

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 109, (Case No. 109)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES 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 14, 2010, when Claimant, Steve W. Durbin (6444764), was issued a Level S 30-day Record suspension with a 1 year review period, concerning his failure to observe, make measurements and protect numerous wear conditions at various locations, revealed on June 2, 2010. The Carrier alleged violation of EI 2.1 Purpose of Track Inspections, EI 2.2.3 Authority and Responsibility of Inspectors, and EI 2.4.4 Safety and Protection During Inspections.**
- 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 reinstated with seniority, vacation, all rights unimpaired and wage loss commencing June 14, 2010, and continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0152) (Organization File No. 210-13N1-1054.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 June 4, 2010, Claimant was directed to attend a formal Investigation on June 14, 2010, concerning in pertinent part the following charge:

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

if any, in connection with your alleged failure to observe, make measurements and protect numerous wear conditions at various locations, including worn conditions at Mile Post 157.6 and Mile Post 152.9 on the Galveston Subdivision, revealed on June 2, 2010 at approximately 1000 hours, in violation Engineering Instructions 2.1, Purpose of Track Inspections, Engineering Instructions 2.2.3, Authority and Responsibility of Inspectors and, Engineering Instructions 2.4.4, Safety and Protection During Inspections."

On August 12, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a one year probationary period.

It is the Organization's position that contrary to the assertions of the charges everything was handled properly by the Claimant regarding this incident. A defect was found, and proper protection was provided and the condition was repaired in accordance with normal practices. It pointed out that prior to the defects being found Claimant had been on vacation for the prior two weeks. During the last week of May, and the week before these defects were found, the Carrier's key witness Roadmaster Mooney made a Hy-Rail trip across those locations and found nothing. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier the Federal Railroad Administration (FRA) was inspecting the Carrier's track on June 2, 2010, when their representative found multiple violations. It argued that it was determined through testimony that the Claimant was working as a Track Supervisor the day before, on June 1, 2010, and had hhyrailed over the track and inspected it at the locations where the violations were found. It asserted the Claimant did not observe those defects through his inspection and he did not report any defects to his Roadmaster nor did he put the required slow orders out lowering train speeds to 10 mph to protect the track under his supervision. It reasoned that was a serious violation and the discipline assessed was appropriate and it closed 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 it is determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

The facts indicate that during an FRA Inspection, Carrier Roadmaster Mooney found a deviation that was (2/16) or (1/8) of an inch out of compliance after which he contacted the Claimant who placed a slow order in accordance to FRA Guidelines Rule EI 2.2.3.

Testimony by Supervisor Mooney further showed that the measurements taken were static measurements wherein no compensation for loaded cars moving over the track were taken into consideration. The Organization asserted that means that under load the locations covered by the charges could have been in compliance. On page 21 of the transcript Mooney testified

that it was possible that under load the track could have been in compliance. He was further questioned on the same page about measuring tracks without being under load as follows:

"Gary Marquart: And I believe you have a gage in your office that you guys use to measure, to simulate a load. Is that correct?"

David N. Mooney: Uh, not for guard check, but for a standard gage, yes sir.

Gary Marquart: Okay, could you use it for guard check or anything?

David N. Mooney: Well, you might could. I never have tried it for guard checking.

Gary Marquart: Okay, would, would that not give you a more accurate measurement than just a static measurement?

David N. Mooney: If there's, uh, if there's defective, uh, track components it would. *(Underlining Board's emphasis)*

On pages 19 - 26 of the transcript Roadmaster Mooney testified that he was not aware of how many trains might have traversed across the territory in question since the Claimant's last actual walking inspection and any movement in the tracks and/or switches is largely due to train traffic coupled with weather conditions (heat and cold). On page 27 he further testified that the FRA Inspector did not take into account movement under load. On page 28 he was questioned as follows:

"Tommy Brazier: I have one more question for Mr. Mooney. Mr. Mooney, normally when you're taking measurements of track loc-, at locations that are static and then when you add the consideration based on those measurements of the track being under load, would those measurements normally be more or less than what you have when you measure those locations static.

David N. Mooney: Normally more. *(Underlining Board's emphasis)*

After Mr. Mooney testified that the measurements would be more under load he reversed himself on pages 28 and 29 as follows:

"Tommy Brazier: Based on those measurements that the presumption in adding the factors in of these locations being under load, would those measurements, would have been more, creating, uh, making defect greater?

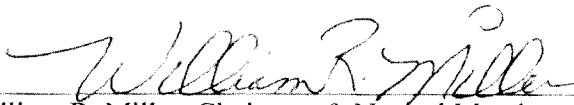
David N. Mooney: No. *(Underlining Board's emphasis)*

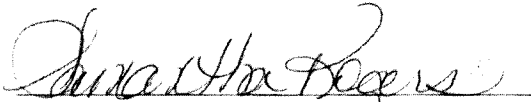
Testimony of Supervisor Mooney was contradictory at times, but despite that fact it was not refuted that track deviations were found, however, the Board is not persuaded that the Claimant failed to adhere to his duties or that deviations discovered were not the result of train traffic movement and/or conditional changes after his last check of the territory, therefore, it is determined that the Carrier did not meet its burden of proof.

The Board finds and holds that the discipline is rescinded and removed from the Claimant's disciplinary record and the Claim is sustained as presented. Claimant is returned to his prior disciplinary status in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.


William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 2/27/13