

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41432
Docket No. MW-41589
12-3-NRAB-00003-110200**

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 [Level S 30 day record suspension and a three (3) years probation commencing on January 30, 2010] imposed upon Mr. B. Peters by letter dated March 22, 2010 for alleged violation of EI 2.1, EI 2.2.3 and EI 2.4.2B for alleged failure to comply with engineering instructions while working as a track inspector, allegedly resulting in a train derailment at Mile Post 334.2 on the Ottumwa Subdivision at approximately 0415 hours on Saturday, January 30, 2010 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-19/10-10-0271 BNR).**
- 2. The discipline [Level S 30 day record suspension and a three (3) years probation commencing on January 30, 2010] imposed upon Mr. R. McSparen by letter dated March 22, 2010 for alleged violation of EI 2.1, EI 2.2.3 and EI 2.4.2B for alleged failure to comply with engineering instructions while working as a track inspector, allegedly resulting in a train derailment at Mile Post 334.2 on the Ottumwa Subdivision at approximately 0415 hours on Saturday, January 30, 2010 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-20/10-10-0272).**

3. As a consequence of the violation referred to in Part (1) above, Claimant B. Peters shall now receive the remedy prescribed by the parties in Rule 40(G).
4. As a consequence of the violation referred to in Part (2) above, Claimant R. McSparen 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.

The facts indicate that on January 30, 2010, at approximately 4:15 A.M., seven coal cars and a locomotive derailed at Mile Post 334.2 on the Ottumwa Subdivision. Both Claimants are Track Inspectors and the record shows that Claimant Peters inspected the track location of the derailment three days prior to the derailment and Claimant McSparen had inspected it one day before.

On February 4, 2010, the Carrier directed both Claimants to report for a formal Investigation on February 11, which was mutually postponed until February 25, 2010:

" . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with Engineering Instructions while working as a Track Inspector, resulting in a train derailment at MP 334.2 on the Ottumwa Subdivision, at approximately 0415 hours on Saturday, January 30, 2010."

On March 22, 2010, the Claimants were found guilty as charged and assessed Level S 30-day record suspensions and three year probationary periods.

It is the position of the Organization that (1) the Carrier failed to meet its burden of proof (2) the Investigation was not "fair and impartial" because the charges were not precise (3) the Claimants were pre-judged, and (4) the Carrier Officer who made the guilty determination was not the Hearing Officer who was in a better position to make credibility decisions. The Organization asserted that because of those procedural errors alone the claim should be sustained without even reviewing the merits. Turning to the merits, it argued there was no showing that the derailment was the fault of anything that the Claimants did, nor was there any proof that either Claimant failed to properly inspect the track location of the derailment. The Organization concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the record shows that the Claimants were afforded a "fair and impartial" Investigation and both were guilty as charged. It argued that the transcript proves that the Claimants not only failed to detect significant track defects, but also failed to take necessary remedial action as required by relevant Rules in order to prevent the derailment that occurred on January 30. 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, or that the Claimants were denied their "due process" Agreement rights.

Both Claimants testified that the last time they checked the track it was in safe working order. The Organization argued that a significant amount of traffic had passed over the location since each had checked the track and suggested that the January 30 derailment was attributable to the heavy traffic factor rather than the Carrier's argument that the Claimants missed track defects and failed to take remedial action.

The record reveals that after Roadmaster L. Hoyle arrived at the derailment site at approximately 5:00 A.M., he examined the area, took photographs and made notes. At the Investigation he testified that the track gauge at the point of the derailment was such that it should have been taken out of service prior to the derailment occurring. He testified that at the point of the derailment there were high and missing spikes as well as the ties being above the plates. Hoyle further testified that this defective track condition could not have happened after the Claimants had allegedly checked the track, but instead that this defective track condition had to have existed for at least three to five weeks prior to the

accident. He further testified that he saw no reason why the Claimants should not have detected and corrected the conditions.

During the Hearing, D. A. Neubauer, Supervisor of Engineering Support, testified that he arrived at the derailment site at approximately 7:30 A.M. on January 30 and independently examined the accident site and concluded that the derailment was caused by excessive track gauge due to defective track conditions. He testified that the deteriorated track conditions did not occur overnight or within less than three days, but rather were conditions that should have been detected and corrected by the Claimants well in advance of the January 30 derailment.

The testimony of Officers Hoyle and Neubauer was not effectively rebutted. The record is clear that substantial evidence was adduced at the Investigation so as to support the Board's conclusion that the Carrier met its burden to prove that the Claimants were guilty as charged.

The only issue remaining is whether the assessed discipline was appropriate. At the time of the incident, Claimant Peters had approximately three years and six months of service and Claimant McSparen had approximately three years and ten months of service. Both employees committed a serious infraction of the Rules that led to the derailment. The Board's review of the discipline reveals that it was assessed in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). Therefore, the Board finds and holds it will not be set aside because it was not excessive, arbitrary, or capricious. The claim will remain denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 5th day of September 2012.