

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41441
Docket No. MW-41734
12-3-NRAB-00003-110257**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The discipline (dismissal) imposed by letter dated January 22, 2010 upon Mr. C. Wheaton for alleged violation of EI 2.5.1 - Track Inspection: Turnouts in connection with alleged failure to recognize improper adjustment of switch points, allegedly resulting in the derailment of Train RNWE815114I, when inspecting switch 3002W near Mile Post 4Z on the Bellingham Subdivision near Anacortes, Washington while working as a track inspector at 0700 hours on December 14, 2009 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File S-P-1478-G/11-10-0208 BNR).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant C. Wheaton shall now receive the remedy prescribed by the parties in Rule 40(G).”**

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.

On December 21, 2009, the Carrier directed the Claimant to report for a formal Investigation on December 29, 2009:

“... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to inspect and recognize improper adjustment of switch points, resulting in the derailment of train RNWE815114I, when you inspected switch 3002W near MP 4Z on the Bellingham Subdivision, near Anacortes, Washington, and reported no defects, on December 14, 2009, while working as Track Inspector (TINS1567), headquartered at Bellingham, Washington, on duty 0700 hours.”

On January 20, 2010, the Claimant was found guilty as charged and was immediately dismissed from service.

It is the position of the Organization that the Claimant inspected the aforementioned switch on December 14 2009, and it was working properly, which was verified by his inspection report in the Carrier's Computer TIMS program. It argued that after the Claimant left the switch location some three or four hours later, during a switching operation, locomotives and freight cars passed over the switch. The switch was thrown by an unidentified trainman for a reverse movement onto the adjacent track and at least five cars passed safely through the switch before a car derailed at an unspecified point causing other trailing cars to derail. It further argued that the testimony against the Claimant was speculative and lacking evidentiary proof that the Claimant failed to make a proper inspection. Because the Carrier did not satisfy its burden of proof, the Organization asserted that the discipline should be set aside and the claim sustained as presented.

It is the Carrier's position the record shows that the Claimant received a "fair and impartial" Investigation and the Claimant was guilty as charged. It stated that the facts indicate that on December 14, 2009, near Mile Post 4Z, Train RNWE8151141 (also known as the Ani Local) derailed causing six cars filled with LPG (liquefied petroleum gas) to derail. It argued that the cause of the derailment was investigated by a panel of Carrier Officers from the Transportation, Mechanical and Engineering Departments and was determined to be a gapped switch point on Switch 3002W. It asserted that the Investigation transcript verifies that the Claimant had checked the same switch a few hours earlier and failed to recognize the gapped switch point resulting in the derailment. It further argued that dismissal was appropriate in this instance because (1) this was the Claimant's second serious Rule violation in less than two months and (2) the discipline assessed was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Carrier closed by asking that the claim remain denied.

The Board thoroughly reviewed the record and transcript and is not persuaded that any alleged procedural violations rise to the level to sustain the claim without reviewing the merits.

The question at issue is what was the cause of the derailment? The record indicates that the Carrier conducted a preliminary investigation of the derailment that occurred on December 14, 2009, the following day with a team from the Transportation, Mechanical and Engineering Departments. Part of that team was Division Engineer B. Hipol, who brought more than 35 years of roadway expertise to the table. Hipol was questioned as follows:

"Matthew Hammond: Okay, thank you. And now I'd like to just ask you to please explain for us why we are here, in your own words, and the reason that we are having this investigation?"

Brian Hipol: The reason we're having this investigation is because we, at the derailment it was determined that the cause of the derailment, through investigation from myself, the Mechanical Supervisor, and the Transportation Supervisor, that a gapped switch point was the root cause of the derailment that happened on the 14th. And I have pictures here of the switch in question, and the point of switch that was in question, that were taken on the 15th when, after I got to the scene." (Emphasis added.)

Additionally, Division Engineer Hipol entered several exhibits into the record to support his conclusions and those of the derailment investigation team.

The Organization discounted the findings of the derailment investigation team and suggested that a sharp flange might have caused the derailment. Hipol was questioned as to whether a sharp flange could have been the cause of the derailment. He testified that the Mechanical Department, which was responsible for reviewing any defects such as a sharp wheel flanges, took no exception to any of the cars. The Board's close examination of the Investigation transcript reveals no authoritative evidence and/or testimony that contradicts Division Engineer Hipol's statement that the root cause of the derailment was a gapped switch point.

The Organization further suggested that the Trainmen who operated over the subject switch had a responsibility and obligation to inspect the switch point just as the Claimant did, and in the Trainmen's case, that obligation came from General Code of Operating Rule 8.2 - Position of Switch. The Organization argued that it is clear that the Trainmen's inspection would have come after the Claimant's and obviously they agreed with the Claimant that there was no problem with the switch point, otherwise they would not have used it. However, assuming for the sake of argument that the Trainmen either did inspect the switch and failed to detect a defect that should have been uncovered, or they did not inspect the switch at all (and thus failed to find an existing defect missed by the Claimant, too) then the Trainmen would be just as guilty if not more so than the Claimant, for the same or a corresponding Rule violation. The Organization's aforementioned theory does not negate the evidence set forth by the derailment investigation team which concluded that the Claimant missed a gapped switch point. Even if the Trainmen did the same that does not change the Claimant's responsibility.

After a full review of the record and transcript the Board concludes that substantial evidence was adduced at the Investigation so as to warrant the finding that the Carrier met its burden to prove that the Claimant was guilty as charged.

The only issue remaining is whether the assessed discipline was appropriate. At the time of the incident, the Claimant had approximately 15 years of service and this was his second serious Rule violation in less than two months. Under the Carrier's Policy for Employee Performance Accountability (PEPA) the Carrier had the option to dismiss the Claimant. In this instance, the Board is concerned that the Claimant was charged with failure to note a gapped switch point, whereas no

Trainmen who used the switch in question and had a responsibility to check that same switch for its safe usability, were summoned to the Investigation in the capacity of charged employees. Consequently, in this instance, the treatment and punishment of the Claimant lacked fairness and was disparate. The Board does not excuse the Claimant's behavior for a serious violation, but finds and holds that the discipline was excessive under the circumstances. Accordingly, his termination is reduced to a lengthy suspension, which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Claimant is to be reinstated to service on a "last chance" basis with seniority intact and all other rights unimpaired, but with no backpay.

AWARD

Claim sustained in accordance with the Findings.

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 5th day of September 2012.