

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40280
Docket No. MW-39863
10-3-NRAB-00003-070006
(07-3-6)**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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 [Level S Record Suspension of thirty (30) days and not allowed to fill any track inspector position for a period of six (6) months from date of incident] imposed upon Track Inspector B. A. Birdsall for alleged violation of BNSF Engineering Instruction 5.5.3 concerning a derailment that occurred on April 6, 2005 at approximately 1105 hours at Mile Post 0.7 on the St. Paul Subdivision, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File T-D-2914-B/11-05-0221 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. B. A. Birdsall 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.

At the time of the April 6, 2005 derailment from which this claim arose, the Claimant was assigned as Dayton's Bluff Track Inspector on the St. Paul Subdivision and had held seniority of 13 years in various classifications of the Carrier's Maintenance of Way and Structures Department. The incident began when one set of wheels on the 36th car of an eastbound train derailed at Mile Post 0.7 on Main Track No. 1. The train traveled two more miles to where the crew was going to execute a crossover move. There, the BNSF consist collided with a Canadian Pacific train, derailing 19 cars.

Following the incident and by letter dated April 11, 2005, the Carrier directed the Claimant to report for an Investigation to assess responsibility, if any, with respect to the incident. The notice reads as follows:

“Attend investigation at the Northtown General Office Building Roadmaster's conference room, 80 - 44th Avenue NE, Minneapolis, MN, at 1000 hours on Tuesday, April 19, 2005, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with the derailment which occurred on April 6, 2005 at approximately (1100) 1105 hours at MP 0.7 on the St. Paul Subdivision, while assigned as Dayton's Bluff track inspector.

Arrange for representative and/or witnesses, if desired, in accordance with governing provisions (and) prevailing schedule rules.”

No violation of a Rule or policy was cited as possibly connecting the Claimant to the derailment and no specific acts or omissions of the Claimant were cited. After

two postponements by mutual agreement, the Hearing was conducted on April 27, 2005.

At the Hearing, Roadmaster, James Wages testified that a preliminary investigation indicated that the derailment was caused by wheel lift recline due to excessive cross levels. The preliminary investigation involved Carrier personnel, but not the officer who subsequently conducted the Hearing. The Claimant testified that on April 1, 2005, he had conducted a routine inspection using a hi-rail vehicle and found no problems at MP 0.7. At 9:00 A.M. on April 5, 2005, he piloted a rail detector car with two employees from a contractor. Neither the Claimant nor the two occupants felt or observed any rough track or detected any indication that the track at MP 0.7 was out of cross level. No rough track or other track related issues at MP 0.7 on Main Track No. 1 were reported by any of the numerous train crews who passed over the area prior to the derailment, including the train which actually derailed. The Claimant testified that in his more than three years of inspecting track in the area he had never detected a cross level or other track related problem at or near MP 0.7 on Main Track No. 1. There is no evidence in the record of any prior discipline.

Following the April 27, 2005 Hearing and by letter dated May 20, the Carrier notified the Claimant that due to his violation of BNSF Engineering Instruction 5.5.3, he was issued a Level S 30-day record suspension and would be prohibited from filling any Track Inspector position for six months from the incident date.

The Carrier argues that the evidence establishes that a derailment occurred at MP 0.7 on Main Line No. 1; that the Claimant knew this subdivision well; that the Carrier is a company where safety is important; that a safe work place is a matter of public policy; that the derailment occurred due to track problems; that the Claimant was a Track Inspector; that the Claimant had inspected track on this line; that the Claimant knew about a track defect at MP 0.7; that he chose not to correct it because he was not specifically told to do so by a superior; that the Claimant failed to carry his burden; and that the discipline rendered is appropriate because the offense falls within the serious category of dismissible offenses under the Carrier's Policy for Employee Performance Accountability ("PEPA"); and that the Organization's request for leniency is inappropriate.

The Carrier disagrees with the Organization's contention that the Carrier violated Rule 40C because the notice initiating the Investigation was not precise enough for the Claimant to prepare a defense. It disputes the Organization's contention that the Notice of Investigation sent to the Claimant violates his Agreement due process rights because it is vague, fails to state the Rule allegedly violated and fails to provide adequate specificity to allow him to prepare a defense. The Carrier argues that the Claimant was at fault in connection with the derailment because he violated the duty imposed on him by Engineering Instruction 5.5.3, entitled "Defect Definitions and Limits." The Carrier emphasized subsection D. of Rule 5.5.3 which lays out in detail permissible track tolerances.

The Carrier disputes the Organization's claim that the Carrier failed to provide a complete and thorough transcript in violation of Rule 40E because in numerous locations, the transcription it delivered states "inaudible."

The Carrier asserts that substantial evidence in the record indicates that the Claimant violated the Carrier's Safety Rules and received discipline in accordance with the Carrier's stated discipline policy.

The Organization argues that the Notice of Investigation and the two postponement notices were vague; that the Carrier did not specify the charges for which the Investigation was being held as is required by Rule 40C; that all three letters failed to list any act or omission that if committed by the Claimant would have led to the derailment; that all three letters failed to list any policy or Rule including Engineering Instruction 5.5.3 that the Claimant allegedly violated; that the record established that the Claimant was not aware of any yellow tags that required any additional attention for the particular area where the Carrier said the derailment occurred; and that no facts were developed during the Investigation indicating that the Claimant was guilty of any act or omission that caused the derailment.

The Organization contends that the Notice of Investigation sent to the Claimant violates his due process rights because it is vague, fails to state the Rules allegedly violated and fails to provide adequate specificity to allow him to prepare a defense. Specifically, the Organization argues that the notice fails to meet the requirement of Rule 40C that the notice must specify the charges for which an Investigation is held.

The Carrier is responsible to provide a full and complete transcript of the Hearing. The numerous inaudible sections in the typed transcript do not meet the Carrier's responsibility; however, the Organization failed to allege, let alone demonstrate, that the inaudible portions of the transcript constituted omissions of evidence material to the defense of the charges against the Claimant. The Board is unable to conclude that the omissions in the transcript constitute harmful error and declines, therefore, to overturn the discipline on that basis.

The Board is not persuaded that the Claimant's Agreement due process rights were violated because the Investigation's Conducting Officer, Roadmaster Dale Johnson, prejudged the decision, or because he did not sign the discipline letter. The Carrier was not barred from using its staff to conduct a preliminary investigation, to question the Claimant and to collect facts. None of these functions were undertaken by the Conducting Officer prior to the start of the Hearing. The results of the preliminary investigation were entered into the record and the Organization had full access to the results as well as the opportunity to challenge them and to present testimony to the contrary. The Board concludes that the preliminary investigation did not deny the Claimant Agreement due process or a fair and impartial Hearing.

The language in the Notice of Investigation describes the derailment with specificity. However, the language fails to list the Rule or Rules that the Claimant might have violated and fails to allege any act or omission connecting the Claimant to the derailment. The purpose of notice is to advise employees of the charges against them with sufficient specificity so as to allow them to prepare a defense. It is not at all clear that the notice in the instant case meets that requirement. However, in light of the Board's disposition of the charges on other grounds, it does not need to resolve the issue whether the Carrier failed to meet the requirements of Rule 40C.

It was the Carrier's burden to establish by substantial evidence considered in the record as a whole that the Claimant is guilty of the charges against him and that the penalty imposed was not harsh, unwarranted, inappropriate, arbitrary, or capricious. A charged employee need not prove his innocence. For the reasons which follow, the Board concludes that the Carrier did not meet its burden.

The record persuades the Board that on April 6, 2005, a derailment occurred at MP 0.7 on Main Track No. 1. This serious incident by itself does not establish a

Rule violation by the Claimant or a connection between him and the derailment. The Investigation produced no information as to what caused the derailment other than conjecture and conclusions. The Carrier did not meet its burden of showing by substantial evidence in the record that there was a link between the Claimant's actions and the derailment. Evidence was presented that other trains had run over the track with no bad result since the last track inspection. The passage of other trains without any issue would not absolve an individual of neglect if it existed, but neither does the mere occurrence of a derailment establish guilt or neglect if there was none. In this case, the Carrier failed to meet its burden of proving that the Claimant's actions were the cause of the derailment or that the Claimant otherwise violated a Rule or policy.

The Board finds no evidentiary support in the record for the Carrier's position that the Claimant knew there was a track defect at MP 0.7 and that the Claimant chose not to correct it unless specifically told to do so by a superior. The Carrier presented no evidence showing that the conditions that existed following the derailment were present on April 1, the last time the Claimant made a track inspection, or even on April 5 when the Claimant traveled past MP 0.7. In short, there was no showing in the record that the Claimant knew the information the Carrier claimed he failed to provide (yellow tag) prior to testimony during the Investigation.

The Board finds no evidentiary support in the record for Carrier's assertion that the Claimant watched the star car printouts of a yellow notice report. The Claimant testified that until the April 27, 2005 Hearing, he had never seen the report and had not been aware of a yellow warning near MP 0.7.

The Claimant testified that he was familiar with Section D of Section 5 of the Engineering Instructions, that prior to the derailment he did comply with the instructions of Section 5 pertaining to track geometry surface, alignments and deviations; that based on the Claimant's experience and understanding of the Engineering Instructions, a warp condition did not exist when he inspected the track on April 1 and did not exist when he rode over the track on April 5. The Claimant also testified credibly that he was familiar with and understood Engineering Instruction 5.5.3 (Defect Definitions and Limits) including his responsibility with respect to yellow tags, if any existed. In short, the Carrier failed to provide

substantial evidence considered in the record as a whole that the Claimant violated any Carrier Rule.

The Claimant did not concede guilt, but rather insisted that he was innocent. The Claimant's uncontradicted testimony was that he inspected Main Line Track No. 1 and found no issues at MP 0.7. The Claimant provided unrefuted testimony that the alleged point of derailment carried no signs of a problem with the subgrade which could lead to track surface defects. There was evidence that the Claimant inspected the track five days prior to the derailment but there is no evidence that the Claimant was aware, or should have been aware, of a yellow tag problem before the derailment. The Claimant testified that he had no track issues at MP 0.7 on Main Track No. 1. The Claimant's testimony that he was not aware of problems was credible and consistent. In view of the foregoing, the Claimant shall be awarded the remedy prescribed by the parties in Rule 40 (G).

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 15th day of January 2010.