

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41440
Docket No. MW-41733
12-3-NRAB-00003-110193

The Third Division consisted of the regular members and in addition Referee William R. Miller 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. M. Shannon by letter dated April 8, 2010 for alleged violation of EI 2.2.3 Records of Walking Inspections EI 2.4.4 Safety and Protection During Inspections and EI 5.4.2 Gage Correction for alleged failure to detect and take proper remedial actions for non-standard track conditions allegedly resulting in a wide gauge location at the west end of Koester's back track switch, allegedly resulting in the derailment of BNSF 1949 and track damage at/or near Mile Post 363.0 at approximately 1645 hours on February 22, 2010 while he was working as a track inspector on Gang TINS 1401 headquartered at Alliance, Nebraska was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D070-8/10-10-0311 BNR).
2. The discipline [Level S thirty (30) day record suspension and a three (3) year probation commencing on April 8, 2010] imposed upon Mr. M. Shannon by letter dated April 8, 2010 for alleged violation of EI 2.1 Purpose of Track Inspections and EI 2.2.3 Authority & Responsibility of Inspectors for alleged failure to detect and take proper remedial actions for non-standard track conditions allegedly resulting in a wide gauge location at/or near the west switch at the Old East Alliance X-over located in the

Alliance Yard at approximately 1630 hours on February 17, 2010 while he was working as a track inspector on Gang TINS 1401 headquartered at Alliance, Nebraska was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-21/10-10-0310).

3. The discipline (dismissal) imposed upon Mr. M. Shannon by letter dated April 8, 2010 for alleged violation of EI 2.1 Purpose of Track Inspections, EI 2.4.5.A Items to Consider When Inspecting, Roadmasters and Track Inspectors, and EI 5.4.2 Gage Correction for alleged failure to detect and take proper remedial actions for non-standard track conditions allegedly resulting in the derailment of train C-BTMCNMO-18 at/or near Mile Post 364.2 on the Sand Hills Subdivision at approximately 1644 hours on February 4, 2010 while he was working as a track inspector on Gang TINS 1401 headquartered at Alliance, Nebraska was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D070-9/10-10-0312).
4. As a consequence of the violation referred to in Part (1) above, Claimant M. Shannon shall now receive the remedy prescribed by the parties in Rule 40(G).
5. As a consequence of the violation referred to in Part (2) above, Claimant M. Shannon shall now receive the remedy prescribed by the parties in Rule 40(G).
6. As a consequence of the violation referred to in Part (3) above, Claimant M. Shannon 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 parties combined three separate cases, two dismissals, and one suspension into one case before the Board for adjudication, all of which have a recurring theme - that being the Claimant allegedly failed to detect and take proper remedial actions for non-standard track conditions resulting in two derailments.

It is the position of the Organization that the Claimant was denied a "fair and impartial" Investigation in all three of the Investigations because of (1) prejudgment (2) the charges were not precise (3) the Hearing Officer did not render the decisions and (4) the Claimant was subjected to disparate treatment. Turning to the merits, it argued that the conflicting testimony offered by various witnesses proved that the Carrier failed to meet its burden of proof. The Organization concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position the record shows that the Claimant received a "fair and impartial" Investigation in all three instances and he was guilty in each case. It argued that the facts indicate that in each dispute the Claimant only performed cursory inspections of the various tracks. It asserted that the transcripts are filled with several instances where the Claimant traveled over those specific tracks daily and said that he had inspected those areas, yet in reality, chose not to take any measures to ascertain the severity of the defects, much less identify them, or to make any attempt to correct them, and because of that dereliction of duties, there were two derailments. It further argued that the discipline assessed was in accordance with its progressive disciplinary policy and it asked that the claim remain denied.

The Board thoroughly reviewed the record and transcript of each case and is not persuaded that any alleged procedural violations rise to the level to sustain the claim without reviewing the merits, or that the Claimant was denied his "due process" Agreement rights. On the contrary, it is clear that he was not prejudiced in his ability to prepare a defense.

The record indicates that on March 15, 2010, two formal Investigations were held involving the Claimant, both of which resulted in dismissal decisions being issued on April 8, 2010. The third Investigation, which was held on March 16, 2010, resulted in the Claimant being assessed a Level S 30-day suspension with a three year probationary period on April 8, 2010. The decisions asserted that the Claimant violated Engineering Instructions 2.1, 2.2.3, 2.4.4, 2.4.5.A and 5.4.2.

As previously stated, all cases involve allegations that the Claimant failed to detect and correct wide gauge defects on his inspection territory, because he either failed to detect them in the performance of his required monthly inspections, or he detected them, but then did nothing to adequately address the situations. In each instance, the Claimant argued that he made all inspections and performed any necessary remedial action needed and there were no significant defects.

The Board will address each case separately as identified in the Statement of Claim in their respective chronological calendar order.

Claim No. 3 involves the train derailment which occurred on February 4, 2010, near Mile Post 364.2 and caused significant damage, for which the Claimant was dismissed. The facts indicate that on February 2, 2010, the Claimant inspected the site of the derailment and found no indication of a wide gauge location. The Claimant testified that he did not see any missing fasteners or spikes and his inspection was not impaired by any snow, mud or debris. Accordingly, he had no reason to sweep anything off. Roadmaster Taylor testified that it was clear that the Claimant had not inspected the area carefully, because the plates with the missing spikes were covered with rock and coal dust and had not been disturbed and/or examined. The testimony given by the Carrier witnesses - that the cause for the wide gauge location was missing fasteners and spikes and that such would not have happened in less than two days after the Claimant's last inspection - was not effectively refuted.. Substantial evidence was adduced at the Investigation to warrant the conclusion that the Carrier met its burden to prove that the Claimant was guilty as charged.

Claim No. 2 involves the Level S 30-day record suspension. Therein it was alleged that the Claimant failed to detect and take proper remedial actions for non-standard track conditions that resulted in a wide gauge location at Mile Post 364.8 near the West Switch at the Old East Alliance crossover in the Alliance Yard that

was discovered on February 17, 2010. The Claimant testified in this instance that during his inspection on February 15 he was unable to see the tracks, spikes, ballast or tie conditions due to snow cover. The Claimant testified that he made no attempt to sweep anything off or remove debris; nor did he make any gauge measurements. The record further indicates that the wide gauge location at Mile Post 364.8 was discovered by a geometry car. It is clear in this instance that substantial evidence was adduced at the Investigation to warrant the conclusion that the Carrier met its burden to prove that the Claimant's February 15, 2010 track inspection was lackadaisical at best.

Claim No. 1 involves yet another derailment that occurred on February 22, 2010. Therein it was alleged that the Claimant failed to detect and take proper remedial action for non-standard track conditions, resulting in a wide gauge location at the West End of Koester's back track switch that caused the derailment of BNSF 1949 and track damage. The same respective arguments made by the parties in connection with Claim Nos. 2 and 3 were also made in this dispute. However, there is one distinction in this case - an Organization expert witness, Foreman T. J. Huddle, testified. Huddle had 33 years of experience that included having been a Roadmaster in the same yard and specialized training in derailment investigations. The record indicates that Huddle visited the derailment site shortly after the incident occurred. He testified that it was his conclusion that wide gauge was not the cause of the derailment. It was his opinion that there was a "rolling" of the rails that preceded the wide gauge and there was nothing the Claimant's inspection could have done to have prevented the failure of the material in this instance. The Carrier's expert witnesses disagreed and concluded that wide gauge caused the derailment. Based upon the evidence presented in this case, the Board is unable to determine that the expertise of either party exceeds that of the other, and because it is the Carrier's responsibility in a discipline case to satisfy its burden of proof, the Board concludes that burden was not met in this instance and the Claimant's dismissal is set aside.

The only issue remaining is whether the discipline assessed in connection with Claim Nos. 2 and 3 was appropriate. At the time of the incidents, the Claimant had approximately 36 years of service with a good work record. The Board finds and holds that the Level S 30-day record suspension coupled with a three year probationary period for his responsibility in connection with Claim No. 2 was appropriate and will not be disturbed. The Board further finds and holds that the Claimant's dismissal for his responsibility in connection with Case No. 3 was

excessive. Accordingly, it shall be reduced to a lengthy suspension, which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). In view of the foregoing, the Claimant is to be reinstated to service with seniority intact and all other rights unimpaired, but with no back-pay. The Claimant is forewarned that after reinstatement, he should make every effort to be diligent in the fulfillment of his duties and responsibilities.

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.