow the rock train to Track 3. It notes that at the time of the diversion, Track 3 was blocked and Assistant Foreman Terrence Highland told them to follow the train. They had previously been advised to follow the rock train to Track 3 and the route taken by the rock train did lead to Track 3, though not directly. The train crew was not made available at hearing, nor was the person who realigned the switch. Gang Foreman Jim Quinn and Employ-in-Charge Willy Stubbs were also absent at the time of investigation. Stubbs was the individual who provided the Form B protection. The charged employees were never told they would not go onto Track 3, but were told they would follow the rock train there; they were never told not to follow the train. The Organization concludes there can be no rules violation under these circumstances.

#### **DECISION:**

The Carrier is correct in its assertion that the parties have not negotiated a discovery process into their agreement. Instead, they have jointly accepted that where the Organization is surprised by unexpected evidence and needs time for additional preparation prior to the investigatory hearing, postponement and delay may be the result. In this case, there was no unfairness since there was no prejudicial denial of a request by the Organization for postponement. It follows that by continuing the hearing, the Organization waived any objection it may have had on this basis.

The Organization argued that the Hearing Officer attempted to testify, and made statements supportive of the Carrier's position in the case. Even if true, none of these flaws was prejudicial to the Organization's case because the facts of the case are largely uncontested.

The Organization is correct in pointing out that persons with important information in the case were not present for the investigation. However, no prejudice has been demonstrated by the Organization due to this lapse. It does not matter who realigned the switch; the important thing is that it was left that way when the charged employees entered the Hi Line. The evidence demonstrates that the train crew breached their authority and the charged employees simply were following that train. This evidence operates in favor of Claimants' position, and therefore Claimants are not harmed by the lack of confirmation of these facts by the train crew.

Rule 40(C) states "The notice must specify the charges for which investigation is being held." The Notice of Investigation stated as follows:

Arrange to attend investigation at 0900 hours, Friday, June 24, 2011, at the Roadmaster's Office, 230 W. Central Avenue, Shelby, MT, 59474, for

the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly protect yourself by occupying main track without authority at MP 1066.5 Shelby, MT approximately 1845 hours on Monday, June 13, 2011 while assigned to TC01 System Gang working on the Great Falls Subdivision.

This Notice made it clear what the subject of the investigation was. It follows that the Carrier was in compliance with Rule 40 in terms of the Notice of Investigation.

As to the allegation of reliance on hearsay testimony, the testimony being referenced by the Organization was Production Gang Roadmaster Andrew Jillard's testimony that he asked Trainmaster Greg Peters whether they had been given a different location to tie up and Peters responded no. This exchange was actually confirmed by the Union Representative, who stated that he found out from the trainmaster that they were supposed to go directly onto Track 3. Since the testimony does not damage the Organization's case, reliance on it cannot be deemed harmful error.

The Organization maintains the Carrier entered into evidence rules that have nothing to do with the case. The Board agrees, for example, that the record does not support discipline under MOWOR 8.1 Hand-Operated Crossover Switches. However, the offense of occupying track without authorization is sufficiently serious that if proven without mitigation, the violation would support the discipline taken. As a result, no prejudice can be attributed to this error.

The Organization has pointed out that the Hearing Officer was not the individual who rendered the decision in the case. In the opinion of this Board, this is a crucial point where credibility determinations sway the decision. In such cases, it is essential for the decision maker to carefully evaluate the testimony, taking witness demeanor into consideration. However, in this case, there is no such credibility decision to be made. The facts are largely uncontested. As a result, there is no prejudice from the fact that someone other than the Hearing Officer rendered the decision in the case.

Turning to the facts of the case, it has been shown that the employees in question did in fact follow the rock train outside their authority. However, there are several critical mitigating circumstances in the case. First, the employees were given a compound instruction: follow the train -- onto Track 3. It was clearly impossible to continue following the train and to simultaneously go directly onto Track 3.

The Union argues both that the employees were unfamiliar with the area so they would not have remembered how they traveled in before, and alternatively that Track 3 can be accessed further down from the Hi Line. So either way, the employees had no way to know they were being steered down the wrong track. It was the Hearing Officer who first pointed out that Highfield was acting as a flagger to direct the equipment onto the proper tracks. Union witness James Snead, the Ag/Scrap Crane Operator, later testified that Highfield was "hollering at me to come in, go in clear." He said he assumed

Highfield had the authority. This uncontroverted testimony establishes that the charged employees were being misdirected by a person they should have been able to trust.

The most significant mitigating circumstances is that the switch had been realigned to permit passage onto the Hi Line. This is an action for which the employees here concerned cannot and should not be held responsible. But for that very serious mistake, this case would never have arisen.

The facts of this case show that there were a number of very significant mitigating circumstances which the Carrier failed to take into consideration. A Level S 30-day Record Suspension with a Three-year review period is a heavy penalty and should be reserved for cases where the rules violation is profound. Claimants in this case were put into an unpredicted and difficult situation and were following orders to the extent that they had been ordered to follow the rock train. It cannot be said that the Claimants were fault free; they occupied track for which they had no authority. At the end of the day, any employee operating equipment on a track must retain some level of responsibility for the fact that he is there. However, the Carrier has leveled a penalty which is quite out of proportion to the actions of the employees in this case.

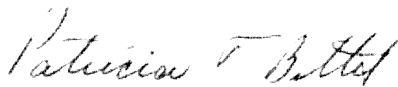
**AWARD:**

The claim is sustained in part. The record suspensions shall be revoked and replaced with formal reprimands and 12-month review period.

**ORDER:**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

August 30, 2013; Cleveland, Ohio



Patricia T. Bittel, Neutral Member



Gary Hart, Organization Member

  
D. J. Merrell, Carrier Member