

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 41529  
Docket No. MW-41729  
13-3-NRAB-00003-110017

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
( 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 upon Mr. B. McDaniel for alleged violation of EI 2.1 Purpose of Track Inspections, EI 2.2.3 Authority and Responsibility of Inspectors and EI 2.4.4 Safety and Protection During Inspections for alleged failure regarding derailment of train H-PASNTW8-10 near KO Jct. on the KO Subdivision on September 13, 2009, allegedly caused by un-repaired previously identified defect in a crossing and his alleged failure to comply with company policy as outlined in the BNSF Engineering Instructions was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-3605-H/11-10-0025 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, “\*\*\* The Carrier must remove any and all mention of the discipline from Mr. McDaniel’s record, reinstate Claimant immediately, and make Mr. McDaniel whole for any and all losses incurred, including, but not limited to, straight time pay for each regular lost work day, all loss of overtime opportunity, and accreditation for any and all vacation and other benefits.”

**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.

This dispute arose as a result of the discharge of B. McDaniel on December 11, 2009 for his alleged violations of Engineering Instructions EI 2.1 Purpose of Track Inspections, EI 2.2.3 Authority and Responsibility of Inspectors and EI 2.4.4 Safety and Protection During Inspections for his alleged failure regarding a derailment that occurred on September 13, 2009.

By letter dated September 18, 2009, the Carrier directed the Claimant to report for a formal Investigation on September 25, 2009, which was mutually postponed until November 12, 2009. The Notice of Investigation specified that said Investigation would be held:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure resulting in derailment of train H-PASNTW8-10 near KO Jct. on the KO Subdivision on September 13, 2009, caused by un-repaired previously identified defect in a crossing and your alleged failure to comply with company policy as outlined in the BNSF Engineering Instructions.”

On December 11, 2009, the Claimant was found to be in violation of Carrier Rules and was immediately dismissed from service. The Carrier's dismissal notice asserts that the Claimant was “ . . . dismissed effective immediately from employment with the BNSF Railway Company for your failure resulting in derailment of train H-PASNTW8-10 near KO Jct. on the KO Subdivision on

September 13, 2009, caused by un-repaired previously identified defect in a crossing and your failure to comply with company policy as outlined in the BNSF Engineering Instructions.” The Carrier based its charge on the contention the Claimant bore a responsibility to inspect the trackage where the derailment occurred and that he had failed to perform that responsibility. The Organization contends that the Claimant was not in violation of the cited Engineering Instructions. The Organization further contends that the Claimant bore no responsibility for inspecting the location identified as the point of the derailment and thus the imposition of any discipline in this instance was unjust.

As a threshold issue in this case, the Board is presented with the question of whether the Carrier established the Claimant’s responsibility for inspecting the trackage at issue, either as a part of his regular assignment or in relation to the geometry car inspection of August 26, 2009. Indeed, a good deal of the testimony at the Investigation surrounded the establishment of the trackage the Claimant was assigned to inspect as a part of his regular assignment.

The Board examined the testimony and documentation in the record of the Investigation and finds beyond a doubt that the location of the derailment was not a part of the Claimant's daily inspection responsibility. In fact, the Carrier’s internal documentation showed that the Claimant’s inspection territory began at Mile Post 3.3X and extended westward from there, with the Mile Post numbers increasing, whereas the area of track involved in these allegations was east of Mile Post 3.3X. All regular inspection reports filed by the Claimant over the preceding eight years covered only territory west of Mile Post 3.3X and no Carrier Official ever objected that the Claimant was not also inspecting track east of that location. Further, the computer program that the Claimant and other Track Inspectors use to file their regular inspection reports recognized Mile Post 3.3X as the easternmost limit of the Claimant’s inspection territory. The record shows that approximately two weeks after the derailment, the derailment location was added to the trackage for which the Claimant would be responsible for inspection going forward. Thus, the record established that the regular inspection responsibilities of the Claimant did not include performing regular track inspections at the location involved.

The Carrier contends that even if the location was not covered by the Claimant’s regular assignment, he had some responsibility for the defect nonetheless because he had been involved with the follow-up verification of track defects found by a track geometry testing vehicle (the STAR Car) that had

traversed the location on August 26, 2009 and had found a wide gauge defect near what it determined later to have been the point of derailment for the September 13, 2009 derailment. However, a thorough examination of the testimony and evidence adduced at the formal Investigation reveals that upon completion of the geometry car inspection on August 26, 2012, the Claimant was engaged in routine follow-up verification of defects reported by the geometry car and ended that assignment some 14 miles west of the location involved in the derailment. The verification procedure was performed by other employees at the location in question and the Claimant was notified by Roadmaster Urwiller that no defects had been found that required any further inspection or verification by the Claimant. Thus, the record indicates that even if there had been some expectation that the Claimant would be responsible for follow-up verification at the location in question, the Carrier had affirmatively relieved him of any such responsibility.

In disciplinary matters, it is well-established that the burden of proof rests with the Carrier to prove the charges against the employee by substantial evidence. In view of the facts presented, we find and hold that the Carrier failed to meet its burden to prove that the Claimant bore responsibility for inspecting the location involved. Consequently, the claim must be sustained.

#### 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 19th day of February 2013.