

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 42, (Case No. 42)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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 March 12, 2010, when Claimant, L. T. Self (6553820) was issued a Level S 30-day record suspension for failure to properly inspect a switch that resulted in a derailment on February 18, 2010. The Carrier alleged violation of Engineering Instruction EI 2.2.3; and**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing March 12, 2010, continuing forward and/or otherwise made whole."**

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 February 19, 2010, Carrier notified Claimant to appear for a formal Investigation on March 10, 2010, which was mutually postponed until March 12, 2010, 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 the West End Track 410 switch that resulted in

a derailment at approximately 0600 on February 18, 2010 that was due to gap switch point.

This investigation will determine possible violation of EI 2.2.3 Authority and Responsibility."

On April 5, 2010, Claimant was notified that he had been found guilty as charged and was issued a Level S 30-day record suspension and a one year probation period.

There is no dispute between the parties that on February 18, 2010, Claimant was assigned as a Track Supervisor in the Bakersfield, California, Switching Yard, when the aforementioned derailment occurred. On February 17th, Claimant inspected the West End Track 410 switch and marked down one item for repair (fasteners) within 30 days or else it would be taken out of service. Claimant also continued the minimum speed restriction for that location with a 213.9B Protect Order.

It is the Organization's position that the Claimant made a proper inspection of the switch in question making some minor repairs in accordance with Carrier Guidelines and FRA Government Regulations. It argued that prior to the derailment several trains passed over the switch which attested to its safety. It alleged that a foreign engine belonging to the San Joaquin Railway had defective wheels (and should have been bad ordered out of service) and was the likely culprit of the derailment and there was no proof that Claimant missed a gap of 1/4 inch at the switch point. It concluded by requesting that the discipline be rescinded and the Claim sustained as presented.

It is the position of the Carrier that Claimant was responsible to perform a thorough inspection of the switch and take the appropriate action to either make the necessary repairs or remove the switch from service on February 17th. The fact that there was a 1/4 inch gap at the switch point, makes clear that he did not make a proper inspection which led to the derailment on February 18th. It argued that Assistant Roadmaster, C. Newell, testified on page 17 of the Transcript that the derailment could not have caused the switch to go out of alignment 1/4 inch. It further argued that the Claimant did not take exception to the points on the day he inspected the switch and the point was gapped about 1/4 inch when he got on the scene of the derailment. According, to the Carrier the Claimant's testimony did not support his assertion that he followed the Engineering Instructions to make the repair or take the track out of service and fill out the required FRA reports while performing his duties as a Track Supervisor. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Investigation was held in compliance with the applicable provisions of Rule 13(a) the Discipline Rule and Appendix No. 11.

Examination of the Transcript indicates no authoritative evidence and/or testimony that contradicts Roadmaster Newell's statement that the derailment did not cause the 1/4 inch gap at the switch point, but instead it was the 1/4 inch gap at the switch point that was the cause of the derailment. The Claimant's various theories as to what might have caused the derailment are not persuasive and the record indicates that the Claimant testified on page 26 - 27 as follows:

"Q And you also stated that the connection rod could have been broken before the derailment occurred, correct?"

A Possibly, could have had a hairline crack in it, it was on the underneath side of the jaw with, and it had dirt and grease on it, so something that would be hard to notice visually.

Q Now your duties as an Inspector, when you inspect a switch, that does include inspecting the connecting rods for any defects, correct?"

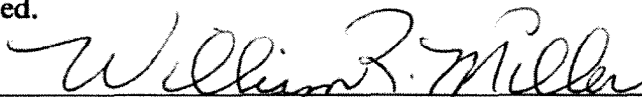
A That is correct, look, for lost movement"

Claimant's admission that he may have missed a defect in the connection rod makes it reasonable that he might have also overlooked a gap at the switch point. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

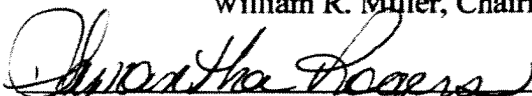
The only issue remaining is whether the discipline was appropriate. A review of the Claimant's disciplinary record reveals that less than one month before the instant dispute he was assessed a Formal Reprimand for **"failure to properly inspect Track 410 that resulted in a derailment that was due to wide gage EI 2.2.3"**. Three weeks later Claimant failed to properly inspect a switch on the same track causing another derailment violating the same Rule. The discipline in this instance was progressive and corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Board finds and holds the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date: 12/6/10