Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41785
Docket No. MW-41684
13-3-NRAB-00003-110295

The Third Division consisted of the regular members and in addition Referee Burton D. White when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes 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 [thirty (30) day record suspension and a three (3) year probation commencing June 17, 2010] imposed upon Mr. R. Rosenbaum for alleged violation of EI 2.1 Purpose of Inspection, EI 2.2.3 Authority & Responsibility of Inspectors, EI 2.4.4 Safety & Protection During Inspection and MOWOR 1.6 Conduct in connection with allegations of failure to apply remedial action on FRA tie defects at/or near Mile Posts 91.25, 84.2 and 83.8 on the Angora Subdivision while working as a track inspector was arbitrary, unwarranted, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-33/10-10-0411 BNR).

(2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now '*** immediately remove this 30 Day Record Suspension and Three (3) Year Probation from Mr. Rosenbaum's personnel record.'"

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 record establishes that the Claimant has been a Track Inspector since January 10, 1999.

Item 2.2.3 of the BNSF Engineering Instructions states:

> "Authority and Responsibility of Inspectors
>
> When an inspecting employee finds conditions that make the track unsafe for trains moving at authorized speed, or finds deviations greater than those permitted by the FRA Track Safety Standards, the employee has the authority and responsibility to do one or more of the following:
>
> Make repairs
> Place temporary speed restrictions.
> Remove track from service."

The charge for which the Claimant was disciplined referred to, ". . . [y]our alleged failure to apply remedial action on FRA [Federal Railroad Administration] tie defects at or near mile posts 91.25, 84.2 & 83.8 on the Angora Subdivision while working as a Track Inspector on gang TINS1508 headquartered at Sidney, Nebraska." The Carrier alleged that the "First knowledge to officers of the company was April 26 and April 28, 2010."

The Carrier contends that the Claimant admitted that he had committed the offense:

"HEARING OFFICER: . . . [I]t's this rule here the 2.2.3. Are there three specific things that [you] are supposed to do if you are, if you are made aware that there is a potential danger to the railroad?

CLAIMANT: Yeah, make repairs, temporary speed restrictions, and remove track from service.

* * *

HEARING OFFICER: So when you were originally notified on November 24th that these three particular areas had poor tie conditions, poor ballast conditions, did you do any of these three items? Did you make repairs, place [a] temporary speed restriction, or remove a track from service?

* * *

HEARING OFFICER: Did you? Did you repair, restrict, or remove this, these three specific areas?

CLAIMANT: No."

The Carrier argues:

"Numerous awards support the assertion that where there is an admission of guilt there is no need for further proof. For example, Fourth Division Award 4779, (Duffy), states:

[T]he Organization nonetheless cannot overcome the longstanding precedent in this industry that when there is an admission of guilt there is no need for further proof and the only remaining question is the degree of discipline, if any. . . . [I]t cannot be said that the Carrier's disposition in this matter was an improper use of its discretion. The Claim, therefore, must fail."

To obtain a clear understanding of this dispute, one must bear in mind that three successive Roadmasters were in office during the relevant time periods. The Roadmaster (Josh Garner) who was in office at the time of the November 2009

inspection went back into scheduled ranks on December 15, 2009. There was a temporary replacement who had no role in the matter. The permanent replacement (John M. Rotness), who was a witness at the Investigation, took over the position on February 25, 2010.

On November 23 and 24, 2009, the Claimant was working on the Angora subdivision covering the territory between MP 35.6 and MP 112.2. A Federal Railroad Administration Track Inspector accompanied the Claimant and filed Reports 32 and 33, which identified several instances in which track safety standards had not been met. In each instance in the two reports in which track safety standards were not met, the block entitled, "Violation Recommended" is marked, "No."

The Claimant did not make repairs, place temporary speed restrictions, or remove the track from service in any of the instances noted by the FRA Track Inspector in these reports. However, he faxed the reports to Josh Garner, the individual who was the Roadmaster at that time. As a result of such notification, Josh Garner started repairs. A Machine Operator who appeared at the Hearing on the Claimant's behalf reported, without contradiction, that in late November 2009, he installed ties in the trouble areas identified by the Claimant. This witness reported that the correction was halted when the crew was pulled off to handle a derailment. He indicated that the halt took place on or about the first Sunday in December.

As John M. Rotness testified, the FRA Inspector noted on April 26, 2010, that ". . . [T]here were some items that he had written up as needing repairs that had not been done at that point." On April 27, the FRA Inspector noted additional unaddressed problems related to his November 2009 report.

The Carrier contends that because the Claimant acknowledged that he did not initiate any repairs on the tracks that were specified in the charges against him that he "confessed" to those charges. The Board disagrees.

Full consideration of the transcript of the Investigation and its accompanying exhibits reveals that although the Claimant acknowledged that he did not take any of the actions specified in Engineering Instruction 2.2.3, he did not ignore the track defects. As he had done in the past in such instances, he reported the matter to Josh Garner, who initiated corrective action that was prematurely aborted through no

fault of the Claimant. Thus, the Claimant's acknowledgment that he did not personally initiate the repairs is hardly an acknowledgement of the truth of the allegations against him. Given the full record, it cannot be said that the Claimant "confessed" to the charges against him.

With the above analysis in mind, however, the Board must note that the responsibilities of a Track Inspector are continuous. The record establishes that the Claimant erred in not continuing to double-check the trouble areas identified by the FRA Inspector so as to ensure that necessary corrections had been made. If he had done so, he would have had opportunity to notice that corrections had not taken place and he could have and should have re-initiated actions to correct the defective track conditions.

The Organization contends that by refusing its request to call as a witness in the Investigation the Carrier employee who was the Roadmaster (Josh Garner) over the areas addressed in this dispute when the FRA inspection took place on November 23 and 24, 2009, the Carrier failed to afford the Claimant a fair and impartial Investigation. It argues:

> ". . . [N]umerous decisions of this Board have held that in discipline cases it is the Carrier's responsibility to present all witnesses with pertinent information and to develop all facts relevant to the incident(s) under investigation."

The Organization cites several Awards that make this point, as illustrated in the following excerpt from First Division Award 19910:

> "As to the calling of witnesses, a carrier's role is that of judge; a carrier is, by rule and by the general principle of fairness, obligated to obtain all the essential facts related to the charge. This means that a carrier must call all witnesses who possibly might be able to throw factual light on the occurrences involved. It means that in respect to the calling of witnesses the judicial function must dominate the behavior of a carrier. It is not enough for a carrier merely to rely on another provision of a rule, which, as here, maintains the right of the accused to call his own witnesses to testify in his behalf."

In its Submission, the Carrier notes this argument by the Organization and responds as follows:

> "Arbitral precedent has repeatedly established that BNSF is not required to call more witnesses than necessary to satisfy its burden of proof and that the claimant is responsible for requesting his own witnesses."

This is clearly demonstrated in Third Division Award 37322 (Parker) wherein the Board stated:

> "Furthermore, if the Organization had desire to use those persons as witnesses, it was incumbent on the Organization to arrange for their presence at the Hearing. Moreover, the Claimant's candid testimony about the incident made it unnecessary to call additional witnesses."

There are two points in the Carrier's argument expressed in the above quotation. We address them in turn.

If it were true, as argued by the Carrier, that "BNSF is not required to call more witnesses than required to satisfy its burden of proof," it would need only to call witnesses who would support its position. This, of course, would hardly be a fair and impartial Hearing.

The letter summoning the Claimant to the Hearing states that the Hearing is "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to apply remedial action on FRA tie defects at/or near mile posts 91.25, 84.2 & 83 on the Angora Subdivison . . . ." In her opening statement, the Hearing Officer explained, "The purpose of this investigation is for ascertaining the facts with regard to failure to apply remedial action on FRA tie defects."

Although the quotation from the following formative work on labor arbitration does not specifically address arbitration under the Railway Labor Act, the point it makes is valid here: From Just Cause The Seven Tests (Adolph M. Koven and Susan L. Smith, 3rd edition revised by Kenneth May, Washington, D.C.: The Bureau of National Affairs. 2006):

"Proof of misconduct falls short in many cases where more thorough efforts by the employer to question all witnesses about the events in dispute might have produced enough evidence by way of corroboration for the employee to prevail."

To put the second matter in the most generous way possible, it is the opinion of the Referee that the Carrier's argument about the Organization's responsibility of calling witnesses in an Investigation is without merit. It misleads because it is based upon an out-of-context quotation from the cited Award. The difference is evident in the following side-by-side citation:

Third Division Award 37322 as quoted by the Carrier in its Submission.	Third Division Award 37322 in context.
"Furthermore, if the Organization had desire to use those persons as witnesses, it was incumbent on the Organization to arrange for their presence at the Hearing. Moreover, the Claimant's candid testimony about the incident made it unnecessary to call additional witnesses."	Third, the Organization objects that the Carrier failed to produce as witnesses at the Hearing the contractor employees who operated the switch grinder and who were eyewitnesses to the incident. Because the Carrier could not subpoena them, however, and did not have control over them because they were not its employees, it could not be expected to produce them as witnesses. Furthermore, if the Organization had desired to use those persons as witnesses, it was incumbent on the Organization to arrange for their presence at the Hearing." (Emphasis added.)

In the case now under review, not only was Josh Garner still an employee of the Carrier, he had been the Claimant's immediate supervisor in November 2009 and the Carrier Official who had been informed by the Claimant of the FRA Inspector's November 2009 report. It was he who initiated corrective action based on the FRA report.

When the Carrier's refusal to call Josh Garner was raised during the Hearing, the Hearing Officer responded:

> ". . . I notified you that if you would like to bring Josh Garner in that you could do so. * * * However, Josh Garner is no longer a Roadmaster and John M. Rotness was able, I feel, to testify to exactly what did or did not transpire."

It is the view of the Board that the Hearing Officer erred in not granting the Organization's request to call Josh Garner as a witness in the Investigation. It was he, not John M. Rotness who was the best witness to testify about what had taken place in November 2009 when Josh Garner, not John M. Rotness, was in charge. The best that John M. Rotness could offer about the time period in question was not even hearsay; it was mere guesswork. John M. Rotness acknowledged as much in the following exchange. The questioner was the Vice General Chairman of the Organization:

> "Roy L. Miller: Do you have any knowledge whether he faxed the November track FRA inspection reports to any officers of the company?
>
> John M. Rotness: I don't have any knowledge of that, no.
>
> Roy L. Miller: So anything that you testified to from November to April you weren't there, right?
>
> John M. Rotness: I was not, no.
>
> Roy L. Miller: So anything you have been able to say about it is really just secondhand?
>
> John M. Rotness: The only knowledge I have of this is from April 27th.
>
> Roy L. Miller: Coming forward?
>
> John M. Rotness: And, and going forward."

Moreover, the record makes clear that the Carrier had the November 2009 reports before John M. Rotness became aware of the problem.

> "HEARING OFFICER: *** So I need to ask you, for clarification, if this was actually reported [by the FRA Inspector] on 11/24/2009, when was your first knowledge and why did it take so long for you to be notified of this information?
>
> John M. Rotness: My first knowledge of this was on April 27th and I had asked on conference calls when we had found some FRA reports that were in the office of the former Roadmaster that we didn't show completion dates on the repairs and so I asked about whether or not repairs had been made and if anybody else had any FRA paperwork that we needed to look into."

When the Hearing Officer declined to call Josh Garner, the Organization introduced a document that it identified as being a statement from him. The Hearing Officer noted that the document had not been signed and asked why the Organization did not call him. The Organization representative replied:

> "A couple of reasons. The first is that the Organization is not the employer of Josh Garner. We have no right to reassign to duties other than those assigned by the Carrier. We have no opportunity to pay . . . [him] . . . ."

Given this background, and the suggestions by the Organization as to how the statement could be verified, the Board accepts the document as bona fide. Key among the information in the statement is the following:

> "[Q.] As track inspector was it Rosenbaum's responsibility to schedule track repairs?
>
> [A.] No. Track inspector found and reported needed repairs. Roadmaster scheduled repairs.
>
> [Q.] Did Rosenbaum deliver the FRA tie defect reports dated November 24, 2009 to you?

[A.] Yes they were faxed to my office.

* * *

[Q.] Did you have occasion to request repairs or maintenance for tie conditions at mileposts 9.25, 84.2, 83.8 on the Angora subdivision in November 2009?

[A.] We were in the process of installing ties with a backhoe before we had a derailment at Northport."

Information in the statement about the communication was verified by testimony from the Claimant and from the Machine Operator who appeared on behalf of the Organization. In addition, partial confirmation came from John M. Rotness in testimony already cited:

". . . [W]e had found some FRA reports that were in the office of the former Roadmaster that we didn't show completion dates on the repairs . . . ."

The Organization argues that Rule 40 of the Agreement is controlling. A part of its presentation of the Rule follows:

"A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company . . . and except as provided in Section B of this rule."

Two inspections figure in this matter and, although they are related, they must be kept separate. There is an ambiguity in the letters summoning the Claimant to the Investigation:

"Arrange to attend investigation . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to apply remedial action on FRA tie defects at/or near mile posts 91.25, 84.2 & 83.8 . . . . First knowledge to

officers of the company was April 26 and April 28, 2010." Similar phrasing is in the letter imposing discipline,

The Organization appears to read the assertion of first knowledge that appears in Transcript Exhibit 16 as saying that the Carrier's first knowledge of the track defects at Mileposts 91.25, 84.2 and 83.8 took place on April 26 and 28, 2010. A careful reading of the paragraph reveals that it asserts that it was on the April 2010 dates that the Carrier first learned of – what it termed – the Claimant's "failure to apply remedial action on FRA tie defects at/or near" those mileposts. This is a concept that is different from when the Carrier first had knowledge that defects were identified at those sites.

The Carrier does assert that its first knowledge of the FRA Inspector's concern about the ties took place in 2010:

> "Upon receiving the FRA inspection report [of April 27, 2010], two items of concern were discovered. First, these defects were originally identified to Claimant by . . . [the FRA Inspector] on November 24, 2009. Second, and more disturbing, was that from November 24, 2009 until . . . [the FRA Inspector] wrote up the violations on April 27, 2010, these three areas were unreported to BNSF supervision and thus, were also unprotected."

This assertion by the Carrier is not valid. The record clearly establishes that the Carrier obtained knowledge of the FRA Inspector's concern upon receipt by Josh Garner of the FRA Inspector's reports on November 24, 2009, emailed to him by the Claimant. In fact, the record shows that repairs on the defects identified in the FRA Inspector's reports dated November 23 and 24, 2009 were initiated by Josh Garner and were underway until they were aborted by the Division Engineer.

As explained in the above discussion, the Board finds that by not calling a key witness in the matter, the Carrier did not provide a fair and impartial Investigation, that the assertion by the Carrier that the Claimant "confessed" to the allegations was not proven, and that the discipline of a 30-day record suspension and a three-year probation imposed upon the Claimant was not warranted. However, because the record indicates that the Claimant erred by not reviewing the troubled areas identified in the FRA Inspector's reports of November 23 and 24 during his continuing responsibility over the relevant areas of tracks to be sure that corrections

were made, we find that corrective discipline in the nature of a written warning is justified.

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 25th day of November 2013.