

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO 81 (Case No. 81)**

**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 January 17, 2011, when Claimant, Jimmy D. Zaikowski (1664432) was issued a 10-Day Record Suspension for failure to inspect track from MP 695.3 to MP 747.990 on October 14, 2010 while working as Track Supervisor. The Carrier alleged violation of E.I 2.2.3 Authority and Responsibility of 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 expense and otherwise made whole." (Carrier File No. 14-11-0058) (Organization File No. 160-13N1-1099.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 October 28, 2010, Claimant was directed to attend a formal Investigation on November 9, 2010, which was mutually postponed until December 21, 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 inspect track from MP 695.3 to MP 747.990 on October 14, 2010 to October 16, 2010, while working as Track Supervisor, TINS1744 on the Clovis Subdivision in Ft. Sumner, N.M. First

knowledge was Monday, October 18, 2010.

This investigation will determine possible violation of EI 2.1 Purpose of Track Inspections, EI 2.2.3 Authority and Responsibility of Inspections, EI 2.4.1 Minimum BNSF Inspections of Frequency, and EI 2.3.2 FRA Track Safety Standards Minimum Inspection Requirements."

On January 17, 2011, Claimant was notified that he had been found guilty as charged and was assessed a 10 Day Record Suspension with a one year probationary period.

It is the Organization's position that the Carrier did not meet its burden of proof. It argued that on October 14, 2010, Claimant fulfilled his job responsibilities and he was not called for work on his rest days October 15th and 16th thus according to it the allegations are in error. Additionally, it asserted that the Claimant's co-worker, J. Romero had already accepted responsibility for the aforementioned charges. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the record shows 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 appropriate action to either make the necessary repairs or take necessary steps ensuring the trains are safe. It argued that he did not inspect the track on October 14, 2010, and on his return from his rest days he was informed that the track was out of compliance following his failure to inspect. 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 has determined that the Investigation was held in accordance with Rule 13(a) the Discipline Rule and Appendix No. 11.

Review of the record reveals that the Claimant was charged with having violated the Rules set forth in the charges on the dates of October 14 through 16, 2010, however, the disciplinary letter of January 17, 2011, narrowed down the alleged violation period to October 14, 2010, making no reference to either October 15th or 16th. The Board is in agreement that there was no basis for the latter two days as the record substantiates those were the Claimant's rest days and he was not called in work on either day.

Turning to October 14th there is no disagreement between the parties that the Claimant did not inspect track from MP 695.3 to MP 747.990, but the question is did the Claimant have a justifiable reason for not making the full inspection. On pages 20 and 21 of the transcript the Hearing Officer questioned the Claimant as follows:

"Sheri Ellis: If you could explain kind of the layout of, the territory you inspect.

Jimmy Zaikowski: My territory comes from, uh, Vaughn, which is, uh, you know, 788.9 all the way down through to 695.

Sheri Ellis: Okay.

Jimmy Zaikowski: And, uh, I, I went to Vaughn and Hy-Railed Vaughn all the way down to, uh, Yeso and they had, uh, they had a Form B and, uh, putting ties in. Dispatcher wouldn't let me through, so he kicked me off, I think it was around 1 o'clock.


Sherri Ellis: And, you were unable to get back on the track on that day, correct?

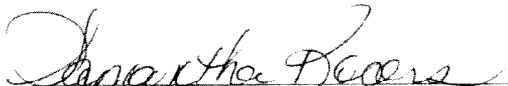
Jimmy Zaikowski: That is correct." (*Underlining Board's emphasis*)

The Claimant's testimony above was not refuted. It is clear that he was taken off the track by the Dispatcher on October 14, 2010, and was not allowed to get back on the track and absent any alternative theory as to how he could finish his inspection on that date, it is determined that the Carrier did not meet its burden of proof. The Board finds and holds the discipline is set aside and the claim is sustained in accordance with part 2 of the claim and the Claimant's disciplinary status reverts to that he held prior to January 17, 2011, 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: May 3, 2012