

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 91, (Case No. 91)**

**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 February 22, 2011, when Claimant, M. R. Lopez (6428130), was issued a Formal Reprimand for failure to properly protect, repair, remove track from service directly related to the derailment of 3 cars on February 22, 2011. The Carrier alleged violation of Engineering Instruction 2.1 Purpose of Track 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 compensated for his lost time and expenses and otherwise made whole."
(Carrier File No. 14-11-0109) (Organization File No. 10-13N1-1120.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 March 3, 2011, Claimant was directed to attend a formal Investigation on March 8, 2011, which was mutually postponed until April 4, 2011, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly inspect track and alleged failure to properly protect, repair, remove track from service directly related to the derailment of 3 cars on February 22, 2011 at approximately 1500

hrs. at the west end of MP 37.03 and 37.04, while assigned as Track Inspector."

On April 28, 2011, Claimant was notified that he had been found guilty as charged and was assessed a formal reprimand.

It is the Organization's position that derailment occurred because one set of wheels got off the track as a result of soft roadbed and a broken gauge rod. According to it, the gauge rod held the track to the required specifications and when it broke the soft road bed and weak ties and pressure by the rail cars forced the rail to spread apart causing a minor derailment through no fault of the Claimant. It argued that the Claimant had taken over track inspection duties on November 11, 2010, and during the month of November and December he performed inspections as required. The last inspection he made was on December 21, 2010 and beginning in January 2011, the Carrier assigned another Track Inspector M. Guzman, to perform inspection while the Carrier assigned the Claimant to work with and assist Section Forces working in the area. It asserted he was acting as a Section Foreman, who went out with that group everyday to perform work during which time he was not allowed to perform his regular track inspection duties as those duties were left up to Mr. Guzman. Additionally, it argued that there had been heavy traffic over this area since Claimant's last inspection and at the time of the derailment there was a recent snowfall of five inches, all of which could have caused the gauge rod to break. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the Claimant was assigned as a Track Supervisor and it was his responsibility to perform a thorough inspection of the tracks he is responsible for and take the appropriate actions to either make the necessary repairs or take necessary step to ensure that trains are safe. It argued that the record reflects that the track leading into 3703 track switch had wide gauge and broken wide gauge rods that caused the three car derailment with estimated damages of \$1,700, and because the Claimant had not made any track inspections since December 2010, he was responsible for the subsequent derailment. 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 determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

There is no dispute between the parties that the last inspection made by the Claimant was on December 21, 2010. The Organization argued that was because the Claimant had been re-assigned to be an acting Foreman with a Section Gang during which time employee Guzman was responsible for making the track inspections whereas the Carrier asserted that the Claimant was a Track Supervisor and it was still his responsibility to check the tracks. The question at issue was Claimant assigned as a Foreman after December 21, 2010, up until the derailment that occurred on February 22, 2011, with no responsibility to make track inspections during that period.

On pages 25 and 26 of the transcript, the Claimant answered the question at issue as follows:

"Michael Heille: Were you aware of what the requirements were to be Track Inspector?"

Michael R. Lopez: Yes.

Michael Heille: Had you ever inspected Track as a Track, as a Track Foreman with a section to make a qualifying inspection, have you ever done that?

Michael R. Lopez: Yes I have actually.

Michael Heille: Is there anything precluding a Track Inspector working with the sections for making an inspection?

Michael R. Lopez: No.

Michael Heille: You can make inspections with the section forces with you right?

Michael R. Lopez: Right.

Michael Heille: Did you ever tell Mr. Heinbaugh that you were lagging behind in your inspection frequency?

Michael R. Lopez: I believe so.

Michael Heille: You believe so?

Michael R. Lopez: I'm not certain.

Michael Heille: So ultimately who was responsible to make sure the track gets inspected?

Michael R. Lopez: As a Track Inspector probably my responsibility.
(Underlining Board's emphasis)

Claimant acknowledged he had responsibility when he first admitted that he thought he had told Mr. Heinbaugh that had fallen behind in his inspections and then further verified that responsibility when he stated that it was his responsibility to have inspected the west end of MP

37.03 and 37.04 since his last inspection. Claimant further testified that his Track Inspector position was abolished and he displaced Guzman off of his Track Inspector position that had only had responsibility for the area in dispute for five days. That admission also substantiated that he should have made additional track inspections after December 21, 2010. Substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 16 years of service with a good work record. The Board finds and holds the reprimand assessed against the Claimant will not be set aside as it was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

Claim denied.


William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 9/24/2012