

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35329
Docket No. MW-34918
01-3-98-3-645**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Level 2 discipline [five (5) day suspension] imposed upon Track Inspector E. Castillon for alleged violation of Engineering Department Circular No. 6 on June 3, 1997 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File B-97-30D/MWD 97-11-06AB BNR).**
- (2) As a consequence of the violation referred to in part (1) above, Track Inspector E. Castillon shall be allowed the remedy prescribed in Rule 40G.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant is a Track Inspector and is responsible for inspecting the track for any conditions that might impair the movement of trains. He must make sure that the track meets the minimum FRA and Carrier standards. At the time of the events under discussion, the Claimant was assigned on the Front Range Subdivision headquartered at Ft. Collins, Colorado, between Mile Post 3.4 and Mile Post 8, under the supervision of Roadmaster G. M. Shymanski.

There is no dispute that during the evening of June 3, 1997 a train passing Mile Post 16.8 derailed because of a track defect known as excess super-elevation. Excess super-elevation occurs when one rail is excessively higher than the other. It is usually repaired by surfacing the track.

An Investigation was held on June 13, 1997 to determine the Claimant's responsibility, if any, in connection with the June 3, 1997 derailment. Following the Investigation, the Claimant was suspended for five days for violation of Engineering Department Circular #6, which details the responsibilities of a Track Inspector.

The record shows that there had been a derailment at this same location less than two weeks earlier. The cause of that May 26, 1997 derailment was determined to be super-elevation in the curve. After that derailment, the section gang surfaced the track and it was put back in service with a 10-mile per hour speed restriction and a three-inch elevation. The track was inspected daily and resurfaced again on May 28 and 30, 1997.

On the morning of June 3, 1997, the Claimant conducted his inspection of the track. He noticed a uniform "sag" in the curve of the track - an area where both the low rail and high rail dipped. The Claimant testified that he did not call the section gang to repair the location because he knew they were tied up in Denver and were not immediately available.

However, the Claimant did call the Roadmaster to discuss the condition of the track. There is a dispute as to what was said during that conversation. According to the Roadmaster's testimony, the Claimant asked if he had planned to surface the track at Mile Post 16.8 before an employee appreciation train, carrying passengers, passed over it in a few days. The Roadmaster replied that he had planned on it and asked if it needed immediate resurfacing. The Claimant responded that the track did not need immediate surfacing. The Carrier contends that the Claimant's determination that the track did not need immediate surfacing was a poor decision which subsequently caused

the derailment that evening. Moreover, the Carrier argues that the Claimant plainly violated Engineering Department Circular No. 6, which reads in pertinent part:

"If person making the inspection detects unsafe conditions or deviations exceeding allowable limits, he must initiate corrective or remedial action.

Track Inspectors must be aware of all train operations on or near the tracks they are inspecting, and protect themselves accordingly. This means compliance with all operating rules, safety rules, and the use of common sense.

Where conditions are found to be beyond the track inspector's ability to correct, he must immediately take action to protect the safety of the railroad and promptly notify the proper authority."

The Carrier further contends that the derailment investigation determined that the elevation at the point of derailment was 5 3/4 inches. Moreover, the excessive elevation was 20 to 25 feet long. If the Claimant had properly performed his job duties, and complied with Engineering Department Circular No. 6, the Carrier argues, he would have detected the unsafe condition caused by the excessive elevation and initiated corrective and remedial action.

The Organization contends that the Claimant is not responsible for the derailment and therefore should not have been subjected to discipline. In support thereof, it points to the Claimant's testimony at the Hearing. The Claimant testified that he told the Roadmaster that morning that the track curve was "bad," the only difference being that there was a uniform dip instead of the super-elevation of track that had presented itself earlier. According to the Claimant, the Roadmaster asked if the track had to be repaired immediately, and the Claimant responded "Well, it probably could wait until tomorrow..." The Roadmaster, heeding the Claimant's recommendation, then advised him to notify the section gang to fix the track the next day.

The Organization argues that there is no evidence on this record that a super-elevation existed before the train derailed. Moreover, notwithstanding the Carrier's contentions, the Claimant took immediate action and notified the Roadmaster of the condition of the track at Mile Post 16.8. The fact that there was a derailment does not establish the Claimant's culpability. In the Organization's view, the Claimant had no

way of knowing or predicting that the track as it existed at the time of his inspection would ultimately cause a derailment. In addition, there are other, more likely explanations for the derailment not fully considered by the Carrier, including the fact that the speed restriction on the curve made it more likely with each passing train that a super-elevation would occur.

After careful study of the transcript of the Hearing, the Board finds that the Carrier has not presented sufficient evidence to support the finding that the Claimant was guilty of being responsible for the derailment or for improperly performing his job. The Claimant inspected the track on the day of the derailment. This particular section of track was being closely watched because of an earlier derailment due to super-elevation. There is no evidence, however, that there was a super-elevation of the track at the time of the Claimant's inspection. On the contrary, the record indicates that there was a uniform dip in the curve which was brought to the attention of the Roadmaster. It is true that the Claimant made a determination that track repairs could wait a day. Despite the conflict in the testimony, both the Roadmaster and the Claimant agree on that point. However, the Carrier never refuted the testimony of the Claimant that the determination not to initiate immediate repair of the track was based on the fact that the track had a low spot rather than a super-elevation, and the additional fact that the section gang was unavailable to make the repair.

The Board has stated on numerous occasions in the past that the Carrier must meet its burden of proof by presenting sufficient evidence to sustain discipline against an employee. Based on the facts and circumstances available to the Claimant at the time of the inspection, we cannot say that the Claimant acted improvidently or in violation of the pertinent procedures for Track Inspectors on June 3, 1997. The mere fact that a derailment occurred does not establish that the Claimant could have been expected to foresee that it would happen, nor does it prove the wrongdoing alleged by the Carrier.

Moreover, as argued by the Organization, and acknowledged by the Roadmaster in his testimony, it is recognized that the weight of trains moving slowly through a curve when there is a temporary speed restriction can cause increased super-elevation. The record shows that at least four trains passed through the curve at Mile Post 16.8 after the Claimant's inspection and before the derailment occurred. Because these other factors may have contributed to the derailment and perhaps were the real cause, we must conclude that the case against the Claimant has not been proven by substantial evidence.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 16th day of February, 2001.