

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 402 – Award No. 402 – Sinclair
Carrier File No. 14-10-0194
Organization File No. 150-13D3-104.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 09, 2010, when Claimant, Ronnie J. Sinclair (6592869), was allegedly improperly disciplined by Disqualification as a Track Supervisor
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this disqualification and reinstate his seniority as a Track Supervisor and he be compensated for his lost time and expense and otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein, and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Ronnie J. Sinclair, was, according to his personal record, hired by the Carrier in 1973. On July 8, 2010, the Carrier issued Claimant a letter notifying him of his disqualification from his Track Supervisor position, as it had been determined that he did not possess the ability, fitness and skills to handle the position in a safe and efficient manner. The letter also notified Claimant that he could request a formal investigation to dispute the Carrier's action. Claimant did so, and the investigation was held on

September 2, 2010. On September 20, 2010, the Carrier issued Claimant a letter which provided, in relevant part:

[I]t has been determined through testimony and exhibits brought forth during the investigation that your Track Supervisor rights will not be reinstated

In assessing discipline, consideration was given to your personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).

Sherri Ellis, Roadmaster at the Carrier's Belen, New Mexico facility, testified that Claimant was her direct report at the time at issue. She stated that she decided to disqualify him based on a derailment on June 19, 2010 at the Belen, New Mexico yard, and factors leading up to that event, including another derailment on September 22, 2009 in Albuquerque. Ms. Ellis testified that Claimant was the senior Track Supervisor with the most seniority and experience, for the territories at issue at the times of these derailments.

The record includes the FRA train accident report for the 2009 derailment, which indicated that the reason for the incident was wide gage, with defective and/or missing spikes/other fasteners. The record also includes six photographs of that incident. Ms. Ellis described the photographs, which showed the condition of the track, including dirt, missing and lifted spikes, and broken gauge bars.

The record also includes the FRA train accident report for the June 2010 derailment, which also shows the primary cause as wide gage, with defective and/or missing spikes/other fasteners. The record further includes inspection reports for the track at issue in the instant derailment, back to June 2, 2009. Claimant first inspected that track on November 30, 2009.

The record also includes an e-mail from an FRA inspector to Ms. Ellis and the Carrier's Division Engineer, dated March 8, 2010. The e-mail describes the FRA's review, on March 8, 2010, of inspection records from December 2009 to February 2010, and states that the FRA inspector has "some concerns." In relevant part, the report provides:

[There is] some concern [about] the number of tracks Mr. Sinclair (Claimant) is showing he inspected in one day. I will use December as the example, however both January and February also showed the same pattern.

December 28th, 2009—20 turnouts inspected and 6 yard tracks—No defects

December 29th, 2009 - 38 yard tracks and 23 turnouts— No defects

December 30th, 2009—42 yard tracks and 0 turnouts—4 defects written on this day, 1 each for 4 different tracks.

The concern here is the amount of tracks claimed to be inspected. Because there is no track and time needed for the yard, there is no way to show the inspections did not take place. The intent here is not to make accusations, but to simply state it is obvious work load is being carried to the end of the month, and then many inspections are being placed in on one day. If we used simple logic and said it was done walking at a generous pace of 3 miles per hours, this would give 24 miles in a 8 hour day that could be walked. If each of the 42 yard tracks were ½ mile each, this may be an achievable goal. This simple exercise does not take into account morning job briefings, lunch, etc. . . . Is it feasible to think 1 Track Supervisor is walking 21 miles in one day.

Another concern is the defect ratio. I looked at 111 pages for Albuquerque and Belen. These reports were from December to January. There were very few defects written during these months. Please understand the point here is not to enforce reporting defects that are not here, just to report them. It is easy to assume when you have 42 yard tracks inspected one day, and a small handful of defects, that maybe the inspection is not of high quality.

Another e-mail from the FRA inspector, dated March 10, 2010, recounted that he had performed an inspection in Belen and there were 8 defective rails with no remedial action, four of which would be recommended as violations, and four as defects. In another e-mail dated March 12, 2010, the FRA inspector provided two more reports, one showing three additional detail fractures with incorrect remedial action. The defect reports were also included in the record.¹ Ms. Ellis testified that she was aware that the FRA coached and counseled Claimant concerning the defects noted in the reports.

Ms. Ellis declined to answer the Organization representative's questions as to whether she performed monthly inspections with Claimant over his territory. When asked whether it was Claimant's responsibility to remove dirt off the ties, she responded that he was required to perform a complete investigation. She stated that she could not recall whether Claimant had ever requested switch cleaners at Albuquerque to clean the switches so that he could perform a proper inspection, but at Belen he did have the vacuum truck in to clean in February 2010, prior to the Belen derailment.

Gary Gomez, Roadmaster at the Carrier's Belen, New Mexico facility, testified at the investigation that he was on duty the weekend of June 19 and 20, 2010, at the time of

¹ The record also includes an FRA report dated March 20, 2010, which apparently concerning defective rails, for which there had been reporting issues beginning in January 2008, before Claimant took over the yard. She conceded that this situation was not entirely Claimant's fault, although there had been several opportunities to inspect which, she believed, he had not taken.

the Belen Yard derailment. He went to the site and inspected the derailment, determining the cause of the incident.

Mr. Gomez described photographs, which were entered into evidence at the hearing, which showed that at the point of the derailment there were no spikes, or rail fasteners, on the inside, gauge side of the rail. Mr. Gomez stated that there were spikes shown in the pictures, but none were holding the base of the rail down, and the closest one was half an inch from the base. One photo, he explained, showed spikes in the ties but all of them were high.

Mr. Gomez testified that, in his opinion, the cause of the derailment was that there were 33 ties without proper rail fasteners, which, in this case, would have been spikes and wood ties. He added that there were 55 feet of track with unsecured rail, which allowed severe cant. He stated that with respect to the spikes that were in, or spiked down, the closest one was a minimum of one half inch from the rail base. The rest, he explained, were missing or high spikes, and some were broken and under the rail.

Mr. Gonzalez stated that these conditions would "absolutely" be identifiable under track inspection. He added that there were obvious signs that all of the spikes had been out for some time, as they were rusted and several had spike heads under the rail which had worked completely off, an obvious sign that there were no inside spike fasteners. He also testified that the derailment site depicted in the photographs had not been cleaned prior to the time the photographs were taken.

Claimant testified at the investigation that he had been a Track Supervisor for over 15 years. He stated that his duties in that position were to maintain inspection records of the tracks in his territory, perform minor repairs and similar tasks. He explained that it was important for him to report track defects so the tracks would be protected and it would be safe for the trains to run over them without the possibility of derailment. Claimant added that he had always passed audits at a high level, had never failed any safety tests or classes, and had been assigned to various Roadmasters in other territories without incident.

Claimant acknowledged that there had been two derailments, which were determined to be track-caused, on his territories. He also acknowledged that it was his responsibility to report and prevent defects such as the ones which were highlighted in the investigations of these incidents.

Claimant contended, however, that the track conditions had not been protected in these incidents because both locations were covered with dirt and he was unable to perform proper inspections. He added that he had requested that the entire surfacing gang come to the Albuquerque yard and work the leads because they were full of dirt and he wanted to tamp up and have them boomed out. However, he stated, his request for the cleaning crew was denied, and it was not his responsibility to clean the ties to perform the inspection. Under those circumstances, he stated, his responsibility was to inspect the tracks to the best of his ability. Claimant stated that the Albuquerque track was covered

with dirt, and he was aware that there had been a derailment on that track prior to that time, so he watched as best as he could, took his measurements and never found any defects.

With respect to the Belen yard incident, Claimant explained that cleaning had been scheduled at the time of the derailment. He stated that the last thing he did prior to his disqualification was to run a vacuum truck to clean the debris and dirt out of the switches, sometime during the last week of June, around the 13th to the 18th, but he must have performed his inspection prior to the track being vacuumed because it had been by the time of the derailment. He stated that the track not having been vacuumed at the time of his inspection must have been the reason he did not find so many missing spikes. He stated that his Roadmaster had not performed any inspections with him, and he stated that Ms. Ellis had never expressed any dissatisfaction with his performance prior to the disqualification.

Claimant explained that an "inspection to the best of his ability" meant that he would take his measurements and, if he could not see underneath the dirt but his static gauge was 57½ it was still within FRA requirements and not a defect. He stated that if he could not properly inspect because of the dirt, he could only assume his measurements were within the proper specifications. He explained that if he did not discover any exceptions in the measurements, he had no reason to believe there were defects underneath the dirt.

Claimant maintained that he performed his required monthly inspections to the best of his ability under the conditions present for his inspection. Claimant acknowledged that he had requested that the tracks be cleaned because he had concerns about being unable to see through the dirt, and explained that if the track were "broomed out" he would have a better chance of performing a proper inspection.

Claimant admitted that if he had a concern with the dirt on the tracks, and his concern was not addressed, the appropriate escalation for the situation would be to take the track out of service.

Claimant's personal record shows a Level S 30-day waiver with a 12 month probation period on November 3, 2005, for failure to stop short of a red flag and receive permission from the employee in charge of a Form B to proceed through his limits. The record also shows three other disciplinary incidents in the 1990s.

The Carrier first states that the Organization improperly attempts to shift the burden of proof in this matter, as this was not a discipline case so the Organization must demonstrate that Claimant possesses the qualifications to be a track supervisor. Further, the Carrier disputes the Organization's contention that it did not provide Claimant a fair and impartial investigation.

The Carrier notes that Claimant's excuse for not finding problems during his inspection was dirt or the track not having been vacuumed. The Carrier states as a Track

Supervisor, Claimant was held to a higher standard and dirt is not an excuse for missing 33 ties improperly fastened and missing spikes. Claimant's attitude, the Carrier asserts, resulted in two derailments. The Carrier states that it cannot risk further property damage and/or a possible catastrophic event because of Claimant's failure to make proper inspections.

The Carrier concludes that the Organization's contention that a flagrant rule violation is necessary to support this disqualification is inaccurate. It states that the disqualification was not excessive or inappropriate in light of Claimant's failure to perform his duties properly, and requests that the claim be denied.

The Organization raises procedural and substantive challenges to the Carrier's action against Claimant. First, the Organization asserts that the Hearing Officer allowed irrelevant evidence to be entered into the record, refused to allow the Organization representative to ask pertinent questions, acceded to the refusal of Carrier witnesses to answer questions, and confused the record by entering massive exhibits.

On the merits, the Organization points out that all of Roadmaster Gomez' testimony concerning track measurements is based on information obtained *after* the derailment. It is common knowledge, the Organization states, that a derailment may damage or destroy entire sections of track, so post-derailment measurements should not be held against Claimant. Further, the Organization notes, the Hearing Officer permitted Roadmaster Ellis to present evidence of a derailment which occurred in 2009 and for which Claimant had no responsibility.

With respect to the incident at issue, the Organization states, testimony indicated that the tracks were covered in dirt, and Ms. Ellis conceded that that condition would make the track inspection difficult. The Organization points out that Ms. Ellis also conceded that the incident was not entirely Claimant's fault, as there were reporting issues prior to his taking the territory over.

Moreover, the Organization notes, Ms. Ellis refused to answer questions as to whether it was her responsibility to perform monthly inspections with Claimant, showing that she attempted to conceal her own failings and attempted to shift responsibility to Claimant.

The Organization stresses that Claimant made multiple requests to have the yard cleaned to help him inspect properly, but his requests were denied. He also, the Organization notes, requested a surfacing gang to broom off the affected areas, allowing for a better inspection. This request, the Organization states, was also denied, and no attention was given to the yard until after the derailment.

The Organization concludes that the Carrier has failed to sustain its charges against Claimant and the claim should be sustained. Even if the charges had been proven, the Organization adds, the penalty assessed is excessive in proportion to the alleged misconduct.

We have carefully reviewed the record in its entirety. At the outset, in light of our findings on the merits, we find it unnecessary to rule on the procedural issue as to whether the Carrier's disqualification of Claimant constituted a disciplinary action, such that the Carrier has the burden of proving his guilt by substantial evidence, or whether the burden is on the Organization to show that Claimant possesses the necessary skill and ability to perform his job. Either way, the record amply supports the Carrier's contention that Claimant, despite his seniority, lacked the necessary skills and ability to properly perform his job, and that disqualification was not an excessive or inappropriate action under the circumstances.

By Claimant's own admission, both the Albuquerque and Belen derailments occurred on tracks for which he was responsible. The FRA report for the incident, as well as photographs of the derailment scene, show defective and missing spikes and broken gauge bars. At the Belen Yard, the FRA inspector reported various defects concerning Claimant's performance, and questioned whether it was even possible for Claimant to have inspected the tracks as he claimed. Claimant did not dispute Ms. Ellis' testimony that he was coached and counseled by the FRA concerning the noted defects.

Yet approximately nine months after the Albuquerque derailment, a virtually identical derailment occurred on Claimant's track at Belen. The FRA accident report shows the same defects. The photographs of the incident clearly demonstrate missing and/or lifted spikes, conditions which, according to the Carrier's witness caused 33 ties to be without proper rail fasteners and 55 feet of track with unsecured rail. The conditions, according to Mr. Gomez' undisputed testimony, had obviously existed for some time and would have been readily observable under inspection.

Claimant's version of events bolsters the Carrier's case against him. Claimant's defense to the disqualification is that he was not responsible for the derailments because of dirty track conditions. The record does show that Claimant requested cleaning for the tracks at issue. Nevertheless, Claimant acknowledged that it was his responsibility to report and prevent defects such as the ones highlighted in the investigations of these two derailments. He admitted that he was aware there had been a previous derailment on the Albuquerque track and requested that it be cleaned because he had concerns about the dirt. However, when cleaning was not forthcoming, he stated, he simply did the best he could and relied upon his measurements.

Notwithstanding this derailment on his watch, Claimant maintained that when he was again faced with dirty track at Belen, he once again simply inspected to the best of his ability under conditions which, he contended, gave him concern as to whether he could properly inspect the track. He could, he stated, only assume that his measurements were proper. Apparently the FRA coaching and counseling had no effect.

Most significantly, Claimant acknowledged that he had the option to take a track out of service if conditions prevented him from performing a proper inspection. But,

even after one derailment, he failed to do so when supposedly faced with identical poor conditions on another track. He is responsible for the derailment.

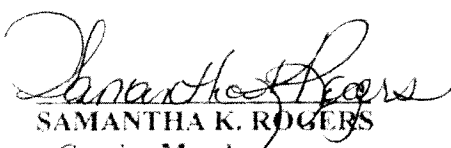
In summary, the record shows that Claimant either failed to perform his assigned inspections and/or performed them in a casual, cursory manner, without taking all available steps to ensure that the track was in safe condition. After one derailment should have alerted him to the danger of continuing as he had, he apparently went on in exactly the same way, leading to another derailment. Despite his lengthy service, the record demonstrates, as the Carrier alleges, that Claimant did not demonstrate the skill required for his position. He was therefore properly disqualified.

AWARD

Claim denied.



DANNIELSEN
Neutral Member



SAMANTHA K. ROGERS
Carrier Member



DAVID TANNER
Organization Member

Dated this ^{3rd} day of *May*, 2012.