

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when on April 24, 2003, Mr. Robert M. Moore was issued a Formal Reprimand and disqualified as a Track Supervisor for violation of MOW Operating Rule 1.6 and 1.13; Engineering Instruction Nos. 2.2.1, 2.4.4, and 2.4.5; and Track Safety Standards Part 213, 213.233 and 213.109 in conjunction with Mr. Moore's alleged falsification of an FRA Report on December 31, 2002.
2. As a consequence of the Carrier's violation referred to above Mr. Moore shall have his record expunged of the above referenced discipline, paid for all time lost as a result of his being disqualified as a Track Supervisor, and he shall have his Track Supervisor seniority reinstated and he should be allowed to work again as a Track Supervisor. [Carrier File No. 14-03-0110. Organization File No. 190-13D2-037.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Robert M. Moore, was first employed in the Carrier's Maintenance of Way Department in 1993. On December 31, 2002, he was working as a Track Supervisor. His duties included inspection of the Carrier's tracks for defects and compliance with the Federal Railroad Administration's (FRA) Track Safety Standards. On a Track Inspection Report form used by the Carrier for that purpose, he indicated that Track 6629 at Amboy, California, was inspected on December 31, 2002, was in good condition, and had no defects. This track, however, had been taken out of service for condemnable crosstie defects on June 14, 2001, and continued out of service until and including December 31, 2002.

Because of the obvious discrepancy in the report, the Claimant was declared disqualified as a Track Supervisor on January 21, 2003, and charged with violation of several Carrier rules and FRA Track Safety Standards.

An investigation was held on these charges and a transcript of testimony and evidence taken therein appears in the record before this Board. The Claimant testified that a fellow employee, another Track Supervisor, prepared the Track Inspection Report and the Claimant signed it without noting that Track 6629 was shown as "Good" with no defects. He forthrightly testified that he was aware it was out of service, by reason of his monthly inspection and frequently passing the location while engaged in his work. The subject report reflected his first inspection of this particular track; prior thereto he had been engaged in inspecting other tracks in his assigned territory.

The investigation's Conducting Officer stated that he was willing to recess the investigation to obtain the presence of the Claimant's fellow employee who prepared the Track Inspection Report, but the offer was declined by the Claimant's representative, who indicated that the Claimant had admitted having signed the erroneous report.

Following the investigation, the Claimant was advised that he was being issued a Formal Reprimand, by letter dated April 24, 2003, reading as follows, in part:

As a result of the investigation held on Thursday, March 27, 2003 and review of the transcript, concerning your falsification of FRA inspection reports, due to your honesty and admittance, you are hereby issued a Formal Reprimand, for violation of Maintenance of Way Operating Rule 1.6 and 1.13, . . . Engineering Instruction No. 2.2.1, 2.4.4 and 2.4.5, . . . and Track Safety Standards Part 213, 213.233 and 213.109, . . . This incident occurred while you were assigned as a Track Supervisor on the Needles Subdivision, Southern California Division. Additionally, you have been assigned a review period of 1 year.

The Organization promptly and timely appealed the Carrier's disciplinary decision. The Organization first argues that the Claimant was taken out of service on January 21, 2003, for a "short discipline." It further argues that the erroneous report data was not the result of malicious intent, but was admittedly a mistake, which more appropriately merits coaching and counseling. The Organization also argues that the subject track's switch was spiked, and the switch locked with a personal lock to prevent access by a train or locomotive. The switch was tagged to alert employees it was out of service. As such, it is argued, the track was "good" for its type, i.e., out of service. The Organization contends that the discipline is "extreme, unwarranted and unjustified," and seeks reinstatement of the Claimant.

The Carrier denies that the Claimant was removed from service on January 21, 2003. It states that he was disqualified as Track Supervisor on that date because he admitted he was not inspecting tracks as required, and he improperly completed inspection reports. Being disqualified, he had the right to exercise his seniority, but delayed doing so. He then took a medical leave of absence for personal medical issues.

The Carrier further responds that the Claimant admitted signing off on an inspection he did not make. He certified the track was in "good" condition when, in fact, it was out of service.

The Board has studied the record in this case, including the investigation transcript, the applicable Carrier rules and Federal regulations, the Parties' Agreement, and their arguments. The Organization presented no rebuttal to the Carrier's explanation of the allegation that the Claimant had been withheld from service on January 21, 2003. The explanation is plausible. Having failed to properly perform his duties as a Track Supervisor, including the apparent falsification of a Federally-required report, the Claimant's continued service as a Track Supervisor placed the Carrier in a position of potential liability. His disqualification at that point was fully justified.

The Board is not persuaded by the Organization's argument that, "[I]n essence it could be said that this track is good for the type of track that it is, which is out of service." The adjective, "good," simply does not serve as an appropriate description of a track with defects which prevent its use for any purpose. Furthermore, the "none" notation under the heading "defect" is clearly incorrect.

The Board, like the Organization, sees the incident as a mistake, (albeit a serious one), rather than a malicious act. Regardless of what was written on the report, no hazard resulted. A train crew mistakenly attempting to use the out-of-service track would be confronted with spiked switch points, a personal lock on the switch which could not be opened with an ordinary switch key, and a tag noting the track's out-of-service condition. But that circumstance does not excuse the submission of an erroneous report, one which might subject the Carrier to criticism or even a monetary fine by a federal regulatory agency.

The Board finds no violation of the Parties' Agreement. Discipline is warranted in this case. The only remaining issue is the severity of the discipline.

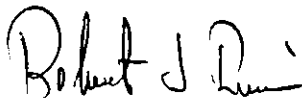
The complete and final disqualification of the Claimant as a Track Supervisor appears unduly punitive, in that it has no termination, regardless of the Claimant's future performance. The Organization asks that his Track Supervisor seniority be reinstated, that he be allowed to again work as a Track Supervisor, and he be paid for all time lost as the result of his disqualification.

The record is not entirely clear on the precise extent of the Carrier's disciplinary assessment. First, although the Organization's Statement of Claim asks that the Claimant's seniority as Track Supervisor be reinstated, the record indicates that he was disqualified, but states nothing about termination of his seniority. Second, his personal record transcript shows that he was given a three-year probation, but the record in this case, including the disciplinary letter quoted on page 2, *supra*, says nothing of a probationary period, other than the one-year review period.

The Board directs that the Claimant's Track Supervisor seniority date and standing be reinstated, if it was terminated. He is serving a one-year review period which expires on or about April 23, 2004. The Board directs that, after that date, he be permitted to exercise his Track Supervisor seniority on his former position, if it still exists and if it is occupied by a junior employee. In the alternative, he may displace a junior Track Supervisor who has been the successful applicant for another position in the period between December 21, 2002, and April 23, 2004. If his former position has been abolished, he may exercise his seniority in accordance with the provisions of Appendix No. 23 of the Parties' Agreement. Failure of the Claimant to accept Track Supervisor service in accordance with the foregoing decision will result in forfeiture of seniority as a Track Supervisor. The three-year probationary period shall be expunged from his personal record. The request for pay for all time lost is denied.

AWARD

The claim is sustained in accordance with the Opinion.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

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Date