

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 89, (Case No. 89)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing June 28, 2010, when Claimant, Charles W. Hall (6479745), was issued a Level S 30-day Record Suspension with 1 year review period, and relinquish his Track Inspector rights for 1 year for his failure to properly detect and protect track warp condition while conducting track inspections resulting in a train derailment on July 3, 2010. The Carrier alleged violation of EI 2.1 Purpose of Track Inspection, EI 2.2.3 Responsibility of Track Inspectors and EI 5.5.3 Defect and Definition and Limits.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be compensated for his lost time and expense and otherwise made whole."
(Carrier File No. 14-10-0169) (Organization File No. 20-13C2-1036.CLM)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On July 8, 2010, Claimant was directed to attend a formal Investigation on July 14, 2010, which was mutually postponed until July 19, 2010, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility,

if any, in connection with your alleged failure to properly detect and protect track warp condition in accordance with BNSF Engineering Instructions on June 28th, 2010, June 29th, 2010, and July 1st, 2010, while conducting track inspections, which resulted in a train derailment on the Marceline Sub at milepost 443.9 main 3 on July 3rd, 2010, at approximately 0150 hours resulting in total damages in excess of three million dollars, while assigned as track inspector."

On August 12, 2010, Claimant was notified that he had been found guilty as charged and assessed a Level S 30 Day Record Suspension with a relinquishment of Track Inspector rights for one year with a one year review period.

It is the Organization's position that the Carrier did not meet its burden of proof. It stated that the facts indicate a train derailment occurred on July 3, 2010, at Milepost 443.9 main 3 which is part of the Claimant's territory as a regularly assigned Track Inspector. There are three main tracks throughout this location which have a large volume of traffic including approximately 30 heavy coal trains a day. Prior to the derailment the Claimant had completed three inspections at this location on June 20, 28 and July 1, 2010, at which time he took measurements. Each inspection according to it revealed that everything was in compliance with the speed of the track according to all BNSF and FRA Rules and Guidelines. It asserted that this was newly constructed track and Claimant was concerned that even though the track was in compliance for 40 MPH there was some weakness in the foundational ground. It argued the Claimant had been watching this location and had informed the Roadmaster Kevin Bristow that it was weak and needed some surfacing and tamping work which was acknowledged by Bristow in his testimony at the Hearing. It further argued that the FRA and the Carrier set standards and as long as the track is within those standards, the Policy is "don't slow them down", which is what the Claimant followed. It reiterated that on the last inspection of July 1st, everything remained in compliance and on July 3rd more than 60 loaded heavy coals had moved over the location with no issues prior to the derailment. It closed by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant failed to inspect a track properly resulting in a derailment on July 3, 2010, causing total damages in excess of 3 million dollars. It argued that Claimant was assigned as a Track Inspector and it was his responsibility to perform a thorough inspection of the track and he is responsible for taking the appropriate action to either make the necessary repairs or put a slow order on the track ensuring the trains are traveling at a less than normal speed. It asserted that the record reflects that there was a 2 1/2 inch warp on the track the Claimant inspected on July 1st yet he did not put a 10 mph slow order on it. It further argued that the Claimant admitted that the track should have been slow ordered. It concluded by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that the Investigation was held in accordance with Rule 13(a) the Discipline Rule and Appendix No. 11.

The record reveals that on page 34 of the transcript the Claimant testified that after the derailment he measured the track and found the worst spot to be 2 1/2 inches and that it needed a slow order of 10 mph.

The Carrier argued that the Claimant admitted he should have put a slow order on the track in dispute on page 35 of the transcript, however, examination of that testimony reveals that he was questioned about the FRA's measurement of the track after the derailment. The FRA measurement was 2 1/8 and he stated that according to that measurement there should have been a slow order, but he went on to testify that on July 1st at his last inspection the measurement was two inches and there was no need for a slow order. However, on page 41 of the transcript, the questioning of the Claimant continued as follows:

"Michael Heille: I've got a few more questions, Mr. Hall, You, you said somewhere thereabouts around June 25th you gave the surfacing gang a list to go surface, is that right?

Charles W. Hall: Yes, it was the following Monday after the 20th.

Michael Heille: The following Monday after the 20th. You gave them a list. You wanted this area surfaced, correct?

Charles W. Hall: Correct.

Michael Heille: You already stated this was an area of concern for you, right?

Charles W. Hall: Yes, it was on the threshold.

Michael Heille: So it was on the threshold and it didn't get tamped that day, is that right?

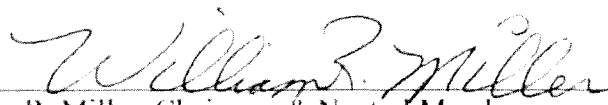
Charles W. Hall: Correct."

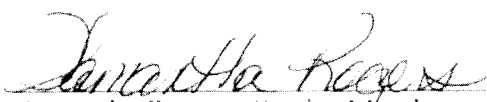
On page 47 of the transcript the Claimant again testified he knew that the location of the derailment on July 3, 2010, was borderline and/or on the threshold for the issuance of a 10 mph slow order and that coupled with the fact that the Claimant had been concerned about that site since June 20th substantiates that he should have issued a slow order for that area prior to July 3, 2010. Substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

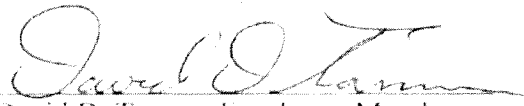
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 32 years of service with a good work record, however, the violation in this instance was a serious matter, therefore, the Level S 30-Day Record Suspension will not be set aside as it was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

Claim denied.


William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 5-21-12