

BEFORE
PUBLIC LAW BOARD NO. 7499
CASE NO. 1

BROTHERHOOD OF RAILROAD SIGNALMEN)	
(Organization File No. 10-021-BNSF-172-AZ))	
)	PARTIES TO THE
vs.)	DISPUTE
)	
BNSF RAILWAY COMPANY)	
(BNSF File No. 35-10-0017))	

STATEMENT OF CLAIM: The Organization requests that discipline given to Signal Foremen Randall Meiwes and Keans Attakai and Signalmen Dwayne Joe and Robert Hildebrand (30 Day record suspensions with a 1 year review period), for allegedly being foul of track without proper authority on January 7, 2010, be stricken from their records.

FINDINGS:

The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated June 22, 2011, that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

After a thorough review of the record, the Board concludes that the issue in this case is whether or not the charged individuals were guilty of being foul of the track, as charged, and if so, whether the discipline assessed was appropriate in all of the circumstances.

On the day in question, the evidence shows that 4 supervisors (Denver Gilliam, who was not called to give evidence, and Dale Johnson, Walter Arend, Steve Marino, who were called to give evidence) were hy-railing on the Phoenix subdivision. When they were approximately 100 yards away from a signal work site, they stopped the hy-rail and observed that 4 men were apparently, in the opinion of the supervisors, within 4 feet of the nearest rail, and therefore foul of the track. One supervisor said that some of the employees were straddling one rail. All other supervisors said that the employees were off the track but within 4 feet of it. None of the supervisors, by their own testimony, were able to identify any of the people allegedly foul of the track (with the possible exception of one supervisor, Mr. Marino, who said that he could recognize the Foremen from working with them in the past). Mr. Marino also thought there were 5 employees foul of the track, not 4 as testified by the other supervisors. Some supervisors said that 2 people foul of the track wore white hardhats and 2 wore orange. Another supervisor said that he could not tell the color from that distance. One supervisor said the employees were facing away from the track. Another said they were facing away from the hy-rail. The third said they were facing

toward the hy-rail. As they approached the workers, no one was then foul of the track. In fact, there were at least 10 people then near the track, but not foul, including contractors on the site. The testimony of the supervisors is that when they questioned the people alongside the track about who was foul of the track, the 4 charged employees raised their hands. It is upon this evidence that the 4 individuals were charged, investigated and disciplined.

The testimony of the 4 charged employees is different. They say that they were asked who was near the track. The four raised their hands in response to this question. All of them say that they never were foul of the track (i.e. within 4 feet of the nearest rail) and that there were a series of questions being asked them by the supervisors collectively and individually and that there was some confusion as to what they were answering. During the investigation, they all insist that they were never foul of the track. They all admit to raising their hands to answer what they thought was the question – namely who was near the track. Further evidence submitted on behalf of the charged employees shows where 4 feet is versus where flags were on the date in question. The flags are outside the 4 foot mark. The employees all state that they were, at all times, outside the flags in question.

They do say that contractors at the same site were foul of the track at various times, and in some cases were talked to and told to stay clear of the track. The contractors wore hardhats of various colors, including the ones in question here.

Mr. Schweikardt, another Signal Maintainer who was not charged, gave evidence that he was at the signal bungalow and that no employee was foul of the track. His testimony was that the supervisors stopped the hy-rail approximately 200 yards away, then approached the gang. His testimony is also that Mr. Meiwes was never near the track – in fact he was at the bungalow at all relevant times, which is some 15 feet from the track.

The supervisor, Mr. Marino, says he could recognize the foremen from 100 yards, because he had worked with them before. But later in his questioning by the Organization's representative, he denied being able to recognize even the foremen from that distance. He did not recognize the other two. However, other supervisors said that none of the employees were facing them.

The Board finds that, as in all discipline cases, the Carrier bears the burden of proof to show that the alleged infraction occurred, and that it was done by the charged employees. It is the view of this Board that, in this case, there is considerable disagreement not only between the testimony of the Carrier witnesses and the employees, but also between the Carrier witnesses themselves. Were there 4 employees or 5? Which way were they facing? Were contractors foul of the tracks versus employees? Did the employees say they were foul? Or did raising their hands merely indicate they were near, but not foul of, the tracks? Of one thing there is no doubt – all of the Carrier witnesses agree they could not identify who was foul of the tracks, if indeed anyone was.

In all of these circumstances, the Board has no alternative but to hold that the Carrier has not met its burden of proof.

The Board also notes that the record shows that not all employees were assessed 30 day record suspensions, as claimed by the Organization in it's original appeal letter (Mr. Joe's discipline letter included in the record before this Board was for 10 days, and for a matter apparently not related to this case), but in the end result, this has no consequence.

AWARD

The Claim is sustained. Any discipline assessed these 4 employees related to this incident shall be removed from their records.

Roger K. MacDougall
Chair and Neutral Member

Kelly Haley
Vice-President
Employee Member

Michelle McBride
Director Labor Relations
Carrier Member

Dated: _____

At: Chicago, IL