PUBLIC LAW BOARD NO. 5850

Award No.
Case No. 287

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on August 24, 2005 when Claimant, D. C. Marquez, was assessed a 10-day record suspension for violation of Maintenance of Way Operating Rules 1.3.3-Curculars, Instructions, and Notices and Engineering Instruction 2.5.1-Turnouts for failure to review the track condition messages (TCM) relative to the west end south siding at Pinta resulting in a derailment.

2. The Carrier violated the Agreement on August 24, 2005 when Claimant, A. C. Reyes, was assessed a 10-day record suspension for violation of Maintenance of Way Operating Rules 1.3.3-Circulars, Instructions and Notices and Engineering Instruction 2.5.1-Turnouts for failure to review the track condition messages (TCM) relative to the west end south siding at Pinta resulting in a derailment

3. The Carrier violated the Agreement on August 24, 2005 when Claimant, A. J. Cordova, was assessed a 10-day record suspension for violation of Maintenance of Way Operating Rules 1.3.3-Circulars, Instructions, and Notices and Engineering Instruction 2.5.1-Turnouts for failure to review the track condition messages (TCM) relative to the west end south siding at Pinta resulting in a derailment.

4. As a consequence of the violations referred to in parts 1, 2, and 3, the Carrier shall remove any mention of this incident from each claimant's personal record.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of

the hearing thereon.

A derailment occurred June 2, 2005, when an engine derailed. The track should have been listed as being out of service as a frog was missing and in lieu, a straight rail was in place which would (and did) stop any movement from fouling the main line, but a review of the track condition messages revealed there existed no out of service for this particular track.

The Carrier then investigated and found that when Claimant Marquez called on March 7 to remove the embargo on the track because of machinery storage, the Dispatcher removed the restriction on the track regarding the missing frog. So from March 7 to March 15 the track condition list showed only that the track was out of service because of the machinery storage.

The Dispatcher was disciplined as well as the train crew who failed to notice the track was missing a frog.

The Carrier in further pursuit of the incident, established an investigation and advised the three Maintenance of Way employees that the purpose was:

> "...to develop the facts and place responsibility, if any, in connection with possible violation of Rule 1.3.3 of the Maintenance of Way Operating Rules in effect October 31, 2005, as supplemented or amended, and Rule 2.5.1A of the Engineering Instructions in effect November 1, 2005, as supplemented or amended, concerning your alleged failure to insure protection when track was removed from service on the West Siding Switch at Pinta on Main Track 2, MP 220.7, while working as Track Supervisors and Foreman on the Gallup Subdivision, March 7, 2005 through June 2, 2005."

The Carrier fully believed they had furnished sufficient evidence substantiating the charges against each Claimant, and assessed each a 10-day record suspension which does not require anyone losing time. The only aftereffect is a forever blot on each

Claimant's record.

Carrier alleged violations of two Rules, but the primary Rule is 1.3.3 which reads as follows (it was not established that any one of the three Claimant's removed the spike from the switch which is a violation of Rule 2.5.1A.):

> "Circulars, Instructions, and Notices
> Circulars, instructions, notices, and other information are issued and cancelled by the designated manager. Before beginning each day's work or trip, trainmen, enginemen, and any others whose duties require, must review those that apply to the territory they will work on." (Emphasis added)

The aforequoted underscored portion of 1.3.3 is generic as to whom other than engineers and trainmen are obligated to review the particular list of track conditions, "that apply to the territory they will work on."

To be successful in establishing guilt, the Carrier must establish that each Claimant was to work in the territory as the authors of the Rule intended it to be applied.

Claimant Marquez was the Foreman of a resurfacing gang. He used the track that is the center of this dispute to park the equipment on overnight. He followed all the procedures required to protect the machinery and then notified the Dispatcher to take the track out of service because of the machinery.

On March 7, the gang moved on and Marquez notified the Dispatcher to advise the machinery was no longer stored on the track. On March 15, 2005, Claimant's Supervisor contacted Claimant and advised the track conditions list still listed the track occupied by the machinery, so Claimant called the Dispatcher to advise that the track was clear of machinery.

From March 15, 2005, until the derailment on June 2, 2005, the track was not listed as being out of service as it should have been. In fact, it is noted that Claimant

Marquez's Supervisor did not himself realize that fact.

Claimant Marquez and the surfacing gang had moved on and, as far as this record is concerned, performed no work and/or was not scheduled to work in the area.

Claimant Marquez's record is to be cleared of the discipline imposed as the Carrier has failed to establish he was in any way responsible for overlooking the fact that after the 15th of March, the track no longer was listed as being out of service. He also is to be paid for any time he may have lost because of this charge.

In fact, the Carrier witness testified that "they" reviewed the track conditions list once a month and "they" failed on at least two occasions to note the track was no longer listed as being out of service. From December 2004, to March 6, 2005, the track condition listed this track as being out of service because of a missing frog. On March 6, 2005, Claimant Marquez to protect the machinery of his crew used the track (accessible from one end) to store the machinery and did have the track listed as being out of service. On March 7, when Claimant Marquez's crew moved on, he called the Dispatcher to remove the out of service because of machinery storage. The Dispatcher removed the notice about the missing frog. Claimant's Supervisor did on March 15, 2005, call the Claimant to advise him that the track was still listed as being out of service because of stored machinery. Claimant Marquez did as instructed, thus from Marquez's call to the Dispatcher on March 15 to the derailment, the track was not listed as being out of service yet the frog was still missing.

Claimant Reyes was the Track Supervisor. The following testimony of Claimant Reyes appeared as follows:

> "182. Q. Okay, we talked about the track condition messages. What is your responsibility as you see it as far as the, the different

instructions in the track condition messages?

A. Well, we go through it in our morning safety briefings, looking over the track condition messages, looking to see what's on the messages and if anything needs to be removed.

183. Q. Okay, if there's an unsafe condition such as the frog being out of a system, is that something that should normally be in the track condition messages?

A. Yes.

184. Q. And whose responsibility is it to make sure that is placed on there?

A. Whatever employee's covering the territory at the time.

185. Q. And whose responsibility is it to assure that the track is maintained safely, whether that's inspecting, riding over the track and doing your inspection or making sure that a portion of that track is taken out of service and not used?

A. Track supervisor, foreman, any employee whose duties are in the area."

Claimant Reyes by the aforequoted, candidly admitted reviewing the track condition list is part of his responsibility. Claimant Reyes may have been on vacation as of June 2, 2005, but from March 15 until his vacation started he was present and should have caught the omission of the out of service on the track here concerned.

Claimant Cordova is also a Track Supervisor. He admitted he knew of the missing frog and that he does review the track condition list. Obviously, he overlooked the track with the missing frog was not on the track condition list, just as "they" did in the once a month review of the track condition list.

A review of Claimants Reyes' and Cordova's discipline records shows Reyes in 1995 received a 30-day deferred suspension for running through a switch. The record also shows that in April 1999, he received a letter of commendation for his efforts and dedication to duty during inclement weather. Nothing after the commendation until the 10-day record suspension assessed because of this incident.

Claimant Cordova hired out in June 1994, and the only blot on his file is this 10-day record suspension.

Of significance to this Board is that the "they" referred to by the Carrier witness was never identified. If they did review the track conditions list once a month, they are also guilty of overlooking the fact that from March 15 to June 2, the track was not listed as being out of service.

It is this Board's opinion that after one year of good behavior the 10-day record suspension and this investigation should be erased from Claimants Reyes' and Cordova's files.

AWARD

Claim sustained for Claimant Marquez; partially sustained for Claimants Reyes and Cordova.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.

Robert L. Hicks, Chairman & Neutral Member

David D. Tanner, Labor Member

Samantha Rogers, Carrier Member

Dated: 11/29/06