

Award No. 7
Case No. 7
NMB Case No. PLB-07602-000007

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY	)
EMPLOYES DIVISION—IBT	)
	)
v.	)
	)
BNSF RAILWAY COMPANY	)

Carrier File No. 10-12-0087
Organization File No. C-12-D040-3

Claimant — Daniel Monohon

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The discipline [Level S thirty (30) day record suspension and a one (1) year review period] imposed upon Mr. Daniel Monohon by letter dated October 21, 2011, for alleged violation of El 2.4.4 Safety and Protection During Inspections in connection with charges of his failure to properly remediate tie defect identified in Federal Report 66, dated May 23, 2011, at or near MP 295.3 and MP 279.0 on the Ottumwa Subdivision, on August 11, 2011.**
- 2. As a consequence of the violation referred to in Part (1)above, Claimant Daniel Monohon shall now receive the remedy prescribed by the parties in Rule 40(G).**

BACKGROUND:

The Claimant is a Track Inspector for the Carrier, operating out of its Ottumwa Subdivision. Pursuant to the BNSF Engineering Instructions (EI), Section 2.2.3, Track Inspectors have "the authority and responsibility" to "make repairs, place temporary speed restrictions, remove track from service, and complete all required FRA reports correctly and on time."

On May 23, 2011, an FRA Inspector conducted an inspection of some of the track in the Ottumwa area that the Claimant was responsible for and prepared an Inspection Report that detailed 33 instances of track deficiencies that needed to be repaired. The Claimant was with the FRA Inspector as he did his inspection but did not get a copy of the Inspection Report until sometime later, when his Roadmaster gave him a copy. According to the Claimant, the Roadmaster gave him no instructions on what needed to be done or a time line for making the repairs. The deficiencies at issue in this case were considered non-class specific defects that did not pose an immediate hazard and thus were not required to be repaired immediately. However, the FRA Track Safety Standards Compliance Manual, Chapter 5.15, sub-part 4, indicates that repairs need to be completed within 30 days in order to avoid enforcement action.

The FRA Inspector returned to the area on August 11, 2011, to check whether the deficiencies noted in the May 23 Inspection Report had been fixed. The Inspector, the Claimant and the Assistant Roadmaster inspected the track together. Three of the deficiencies had not yet been fixed—one at the Junkyard switch in Main One at MP 279 in Ottumwa and two other defects at the same location on Main Two at MP 295.13. The tracks were immediately removed from service and crews brought in to make the repairs that same day.

By letter dated August 17, 2011, the Carrier notified Claimant of its intent to conduct an investigation into his "responsibility, if any, in connection with your alleged failure to properly remediate tie defect [sic] identified in Federal Report 66, dated May 23, 2011 . . ." At the investigation, the Claimant testified that he had never received a copy of the FRA Compliance Manual, and his Roadmaster acknowledged that he had not given one to him. Claimant also testified that no one ever indicated to

him that FRA defects needed to be repaired within 30 days or asked him to complete the portions on the May 23 Inspection Report detailing what repair actions were taken and when. Statements from three long-time Track Inspectors indicated that they had not been given the Manual or heard of the 30-day requirement until quite recently. BNSF issues a smaller pocket-sized Track Inspection Field Manual for the Track Inspectors to use in their daily work; it makes no reference to a 30-day period for repairing FRA defects. Track Inspectors may perform minor track repairs themselves; others require a crew to effect. The repairs at issue were substantial enough to require use of a crew.

Based on the evidence presented at the investigation, the Carrier determined that the Claimant had violated EI 2.4.4, Safety and Protection During Inspections,¹ when he failed properly to remediate the defects identified by the FRA Inspector in May 2011 by August 11, 2011. By letter dated October 21, 2011, it notified him of its decision and the assessed penalty, a Standard 10-Day Record Suspension, in conjunction with a one-year review period.

FINDINGS AND OPINION:

The Public Law Board, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Public Law Board has jurisdiction over the dispute involved herein.

According to the Carrier, Claimant had the responsibility as a Track Inspector either to ensure that the defects were repaired or the track removed from service within thirty days. He failed to do so. If he was unaware or unsure of his responsibilities, he should have asked his Supervisor for clarification. He did not. His failure to address the defects establishes his responsibility for this incident and supports the discipline involved.

The Organization raised an initial procedural issue, contending that the integrity and fairness of the investigation had been compromised when the Conducting Officer and two Carrier witnesses remained in the hearing room with the

¹ The specific language of Section 2.4.4 is not in the record presented to the Board.

door closed during a break while the Claimant and his representative consulted in another location. The fact that one side's witnesses and the hearing officer remain in the same room during a break does not necessarily compromise the hearing process: that happens only if there is inappropriate conversation about the case between the hearing officer and the Carrier's witnesses. Otherwise the individuals are free to engage in conversation on any topic not related to the matter under investigation. In the absence of any indication that the hearing officer actually engaged in inappropriate communications with the Carrier's witnesses, the Board will not presume that the fairness and impartiality of the hearing process was compromised.

Turning now to the substance of the case, as a Track Inspector, the Claimant has responsibility for identifying track defects and ensuring their repair over the territory assigned to him. This includes repair of defects identified by the FRA Inspector that he is informed of. This does not necessarily mean that the Claimant must physically perform the repairs himself, only that he has the responsibility to make sure that they are done. Here, the Claimant was issued a ten-day record suspension because he had failed to ensure that certain FRA-identified defects were repaired within thirty days. The evidence at the hearing established several pertinent facts:

- Claimant was never given a copy of the FRA Compliance Manual that sets forth the 30-day compliance period for non-class specific defects that do not pose an immediate hazard;
- His Track Inspector training did not include any reference to a 30-day compliance period;
- The BNSF Track Inspector's Field Manual does not reference a 30-day compliance period;
- The BNSF Engineering Instructions do not reference a 30-day compliance period;
- Long-time Track Inspectors testified that they only had very recent knowledge of the FRA Compliance Manual, some of it after the incident at issue in this case;
- Claimant was never instructed by anyone to perform the repairs, or have them performed by a crew, within thirty days;
- His supervisors never inquired if the defects had been repaired, or when.

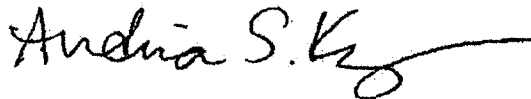
It is a fundamental principle of due process that employees are entitled to know the employer's expectations before they can be held accountable for failing to meet those expectations. In this case, the Claimant never had notice—specific notice, general notice, or even implicit notice—that the Carrier, much less the FRA, expected him to ensure that the noted defects were repaired within thirty days. In the absence of such notice, he cannot be found guilty of failing to have the defects repaired in a timely fashion. The discipline shall be removed from his record in its entirety.

AWARD

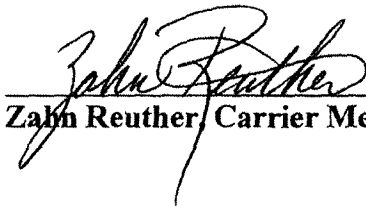
Claim sustained.

ORDER

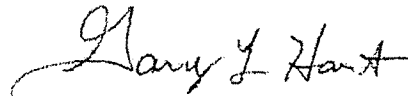
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member



Zalm Reuther, Carrier Member



Gary Hart, Organization Member

April 29, 2013

Date