

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees Division
of the International Brotherhood of Teamsters
and
BNSF Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when claimant, J. H. Trevino, was disqualified as a Track Supervisor effective October 11, 2004. An investigation was held on January 26, 2005 and the disqualification was upheld.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately reinstate claimant's Track Supervisor seniority date of 12/16/97, return the Claimant to service with seniority, vacation and all other rights restored, remove any mention of this incident from his personal record, and make him whole for all time lost account of this incident.
[Carrier File No. 14-05-0034. Organization File No.210-13D3-042.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. Juan H. Trevino, entered the Carrier's service in 1979, in its Maintenance of Way Department. On October 11, 2004, the Carrier's Division Engineer advised the Claimant that he was disqualified as Track Supervisor by means of a letter reading:

You are hereby notified that you are disqualified as a Track Supervisor effective immediately and further you are instructed to contact Manpower Planning in Fort Worth, TX. To exercise your seniority.

On October 19, 2004, the Claimant requested an investigation. The Carrier scheduled an investigation for November 24, 2004, but by mutually agreed-upon postponements, it was finally held on January 26, 2005.

The Claimant was represented in the investigation by the Organization's Assistant General Chairman. Two witnesses offered testimony and evidence for the Carrier, Roadmaster Mark Paris, the Claimant's immediate supervisor, and Division Engineer David S. Thornton. The Claimant offered testimony on his own behalf.

Roadmaster Paris stated that he was concerned about the Claimant's qualifications because of several derailments which had occurred in the Claimant's assigned territory. (The record indicates that the Claimant's territory is all yard tracks, and no main tracks are assigned to him.) Mr. Paris said the Claimant had done a good job with regard to track inspecting and "day-to-day jobs," but because of the derailments, an audit was conducted on the Claimant's work practices and equipment on September 30, 2004. The audit was performed by a Roadmaster from a different part of the Carrier's system. Out of a possible score of 100 points, the Claimant's score was 30.89.

Examples of deficiencies noted were a broken track level, and missing essential tools. The part of the audit with the greatest negative values was in the area of field checking the Claimant's knowledge and abilities respecting track maintenance. Here, of 60 possible points, the Claimant scored 8.57.

Division Engineer Thornton stated that he disqualified the Claimant as a Track Supervisor because of his inability to pass the audit, along with a history of track-caused derailments on the Claimant's territory. Mr. Thornton said he participated in the audit on September 30, and that the Claimant was unable to perform a number of field checks for track standards. He offered the following testimony as examples of required "core competencies" for a Track Supervisor:

The first one is Line Item Number 6, FRA [Federal Railroad Administration] Item 213.137(b) Frog point 5/8 down and 6" back is the measurement. When we – Mr. Tommy Brazier and myself participated in the audit of Mr. Trevino, and we scored zero on that competency.

The second competency, Line Item No. 7, FRA 213.137(c), Frog casting 3/8" below original contour, Mr. Trevino was unable to make that measurement.

Line Item No. 8, FRA 213.137(a), Flange way depth, Mr. Trevino was unable to take that measurement.

Line Item No. 9, FRA 213.143, Guard face gauge, Mr. Trevino was unable to take that measurement.

Line Item 10, FRA 213.143, Guard check gauge, Mr. Trevino – we gave him the points on that, and Mr. Brazier's note says, I think he knew how to take. I remember that, details on that.

Number 11, concerning Track Surface, do track inspectors and supervisors understand and perform track level test outlined in 5.1.7 (zero level board), we

gave Mr. Trevino a zero as he did not have a level board. [Transcript pages 12-13.]

(The above is only a part of Mr. Thornton's testimony with regard to the Claimant's audit scores.)

Mr. Thornton also offered in evidence a list of all track-caused derailments on the Gulf Division between January 1 and September 26, 2004. Of 39 such derailments, 11 were on the Claimant's territory. Two Track Supervisors had five derailments each, and 12 other Track Supervisors had a total of 18 track-caused derailments among them.

The Claimant testified that over several years of service, he had not been given the tools that the audit indicates he was supposed to have to perform his duties as a Track Supervisor. Following the audit on September 30, 2004, he was not given the benefit of any coaching or further training, to assist in overcoming his deficiencies. (Mr. Paris, however, denied that the Claimant contacted him with respect to further training and the missing tools.) He said the yard which comprises his territory was formerly the property of the Houston Belt and Terminal Railway, (a terminal company serving several of its owning carriers), and it had fallen into disrepair before BNSF Railway began operating it. He also felt that some of the derailments alluded to in the investigation were the result of causes other than the track conditions.

The Claimant's representative, in his closing argument, contended that the Claimant's disqualification was not handled in accordance with Rule 8(c) of the Collective Bargaining Agreement:

Failure to Qualify. An employee who accepts promotion to a higher class but fails to satisfactorily perform the duties of the higher class within twenty-five (25) work days will be disqualified. This employee will return to his former position in accordance with Rule 5. All employees affected thereby will be governed by Rule 3(c).

An employee who is assigned more than twenty-five (25) work days to a position will be considered qualified.

An employee who fails to pass the examination(s) or who is otherwise disqualified, shall be advised promptly in writing, with copy to the General Chairman, as to the cause or causes of his failure to qualify.

NOTE: An employee disqualified under the provisions of this rule after having been assigned more than twenty-five (25) work days to the position, may, within 20 days following notification of disqualification, request a formal investigation. If the employee requests a formal investigation and a claim is filed for restoration of his rights, it will be handled as a discipline case.

On February 16, 2005, the Carrier's Director of Line Maintenance sent the following letter to the Claimant:

I reviewed all the pertinent materials and reconsidered the evidence presented in the transcript of the investigation that was held January 26, 2005 in reference to the disqualification of your Track Supervisor seniority.

The investigation revealed no new information that would overturn the disqualification of your Track Supervisor capability. Therefore, disqualification of your Track Supervisor rank stands.

If you feel that you have corrected the deficiencies noted in your ability to perform the required competencies of a Track Supervisor, please contact Division Engineer Thornton and he will arrange for an assessment of your ability to satisfactorily perform the required duties of this position.

The Organization promptly appealed the Carrier's decision to uphold the Claimant's disqualification. It argues that the Claimant has been a Track Inspector or Supervisor for 19 years (counting previous service on the Houston Belt & Terminal) with no prior disciplinary entries. It further argues that the recent derailment which was mentioned in the investigation was attributable to the movement of a six-axle locomotive through a sharp turnout. The long, rigid trucks of such locomotives tend to spread the rails. The Organization states that such movements are not allowed at many points across the Carrier's system. If there were other derailments, the Carrier provided no facts about them.

The Organization also argues that when most employees fail an audit, they are allowed to study their failures and be audited again after they have corrected their deficiencies. It also argues that the Carrier "has on many occasions stated that they will not use an audit as a disqualification procedure."

Furthermore, the Organization argues, when the Claimant was disqualified as a Track Supervisor, he was placed on a Foreman's job that requires even greater qualifications than those of a Track Supervisor. It submits a copy of the Carrier's Position Qualification Template showing the qualification standards for various positions in the Maintenance of Way Department, and points out that both Track Supervisors and Foremen are required to be qualified to maintain track and to inspect track.

The Carrier responds that, unlike a discipline case, in a disqualification case the burden is upon the employee to show that he is qualified. The Carrier argues that the Claimant's years of experience are not at issue, but rather, his current qualifications, knowledge, and ability to perform the duties of a Track Supervisor. The Carrier relies on the audit, which it says shows the

Claimant to be lacking in many of the core competencies required, and he did not have most of the tools required of his occupation. One of his required tools had been broken for an unspecified period of time. It was his responsibility to obtain the necessary tools. If he requested the missing tools, he failed to offer evidence to that effect.

The Carrier also argues that evidence of multiple derailments in his territory was corroborated by the list submitted by the Carrier as an exhibit. It further notes that the Claimant was assessed a formal reprimand as the consequence of one of these derailments.

The Carrier argues that in most cases, an audit will find employees deficient in only a few areas, requiring minimal retraining or instruction. In this case, it says, the Claimant lacked most of the core competencies and tools necessary for his position. It was therefore impossible for the Claimant to adequately inspect track to insure the safety of other employees, equipment, and the general public.

The Carrier also rejects the Organization's argument with respect to the respective qualifications of Track Supervisors and Foremen, contending that while their qualifications are the same in some respects, their actual duties are not the same. The Carrier points out that the Claimant remains fully employed. It denies the Organization's appeal.

The Board has considered the record in the case and the Parties' respective positions. The Claimant is a long-term employee of the Carrier with a relatively good record. He had a formal reprimand in 2001 for a personal safety violation, and another formal reprimand resulting from the derailment of the six-axle locomotive which was alluded to in the instant investigation, as well as another track defect. That matter came before this Board and resulted in its denial Award No. 344.

Length of service and a good personal record do not of themselves, of course, preclude an employee's disqualification, although long, satisfactory service on a particular job raises the bar for disqualification. So, also, the number of derailments in the Claimant's territory, when compared with the number of derailments elsewhere, is not sufficient of itself to prove that he is not qualified. The character of his territory must also be considered. Yard tracks are not required to be maintained to main track standards, and yard derailments are more common than main track derailments, although — fortunately — they are usually less catastrophic by reason of the slow speeds observed in train yards.

Although the Carrier's Position Qualification Template indicates that Track Supervisors and Foremen have the same qualification standards with respect to maintaining track and inspecting track, the Board is not persuaded that this discredits the Carrier's grounds for disqualification. Examination of the Parties' Collective Bargaining Agreement indicates that Track Supervisors are (with but one exception on each General Manager's territory) chosen from

the ranks of Track Foremen. The position of Track Supervisor carries a greater rate of pay, suggesting that it carries greater responsibilities. The record in the case which resulted in this Board's Award No. 344 shows that in his capacity as Track Supervisor, the Claimant was responsible for determining what work was required to maintain track in accordance with the Carrier's and the FRA's prescribed standards, and directing Foremen to do the work necessary to meet those ends. Certainly, a Foreman must be conversant with those standards, because he has the responsibility to maintain and restore track, but the Board regards the Track Supervisor's position as a promotion carrying even greater responsibility, although not an officer's position.

The Carrier has a burden of proof, particularly so when consideration is given to the Claimant's many years of satisfactory service. Once it has met that burden of proof affirmatively, however, the burden shifts to the Organization to show that the Claimant meets the qualifications required of his job. The Board is persuaded that the Carrier has met its burden of proof. Although we will discount the number of derailments which have occurred in the Claimant's assigned territory, for the reasons discussed above, the most telling factor in his disqualification is the audit, including his failure to have available the tools required of his occupation.

He did not have a tool to measure switch point wear, he did not have a rail thermometer nor temperature gun, he did not have the rail wear gauges for the several rail weights in his territory, he did not have a wind gauge, the track level board was broken, and he testified that it had been for some time. He asserted that he'd not been furnished these tools, but was unable to show that he'd acted in a positive way to requisition or make known his needs for these essential tools.

Unfortunately, the Claimant received doubly negative entries on the audit because he could not demonstrate his proficiency in determining certain track defects without these tools. Although the Organization argues that the Carrier has stated, "on many occasions," that it will not use an audit to disqualify an employee, it offers nothing substantive to support this assertion.

The Claimant's representative raised a procedural issue during the course of the investigation, i.e., the Carrier's failure to name any cause or alleged rule violations by the Claimant which resulted in his disqualification. He pointed to the provisions of Agreement Rule 8(c), which is quoted on page 3, above. The third paragraph of this Rule reads as follows:

An employee who fails to pass the examination(s) or who is otherwise disqualified, shall be advised promptly in writing, with copy to the General Chairman, as to the cause or causes of his failure to qualify.

The notice of the Claimant's disqualification, quoted on page 1 hereof, does not state a "cause or causes of his failure to qualify," nor does the notice of his investigation. The Claimant's representative timely raised this issue during the course of the investigation, and again at its close.

This Board has addressed this issue before, in its Award No. 332. In that case, the Board took notice of the Carrier's failure to specify a "cause or causes," but held that the claimant in that case was not prejudiced for the reasons stated therein. The Board said,

The obvious purpose of requiring the Carrier to specify the "cause or causes" of an employee's disqualification is to enable him to prepare a defense, and to obtain witnesses, if he desires to challenge the disqualification. While it is clear that the Carrier did not comply with this necessary requirement, the Claimant was not in the dark about the cause. He testified, at Transcript page 60, that Mr. Barnes called him to his office and said, "You're getting disqualified because you didn't do the back track reports." This report had been the subject of detailed discussion up to that point.

The Board is not persuaded that the Claimant's defense was impaired by the failure to list the known "cause" for his disqualification. ...

Circumstances are different in the instant case. There is no "cause or causes" given in the notices, and the record does not show any discussion or other communication which would have informed the Claimant what reasons for his disqualification he could expect to defend against at his investigation. For this reason, this claim must be sustained. The Carrier's failure might have been an oversight, as suggested by Mr. Thornton at transcript page 18, but adherence to these Agreement rules is an essential element in the Claimant's due process rights.

The Board is not persuaded, however, that full compensation should be allowed the Claimant. The last paragraph of the letter sent the Claimant by the Director of Line Maintenance on February 16, 2005, reads:

If you feel that you have corrected the deficiencies noted in your ability to perform the required competencies of a Track Supervisor, please contact Division Engineer Thornton and he will arrange for an assessment of your ability to satisfactorily perform the required duties of this position.

There is nothing in the record which indicates that the Claimant responded to this invitation to have his qualifications reconsidered. If he did respond, and was still unable to "satisfactorily perform the required duties" of Track Supervisor, then his disqualification must stand from February 16, 2005, and thereafter.

If, on the other hand, he failed to respond to the above invitation, he will be denied Track Supervisor's compensation after February 16, 2005, notwithstanding the Carrier's failure to inform him of the "cause or causes" of his disqualification. The reason for cutting off any recovery of Track Supervisor's compensation after that date is attributable to the Claimant's

failure to mitigate his losses. Award No. 9354 of the Second Division, National Railroad Adjustment Board, explained the principle of mitigating one's losses:

... In failing to accept the reinstatement offer, which in no way required Claimant to abandon his claim for relief for wrongful dismissal prior to the date of his reinstatement, Claimant has failed to make a reasonable effort to mitigate damages. He may not recover for such avoidable harm.

Based upon the reasoning set forth in the preceding paragraphs, the Board will sustain the Organization's claim to the extent of ordering that the Claimant be paid the difference between his earnings in whatever position he displaced to when he was disqualified, and the earnings of the Track Supervisor who obtained his vacant position, for the period beginning October 11, 2004, and ending February 16, 2005. The Board contemplates that both straight time and overtime earnings will be considered on both positions when computing the differences in pay. In the event the Track Supervisor's position vacated by the Claimant was not filled during any period between the above dates, the computation will assume that it was filled at the straight time rate. The Board will retain jurisdiction, in the event dispute arises as to the computation of the difference in pay due the Claimant.

AWARD

The claim is sustained in accordance with the Opinion, and remanded to the Parties to determine the amount of compensation, if any, to be awarded



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member



Date