

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42386  
Docket No. MW-42587  
16-3-NRAB-00003-140274**

**The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(BNSF Railway Company (former Burlington  
( Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [Level S thirty (30) day record suspension and a three (3) year probation period] imposed upon Mr. L. Bellew for alleged violation of EI 2.4.5 Items to Consider When Inspecting and MOWOR 1.13 Reporting and Complying with instructions in connection with charges of alleged failure to properly protect track per the FRA Track Safety Standards, Part 213 where defects were found unprotected and/or no proper remedial action taken per FRA Inspector’s inspection conducted starting at Mile Post 2.20 on October 22, 2012 and continuing while assigned as track inspector on the Glasgow Subdivision was arbitrary, capricious and in violation of the Agreement (System File B-M-2654-M/11-13-0165 BNR).**
- (2) The claim\* as presented by Vice General Chairman J.A. Mozinski on February 7, 2013 to Mr. R.T. Bartoskewitz, General Manager Montana Division, shall be allowed as presented because said claim was not disallowed by Mr. R.T. Bartoskewitz in accordance with Rule 42(A).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant L. Bellew shall now have ‘ . . . the discipline immediately removed from his record, and his record cleared of**

any reference to any of the discipline set forth in the letter received by the Organization on January 14, 2013. . . .’ \*The initial letter of claim will be reproduced within our initial submission.”

**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 Claimant is a track inspector who allegedly failed to detect and properly protect track defects during his inspections. The FRA inspector reported the following:

- Report 132, October 22, 2012
  - Crossing diamond defects found at each turnout and frog, separately reported;
  - Guard check gage less than allowable, 54 with plate movement, Gassman switch;
- Report 133, October 23, 2012
  - Milepost 51.40, Guard check gage less than allowable value = 54 inches, East Stanley;
  - Milepost 54.50, guard check gage less than allowable value = 54.25, West Stanley;
  - Milepost 39.90, guard check gage less than allowable = 54, West Blaisdell;

- Milepost 38.00, guard check gage less than allowable value – 53.875 East Blaisdell.
- **Report 134, October 24, 2012**
  - All four turnouts on the main required remedial action “It is this FRA inspector’s strong opinion (based on the defects found the track time make available for a Thorough inspection) that the Engineering Department is NOT getting the appropriate or required time and/or support to properly inspect, protect, or maintain the tracks for the track class it is.”
  - Milepost 14, Guard check gage less than allowable value = 4.25, West Des Lacs;
  - Milepost 30, guard check gage less than allowable value 54.25, East Tagus;
  - Milepost 32.4, guard check gage less than allowable value 54.375, West Tagus;
- **Report 137, October 30, 2012**
  - Inspecting the track records of two BNSF Inspectors on the Galsgow [sic] sub that report to Roadmaster Jim Kuhnenn. Track Inspectors are not reporting defects that are in the track;
  - **FAILURE OF INSPECTOR TO PROVIDE REQUIRED INFORMATION.** The BNSF track Inspectors are not recording the actual condition in the track. FRA Track inspections records being compared to the BNSF records.

None of these defects were protected or shown as defects prior to October 23.

The Carrier asserts the discipline was rendered in a timely fashion because the letter was mailed within the prescribed 30 days. It argues the fact that it was not received within the 30-day period is meaningless because the “Mailbox Rule” applies: the time of notification or transmission is controlling, not the time of receipt. As has been clarified by numerous prior awards, notification occurs at the time of dispatch. This means a claim is presented when it is deposited in the US mail. There is no possible rationale for setting a different standard for the denial. The only logical interpretation is for the Mailbox Rule to apply to both communications.

The Carrier maintains that multiple defects existed on the Claimant's territory which were not identified and remedied by him as required. These defects were not due to weather or other intervening circumstances. Though the applicable rules were not referred to during the hearing, the case concerns the Claimant's main duties, so he plainly knew the issue was violation of the Engineering Instructions.

The Organization argues the award cited by the Carrier only applies to initial presentation of claims. It does not address the required timing for notification of denial. Award 37811 by Arbitrator Myers is the most recent guidance we have and interprets notification to mean actual receipt. The Claimant had nine more days before he was required to report the defects on the track section of concern.

The Organization asserts the Claimant was disciplined under rules which were not introduced in the investigation. The first mention of the rules in question was in the disciplinary letter. Award 42293 makes it clear that the accused must know all the charges being leveled against him. This standard cannot be met in this case.

The Organization also argues the defects of concern were not there the last time he inspected and he would have found them at his next scheduled inspection. The Board has to show the defect existed before it can penalize the Claimant and it cannot show this.

There is no evidence to support intent of the parties that initial presentation and declination of a claim be handled differently. It is an accepted that a provision should be interpreted to harmonize language rather than create conflict within the language used by the parties to express their intent. Though the parties did use the word "presentation" to convey initiation of the claim and "notification" to express communication of its declination, there is no discernible intent to create differential treatment. In the opinion of this Board, such an interpretation is disfavored; an express intent should be in evidence to support the creation of schisms in the parties' methods of dealing with each other. It follows that the Mailbox Rule, established for presentation of claims, is also applicable to notification of declination. This means the Carrier's denial was timely filed.

The Notice of Investigation informed the Claimant that the investigation was:

“ . . . for the purpose of ascertaining the facts and determining [Claimant’s] responsibility, if any, in connection with your alleged failure to properly protect track per the FRA Track Safety Standards, Part 213 where defects were allegedly unprotected and/or no proper remedial action taken starting at MP 2.20 on October 22, 2012 and continuing while assigned as Track Inspector on the Glasgow Subdivision.”

This Notice did not advise the Claimant or Organization of the rules the Carrier was attempting to enforce. No rules were submitted into the record. However, it was quite clear that the subject matter of the investigation would be the Claimant’s alleged failure to detect and identify defects as a result of his inspections. The Organization knew or should have known what rules are involved in such allegations. As a result, there was no prejudice to the Claimant resulting from the Carrier’s failure to submit the rules into the record.

The Carrier asserts the Claimant failed to locate and identify defects which should have been apparent during his inspections. The Claimant testified that he was not due to report the track defects in question for nine more days:

“JOHN MOZINSKI: And, um, by your earlier testimony,  
23 Brian said that you have 30 days to do a turnout, is  
24 that correct?  
25 LARRY D BELLEW JR: Got a month.  
26 JOHN MOZINSKI: Yes.

1 LARRY D BELLEW JR: Yeah, 30 days per every month you get  
2 a, a monthly inspection does on turnouts, that is correct.  
3 JOHN MOZINSKI: And these were defects found on  
4 turnouts, correct?  
5 LARRY D BELLEW JR: They were.<sup>1</sup>”

Certainly, a defect can appear between the time of one inspection and the next through no fault of the inspector. Under ordinary circumstances this might explain why the listed reports might not surface until later. However, when the

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<sup>1</sup> TR 49-50.

defects become multiple and pervasive, the likelihood that a defect simply occurred between inspections diminishes. The Board is not persuaded that the Claimant could effectively perform his job if he withheld information about defects until the end of the month.

The Claimant was expected to continually and frequently perform inspections. It strains credulity to think he would not have come across any of the listed defects had he been doing his job. This is particularly true where, as here, the Claimant inspected track with a high level of frequency. Given the facts of this case, the Carrier must be deemed to have substantial evidence to support the discipline leveled against the Claimant.

**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 October 2016.