

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 444 – Award No. 444 – Claimant: Andrews
Carrier File No. 14-12-0323
Organization File No. 40-13N1-1237

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing March 22, 2012, when Claimant, Kevin D. Andrews (1660166), was disciplined with a Level S Record Suspension with a 1-year review period for his alleged failure to properly protect a wide gauge condition in the turnout portion of Switch 6809 resulting in derailment while working as Track Inspector on the Emporia Kansas Yard on March 22, 2012. The Carrier alleged violation of EI 2.1 Purpose of Track Inspections, EI 2.2.3 Authority and Responsibility of Inspector, MOWOR 1.1.2 Alert and Attentive, and MOWOR 1.6 Conduct.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline with seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 22, 2012, continuing forward and/or 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, K.D. Andrews, has been employed by the Carrier since 2005. On March 29, 2012, the Carrier charged Claimant to attend an investigation for the purpose of ascertaining the facts and to determine his responsibility, if any, in connection with his alleged failure, while working as a Track Inspector, to detect and properly protect a wide

gauge condition in the turnout portion of Switch 6809, at the Emporia, Kansas Yard, on the Emporia Subdivision, at approximately 0800 hours on March 22, 2012, resulting in the derailment of train M-KCKALT1-21. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 1.1.2 Alert and Attentive and 1.6 Conduct, and Engineering Instructions (EI) 2.1 Purpose of Track Inspections and 2.2.3 Authority and Responsibility of Inspectors. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged and assessed him a Level S 30-day Record Suspension with a one-year review period

The applicable Carrier Rules provide, in relevant part:

Engineering Instructions

2.1 Purpose of Track Inspections

Track inspection has two basic purposes:

- First, it allows employees to detect, correct and protect variations from BNSF track standards and to ensure safe train operations at authorized speeds.
- Second, it allows a planned program of repairs and improvements to ensure that employees are productive and use materials efficiently.

Perform at least the minimum track inspections required in this section.

2.23 Authority and Responsibility of Inspectors

When an inspecting employee finds conditions that make track unsafe for trains moving at authorized speed, or finds deviations greater than those permitted by the FRA Track Safety Standards, the employee has the authority and responsibility to do one or more of the following:

- Make repairs.
- Place temporary speed restrictions.
- Remove track from service.
- Complete all required FRA reports correctly and on time.

Maintenance of Way Operating Rules

1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent

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Any act of negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

Carrier Kansas City Manager of Maintenance Planning Roger Thompson testified at the investigation that he was Acting Division Engineer at the time at issue, when he was called to Emporia, Kansas to investigate a 12-car derailment. Mr. Thompson stated that employees Scott Newton and Fred Aguilar were present when he performed his post-derailment investigation. He explained that after much inspection and deliberation it was determined that wide gauge caused the derailment.

Mr. Thompson stated that he took photographs of the scene, which were entered into the hearing record. He explained that wide gauge is caused by poor tie conditions or insufficient fasteners, and described how the photographs demonstrated that situation. He stated that the photographs showed the static gauge at 57 1/8 inches, which is within FRA standards. However, he stated, when he took the under load measure, that is, the measurement as if a train were on the track, it pushed the tie or plate out just under two inches. Adding that measurement to the static 57 1/8 inches, it was 59 1/8, and over 58 is an out of service condition. Mr. Thompson added that some of the photos were taken in daylight and some at night, but they were of the same location.

Mr. Thompson added that he observed marginal ties and it appeared that a gauge rod had been inserted to help shore it up. At the time of the post-derailment inspection, he added, many outside spikes were missing, some were up in the air and the gauge rod was broken. He added that on one rail there was a false flange, which would be caused over a long period of time by the outside of the train wheels running on the inside of the rail, an abnormal position. He explained that this is a quick indicator that there was wide gauge at the location. Mr. Thompson testified that the tie and rail conditions which caused the wide gauge would develop over time, and the Track Inspector is required to detect and correct them. Mr. Thompson stated that although Carrier records indicate that Claimant made his inspections, he apparently missed these conditions.

Claimant testified at the investigation that he had last inspected this track approximately 15 days before the incident. He, Mr. Newton and Mr. Aguilar participated in the post-derailment investigation and took track notes, which were entered into the investigation record. Claimant stated that Mr. Thompson followed the employees as they measured the base gauge and then continued 10 ties, approximately 15 feet. Claimant stated, and the track notes show, that the maximum gauge they measured that day was 57

inches. Claimant maintained that this was an inch within tolerance because the standard is 58 inches on the 10 mile per hour track where the derailment occurred. Claimant added that Mr. Thompson told Mr. Newton and Mr. Aguilar there was no wide gauge. Claimant conceded that the measurements were static, and they did not take any measurements under load. Claimant did not make any notes or measurements concerning the tie conditions.

Track Supervisor Scott Newton testified at the investigation, and a written statement he prepared at the time of the incident was entered into evidence. In the statement, Mr. Newton stated that he, along with Claimant and Mr. Aguilar, prepared track notes starting immediately east of the derailment point, including a base gauge measurement at the derailment point, and moved east. He stated that the base gauge measurement was 54, as noted in the track notes, and maintained that Mr. Thompson confirmed there was no wide gauge at that location. The track notes show that all of the other measurements ranged from 56 1/8 to 57. In his statement, Mr. Newton also indicated that at the derailment point seven ties in a row were broken in half, and the top side of the ties appeared solid but the underside had deteriorated. He testified that the damage depicted in the photographs had probably been caused by the derailment itself.

Claimant's personal record shows no previous discipline.

The Carrier states that the case is not complicated, as Mr. Thompson's testimony, as well as Claimant's, establishes that Claimant failed to ensure proper gauge on track he inspected. The Carrier notes Mr. Thompson's testimony that after a lengthy inspection it was determined that the cause of the derailment was wide gauge. The Carrier further notes Mr. Thompson's statement that the standard for gauge cannot exceed 56½, and Claimant's admission that there was a 57 measurement at the derailment site. It is well settled, the Carrier maintains, that such an admission is sufficient to satisfy its burden of proof. As for the penalty, the Carrier states that Claimant violated its Rules as alleged, and the discipline was assessed in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and Claimant's personal record. The Carrier urges that the claim be denied.

The Organization states that there is no dispute that a derailment occurred, but the Carrier has failed to meet its burden of proving that Claimant violated any Rules or bore any responsibility for the incident. The Organization notes that the Carrier's only witness, Mr. Thompson, entered photographs which appeared to contradict themselves. The Organization states that Mr. Thompson's testimony that the derailment resulted from wide gauge missed by Claimant was also contradicted by Claimant and another Track Inspector. In addition, the Organization entered into evidence the track measurement notes taken by Claimant and two other employees, with Mr. Thompson following the group. Those measurements show, the Organization maintains, that the widest measure that day was 57 inches, well within the tolerance established by the Carrier and FRA guidelines. The Organization adds that the record shows that the inspections were up to date.

The Organization asserts that the track notes are the only actual evidence in the record, and they support that there was no wide gauge at the critical location. The Organization concludes that the Carrier has failed to meet its burden of proof and urges that the claim be sustained.

We have carefully reviewed the record in its entirety. There is no question that Claimant was the Track Inspector responsible for a section of track where a derailment occurred. The Carrier maintains, as Mr. Thompson testified, that wide gauge at the location was the cause of the derailment, and that Claimant violated Carrier Rules by failing to note and correct it. Mr. Thompson testified extensively as to the conditions he observed on the track, conditions which he stated had to have existed for a considerable period of time. Mr. Thompson also explained that while the highest measurement he took at the area was 57 1/8, within FRA standards, that was a static measurement and the measurement under load added almost two inches, to 59 1/2, while 58 is an out of service condition. Claimant and Mr. Newton maintained that the base gauge measurement was 54 and Mr. Thompson told them that there was no wide gauge at that location. However, Claimant acknowledged that the employees took static, not under load, measurements and that other than the one 54 measurement, all of the others were over 56, with one at 57. The Organization did not rebut Mr. Thompson's testimony that the appropriate measurement took into account approximately two extra inches of play in the plate under load, and that those measurements demonstrated wide gauge conditions. While the damage to the track, ties, pins and plates in this area may have been attributable to the derailment itself, Mr. Thompson also observed a false flange, a condition indicating that the play in the plate was a long standing condition, and something that would have been present and obvious during Claimant's inspection. Mr. Thompson's testimony is sufficient for the Carrier to meet its burden of proving Claimant's guilt by substantial evidence. With respect to the penalty, Claimant committed a serious violation, and we cannot say that the discipline assessed represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine penalties.

AWARD

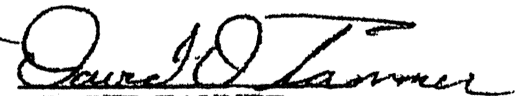
Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 20th day of Feb, 2014.