

PUBLIC LAW BOARD NO. 7394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former St. Louis—San Francisco Railway Co.)

Case No. 22 – Award No. 22 – Claimant: Stowers (Inspection)
Carrier File No. 12-11-0009 / Organization File No. B-3104-10

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assessed Mr. Blair M. Stowers a Level S 30-day Record Suspension with a three-year probation period for his alleged failure to inspect and protect track defects as required on November 23, 2010 resulting in a derailment in track 3030 on December 8, 2010, milepost 132.1 on Line Segment 1025, Coal track at or near Cape Girardeau, Missouri on the Springfield Division, River Subdivision violating Engineering Instruction (EI) 2.1—Purpose of Track inspector, EI2.2.3—Authority and Responsibility of Inspectors, and EI2.5.1—Turnouts.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the charge be removed from Mr. Stowers' personal file and he be made whole for all time lost and any expenses he incurred.

FINDINGS:

Public Law Board No. 7394, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, B.M. Stowers, has been employed by the Carrier since 2005. On December 14, 2010, the Carrier assessed Claimant a Level S 30-day record suspension, with a three-year probation period, for his failure to inspect and protect track defects as required, resulting in a derailment in track 3030 on December 8, 2010, MP-132.1 on LS

1025, Coal track, at or near Cape Girardeau, Missouri on the Springfield Division, River Subdivision. The letter stated that Claimant's actions were in violation of Engineering Instructions (EI) 2.1—Purpose of Track Inspector; EI 2.2.3—Authority and Responsibility of Inspectors and EI 2.51.—Turnouts. Following a request by the Organization, a formal investigation was scheduled in connection with this matter. Following the investigation, on January 13, 2011, the Carrier issued Claimant a letter upholding the discipline.

The applicable Carrier directives provide, in relevant part:

Engineering Instructions

2.1 Purpose of Track Inspections

Track inspection has two basic purposes:

- First, it allows employees to detect, correct and protect variations from BNSF track standards and to ensure safe train operations at authorized speeds.
- Second, it allows a planned program of repairs and improvements to ensure that employees are productive and use materials efficiently.

Perform at least the minimum track inspections required in this section.

2.2 Qualifications of Track Inspectors and Employees Supervising Restorations and Renewals

2.2.3 Authority and Responsibility of Inspectors

When an inspecting employee finds conditions that make the track unsafe for trains moving at authorized speed, or finds deviations greater than those permitted by the FRA Track Safety Standards, the employee has the authority and responsibility to do one or more of the following:

- Make repairs.
- Place temporary speed restrictions.
- Remove track from service.
- Complete all required FRA reports correctly and on time.

2.5 Turnouts

At least once each month, make a detailed walking inspection of all main line and yard turnouts as follows:

1. Inspect the following components:

- Switch points
- Switch point rollers
- Switch rods
- Connection rods
- Switch point locks
- Broken spikes . . .
- Frogs
- Guard rails
- Ties

* Each 39 foot segment of track shall have the minimum number and type of crossties as indicated in the following table: Class W track, Class of Track I, turnouts and turn track over two degrees needs six is the minimum number of crossties. When determining compliance with the minimum number of non-defective crossties per 39-foot segments, the Inspector is reminded that the 39-foot segment may be taken anywhere along the track and not need coincide with joint locations. . . . Crossties counted to satisfy the requirements set forth in the table in paragraph 'd' of this section shall not be: 1. Broken through. 2. Split or otherwise impaired to the extent the crossties will allow the ballast to work through, or will not hold spikes or rail fasteners. 3. So deteriorated that the tie plate or base of rail can move laterally one-half inch relative to the crossties; or 4. Cut by the plate through more than 40 percent of a crosstie's thickness... *[As read into the transcript]*

S.R. Harlin, Carrier Roadmaster at Cape Girardeau, Missouri, was the Carrier's only witness at the investigation. He testified at the investigation that on December 8, 2010, he was notified of a derailment in the coal track. He went to the scene, where he inspected and took photographs of the track at the point of derailment. Mr. Harlin explained that the train derailed at the heel filler, in the center of the track, and broke that rail, hit the frog and then slung over onto another track. That track was apparently out of service but Mr. Harlin was not aware why that was the case.

Mr. Harlin testified that it appeared that the derailment occurred due to wide gauge because of insufficient ties. Mr. Harlin explained what was depicted in the photographs, which were entered into evidence at the investigation. Mr. Harlin stated that where the train got off at the heel filler, the gauge was measured and it was wide. He did not recall the measurement and initially did not have the track inspection notes. The notes had been prepared by Track Inspector Chris Avery on December 8, 2010, and were ultimately retrieved. Mr. Avery did not testify at the investigation. The track notes taken by Mr. Avery show that at the point of derailment the gauge measurement for the heel block of the switch was 58 and 8/16 inches, which, Mr. Harlin stated, was not good for

Class I track such as this. The report includes gauge measurements from other locations but Mr. Harlin did not explain their relevance to this derailment.

In his photographs, Mr. Harlin had flagged the bad ties with orange paint. Mr. Harlin testified that the ties were in poor condition or missing, and it would take a long time, probably a period of years, for ties to deteriorate to that extent.

Mr. Harlin could not recall, however, how many good ties were required within a 39 foot section of rail and would have to look it up, but stated that he believed it was eight. It appeared from the record that the number required for this type of track was in fact six. Mr. Harlin stated that there were portions of this track where there were not five or six good ties within a 39 foot section, but, in response to a question from the Organization's representative, Mr. Harlin conceded that there were plenty of good ties within this section of track. When asked how he knew where the 39 feet were up, he replied that he did not. However, he stated, the typical length of a rail is 39 feet, so it is fairly easy to assume he could count the number of ties within a 39 foot section of rail, as they had in this switch, and determine the numbers of good and bad ties, and that is how he made his assessment in this matter. Mr. Harlin appeared to concede, however, in response to Organization questioning, that the problem was not a tie condition and there were no gauge measurements for this particular section of the track.

Mr. Harlin explained that for FRA Class I and Class II tracks there must be one crosstie whose center line is within 24 inches of each rail joint location. He stated that he could tell by looking at the joint and the joint bar that there was not a tie within 24 inches that was good. He stated that the picture showed a tie six inches from the bar, but it was not a good tie. He stated that it was apparent that the tie was split and not holding the rail in place, and one could see the rail braces at least an inch or so away from the tie. Mr. Harlin stated that there was plate movement at the point of derailment, although it was not visible in the photographs.

Mr. Harlin conceded, however, that as far as the necessary two ties underneath a joint, there were no markings or measurements as to how far away the good tie was. He stated that he was going off his orange markings on the photographs and he did not mark the ties he felt were good ties.

Mr. Harlin also conceded that the photographs were not very clear, and that it can be seen where the car dropped down and ran on the base, and the other car was on the wheel, shoving it out. In photo 12, where the cars are on the ground, he stated that one cannot see from the pictures where there is damage to the ties.

The Carrier's Track Inspection Records showed that the track at issue had been most recently inspected by Claimant and employee Billy Pottorff on November 23, 2010 with no defects noted. An FRA inspection report dated November 2, 2010 was entered into evidence at the investigation. Mr. Harlin explained that the report concerned milepost 232.0, which was not the same location as the coal track at Cape Girardeau where the derailment occurred.

Mr. Harlin stated that the location referenced in the report was approximately 1/10 mile from the derailment, and was main line turnout 303N. He explained that the FRA inspector did not inspect the track involved in the derailment. Mr. Harlin stated that he did not know if there were any reports showing when the FRA inspector had last inspected the track in issue. However, he added, the FRA inspector only notes defects, so there is no way for the Carrier to know what track has actually been inspected if defects were not found.

Claimant testified at the investigation that he was working as the Foreman of a patrol gang at the time of the incident. He stated that it was the track inspectors' responsibility to ensure that the tracks were in good shape.

Claimant stated that on November 23, 2010, he was called out on an indication, and he recalled that the Maintainer found a broken rail, which was presumed to be the cause of the indication, before he did. He stated that he went to the location to make himself available to supervise trains.

Claimant added that he later proceeded to inspect main line track, as a track inspector, for the rest of the day. Claimant explained that he had actually inspected the Coal Track Switch on November 19 but when he went back on the 23rd, he noted what he assumed was a computer failure showing that the area still needed inspection, so he put the information into the system again. He maintained that his actual inspection was performed on the 19th, but when it showed up on his computer screen as nearing his due date, he realized that he had already inspected the track so put it into the system as inspected on the 23rd with no defects. Although the Track Inspection Report produced by the Carrier at the investigation showed that he was accompanied by Mr. Pottorff on this inspection, Claimant maintained that Mr. Pottorff was not there with him on either the 19th or the 23rd and the copy of the report he pulled did not show Mr. Pottorff. Claimant said he had no idea how Mr. Pottorff came to be listed as assisting on either of these inspection dates.

Claimant stated that the photographs depicted the middle track switch off the coal track, but this was not the switch he inspected when he entered the TIMS record. He stated that when he inspects the coal track switch, he has inspected the switch off the main that goes to track 3030. He stated that he knew that switch as 3030, and on the 19th he did not inspect the switch in the photographs. Rather, he inspected the coal track switch coming off the main, which was a yard track. In either event, however, Claimant said he inspected all of his switches for the month of November, and he was sure he had inspected the one in the photographs.

Claimant acknowledged that the track depicted in the photographs “did not look good,” but refused to acknowledge any particular defects, stating that he could not inspect track from photographs,. Reviewing the photographs, he did say that the two ties closest to the joint appeared to be in bad shape but he could not see ballast working through, which is what would make them defective. He stated that he did see one broken plate and some fasteners that would be north of the joint that looked adequate. He also stated that from the photographs, it appeared that the ties on either side of the joint were in decent shape, and that they were within 24 inches of the joint, which is the standard for properly supporting the joint.

Addressing the general state of the ties in this stretch, Claimant noted that the test of a reportable defect is fewer than six good ties in a 39 foot length of track, and from the photographs of the derailment site, he believed he could count at least six good ties in that span, even using Mr. Harlin’s markings as the test of which ties were good and which were bad. Claimant observed that there is a good deal of judgment used in deciding whether a given tie is defective. As for the gauge, he stated that fifty six and a half inches is the ideal gauge, but that a derailment, in and of itself, could very easily cause the gauge to widen by several inches, and that measuring the width of the gauge after a derailment says nothing about the width before the derailment.

Claimant reviewed a track inspection of this same section of track on October 22nd, the month before his inspection, by a different track inspector, which showed no defects. This was consistent with what he observed when he inspected the tracks, and with the FRA inspections of the section.

Billy Pottorff testified that he was working in St. Louis on November 19th and was working as a welder on November 23rd. He stated that he had no involvement in inspecting track with Claimant on either day.

Claimant’s personal record shows a 10-day record suspension for failure to be alert and attentive while operating a Carrier vehicle, resulting in an accident, issued on April 8, 2010, and a Level-S 30 day record suspension, with a three-year review period, for failure to perform a job briefing, issued May 22, 2007.

The Carrier asserts that the facts of this case are simple. Claimant, the Carrier points out, was the Patrol Gang Foreman responsible for inspecting and reporting any defects to the track where the derailment occurred. Claimant, the Carrier states, admitted to performing a walking inspection of the track but failed to note the obviously defective cross ties that caused the derailment. Moreover, even though Claimant’s Track Inspection Report showed that he performed this walking inspection on November 23, 2010, he testified at the investigation that he actually performed the inspection on November 19. This, the Carrier urges, compounds Claimant’s violation.

The Carrier notes that its exhibits clearly indicate significant tie defects on Track 3030, conditions which did not meet FRA standards, let alone the more restrictive Carrier standards, either as to the number of good ties in a 39 foot length of track or the proper tie

support for a rail joint. Claimant, the Carrier stresses, did not report these violations. Moreover, the Carrier states, even Claimant acknowledged that such conditions do not develop overnight. So, the Carrier maintains, even if Claimant inspected the track some 20 days before the derailment, he is still responsible for failing to properly identify those tie defects and take appropriate action to correct the situation.

The Carrier also points to Mr. Harlin's testimony that the joint itself was not properly supported by a cross tie, as required by FRA regulations. The exhibits entered into evidence, the Carrier states, clearly show only two cross ties which could have met this requirement, but both were defective. Moreover, the Carrier states, Claimant admitted as much at the investigation.

With respect to the Organization's assertion that the FRA Track Inspector's report showed no adverse findings, the Carrier states that the report was for main line track and not the yard track involved in this incident. In any event, the Carrier stresses, its standards are more stringent than the FRA's, so even if the FRA found no defect it would not excuse Claimant.

The Carrier concludes that the record does not support the Organization's contention that unknown factors caused this incident. Rather, the Carrier states, the cause was defective crossties which failed to hold the rail in proper alignment and support a rail joint. Claimant, the Carrier points out, was, in November and December, the individual responsible for ensuring that the track at issue was defect-free, and he failed to properly perform his duty. The Carrier argues it has proven Claimant's guilt by substantial evidence, and the discipline assessed was in accordance with its PEPA and Claimant's personal record. It urges that the claim be denied.

The Organization asserts that there are many variables in determining track conditions and possible defects, and many factors at work when a car derails. The Organization states that track standards are kept to the FRA minimum to avoid the costs of track improvements, and at the point of this derailment the track was within the required FRA specifications. The Organization notes that there were no exceptions to the track taken by the FRA inspector, the former Track Inspector who inspected the track on October 20, 2010 or by Claimant who inspected it on November 19, 2010. The Organization maintains that there was a sufficient number of good ties for the section of track as required by FRA guidelines the last time Claimant inspected the track.

The Organization points out that the car derailed 20 days after the last inspection. Many factors could have caused the derailment, it asserts, of which no one had knowledge. The Organization contends that the Carrier chose to arbitrarily discipline Claimant, and, in doing so, failed to meet its burden of proof. The Organization there urges that the claim be sustained.

We have carefully reviewed the record in its entirety. We find no procedural defect which adversely affected Claimant's rights. As to the merits, the discipline was imposed as the result of a derailment on track that Claimant was responsible for

inspecting. Records submitted by Claimant show he had inspected the track within three weeks prior to the derailment, and had noted no defects. In the wake of the derailment, inspection by Track Inspector Chris Avery and Roadmaster S. R. Harlin showed that the gauge was wide at the point of derailment, and many of the ties were in poor condition, including cross ties under the joint where the derailment occurred.

Certainly a Track Inspector who fails to note defects may be subject to discipline for failing to perform his duties. The fact of a derailment reasonably gives rise to a concern that defects may have been missed. It is, however, the burden of the Carrier to prove by substantial evidence that this employee in fact failed to perform his duties, and on the facts of this case, we conclude that it has not carried that burden.

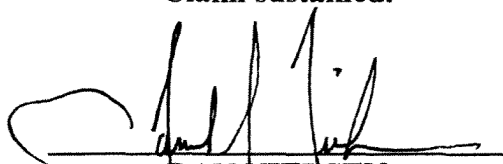
Track Inspector Avery was not available to the Hearing Officer, and the Carrier proceeded on the testimony of Roadmaster Harlin. Mr. Harlin was not able to provide any clear description of how the defects he identified led to the derailment, or in many cases, whether they were within or outside of the tolerances set by the Carrier. He could not say whether the number of good ties in this section of track were sufficient, though he conceded that there were plenty of good ties in this section. Indeed, he could not recall how many good ties were required within a 39 foot section of rail.

In the end, even though Mr. Harlin testified a great deal about the state of the ties, he conceded that the problem in this case was not with the ties as such, but with the cross ties under the joint and the width of the gauge. He was not able, however, to identify the width of the gauge at the point of derailment. Nor could he say that the cross ties at the point of derailment caused the derailment, or state how far it was from the good cross tie to the joint. While there was a report from Mr. Avery that he measured the width at the heel block at 58 and a half inches, Mr. Avery was not available to testify, and thus could not respond to the question of whether the width of the gauge would be affected by the derailment itself, as seems reasonably likely. As for the cross ties, it does appear that the ties immediately under the joint were defective. However, it is not a defect so long as the cross ties within 24" of the joint are adequate. Mr. Harlin was not able to say exactly how far it was from the joint to the adjoining ties, nor is it apparent from the photos that these ties are in fact defective, even though Mr. Harlin painted them orange.

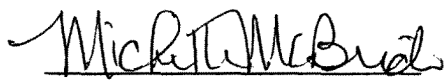
The Board has no doubt of Mr. Harlin's good faith, but he was not able to testify from memory as to any pertinent fact, and instead relied on admittedly unclear photographs to make the case that Claimant must have failed to inspect adequately. As noted, the fact of a derailment raises reasonable questions about the condition of the track, but there can be many causes for a derailment. Absolute certainty cannot be expected, but the Carrier is required to produce substantial evidence of guilt before imposing discipline. On this record the Board cannot even conclude that it is more likely than not that there were defects in this track which Claimant should have noted when he inspected in November. We therefore conclude that the claim must be sustained in full.

AWARD

Claim sustained.



DAN NIELSEN
Neutral Member



MICHELLE MCBRIDE
Carrier Member



R. C. SANDLIN
Organization Member

Dated this 30th day of July, 2012.