

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on January 5, 2004, when it issued the Claimant, Mr. C. W. Ing, a 10-day record suspension for allegedly violating Maintenance of Way Operating Rule 1.3.1, 1.4, and 1.13, when he failed to inspect, document, repair or protect track deviations and conditions as instructed about November 5-11, 2003, while working on the Fort Worth Subdivision.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove any mention of this incident from the Claimant's personal record and make him whole for any wages lost account of this incident. [Carrier File No. 14-04-0007. Organization File No. 90-13N1-0320.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Charles W. Ing, was employed by the Carrier in 1974. On November 5, 2003, he was working as a Track Supervisor, and on that date he accompanied Assistant Director Maintenance Production William F. Switzer and Roadmaster Marlon L. Gaunt on an inspection of the territory assigned to Mr. Ing, main line trackage between Miles 342.2 and 368.5. (Mr. Gaunt left the inspection party at mid-day.) The inspection made on that date, and subsequent events, caused the Division Engineer to address a notice of investigation and charges to the Claimant on November 14, 2003, as follows:

Please arrange to attend investigation in the conference room at 14100 John Day Road, Bldg. G, in Haslet, Texas at 9:00 AM, Tuesday, November 25, 2003, to ascertain the facts and determine your responsibility, if any, in connection with your failure to inspect, document, repair or protect track deviations and conditions

as instructed while performing duties as track supervisor on the Fort Worth Subdivision about November 5 thru 11, 2003.

The investigation was postponed until and held on December 18, 2003. The Claimant was competently represented by the Organization's Vice General Chairman. Mr. Switzer, Mr. Gaunt, and Section Foreman Mark R. Powell appeared as witnesses for the Carrier.

At the beginning of the investigation, the Claimant's representative objected to the notice of investigation as lacking in specific rule violations or specific charges. The objection was made a matter of record. It was renewed at the close of the investigation, when certain Maintenance of Way Operating Rules (MWOR) were read into the record.

Mr. Switzer testified that while making an inspection trip on the Claimant's assigned territory, the inspection party found a number of defects which, he asserted, could have been repaired by the Claimant in the course of his regular inspections. While there were some repairs that the Claimant could not have done by himself, he named those items which one man, working alone, could have done:

[L]oose bolts, missing bolts, guard rail bolts loose, one brace plate off, one brace wedge out, small scrap that needed to be picked up and hauled in; things like that, that one man could certainly do. [Transcript page 11.]

Mr. Switzer submitted in evidence a copy of his list of all exceptions or defects that were found by the inspection party on November 5. There are approximately 90 separate items listed therein. The inspection party required that one 10 m.p.h. speed restriction be applied, but other defects or exceptions did not require immediate remedial action. His list was transmitted to the Claimant and Mr. Gaunt, as well as other addressees, by e-mail at 11:35 a.m. on November 7, 2003.

Mr. Gaunt testified that he believed the number of defects found on November 5 was excessive, considering the frequency of inspections in this territory. He further stated that the Claimant failed to prepare an inspection report on the November 5 findings, and that such reports are required by the Federal Railroad Administration (FRA) to be made within 24 hours. Except for the defect requiring the 10 m.p.h. speed restriction, he testified that all the other defects were considered minor, and he gave the Claimant until December 31, 2003, to have all of the work completed.

The Claimant stated that he rendered reports of defects found on November 6 and 7, and the reports were entered as exhibits. He further testified that he did not inspect track during the period November 8 through 14, inclusive, being assigned other duties. He did not report the defects found on November 5, because he was waiting to receive Mr. Switzer's list, received on

November 7. He said he did not possess a complete list of his own of the findings by the entire inspection party because he was driving the on-track vehicle half the time while Mr. Gaunt and/or Mr. Switzer were on the ground making a visual inspection in detail.

He further testified that he began repairing the items he was aware of on the same day, November 5, and had repaired most items on Mr. Switzer's list as of December 18. He said he had until December 31 to finish the needed work.

On January 5, 2004, the Division Engineer advised the Claimant of the outcome of the investigation afforded him:

Based on evidence and information provided in the investigation you are issued a ***10-day Record Suspension*** for violation of Maintenance of Way Operating Rules 1.3.1, 1.4 and 1.13. [Bold italics in original text.]

These three Rules read as follows, as read into the investigation transcript:

MWOR 1.3.1

Explanation. Employees must ask their supervisor for an explanation of any rule, regulation, or instruction they are unsure of.

MWOR 1.4

Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad.

MWOR 1.13

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

An appeal of the Carrier's disciplinary decision was promptly filed by the Organization with the Carrier's General Director - Labor Relations. It argues that the Claimant was not provided a fair and impartial investigation, in that the Carrier named the rules allegedly violated

after hearing all the evidence. Not knowing the rules at the beginning of the investigation, the Claimant and his representative do not know what they are to defend against.

The Organization further argues that the preparation of track inspection reports is not limited to Track Inspectors (the Board notices that the Claimant's job title in the record is "Track Supervisor," but the Claimant himself said he was a "Track Inspector," as does the Organization in its appeal letter). The Organization contends that anyone inspecting track should be responsible for filling out inspection reports.

The Organization also argues that the Claimant was given until December 31, 2003, to effect repairs, and asks why he was charged with failure to make repairs when that target date had not yet been reached. Finally, the Organization points out that the Claimant performed no track inspection on those dates in the notice of charges which followed November 7, 2003, being assigned other duties on those succeeding dates.

The Carrier denies any violation of the Claimant's due process rights. He was properly notified of the investigation and had the opportunity to cross-examine all witnesses. The Carrier asserts that it developed substantial evidence, including the Claimant's own testimony, that he did not fill out FRA reports as he was required to do.

The Carrier points to 49 CFR § 213.241(b), which requires that each record of a track inspection "shall be prepared on the day the inspection is made and signed by the person making the inspection." It argues that the Claimant did not make a report by the end of the day on November 5, and even after receiving the consolidated list of deviations from Mr. Switzer on November 7, he still did not make the report. Under these circumstances, the 10-day record suspension is neither harsh nor excessive.

The Board has carefully read the transcript of testimony and evidence in the record, and considered the arguments of the Parties. The threshold issue of sufficiency of the notice of charges, a procedural matter, shall be addressed first.

In Third Division Award 24621, the Board's majority said,

This Board has often held that a charge against an employee in a disciplinary case is adequate if it reasonably apprises the employee of the set of facts or circumstances under inquiry to provide an opportunity to prepare a defense and prevent surprises.

Rule 13 - (c) of the Parties' Collective Bargaining Agreement, the Discipline rule, states:

Prior to the investigation, the employee alleged to be at fault shall be apprised, in writing, of the circumstance or matter to be investigated, . . .

This provision does not require that operating rules be stated in the notice, although they often are set forth. Employees are presumed to be conversant with the operating rules which govern their employment. Thus, the entry of such rules in an investigation is not a surprising event, catching one unprepared, except the introduction of rules unrelated to the employee's duties. In the instant case, however, the Board does not perceive the application of MWOR 1.3.1 and 1.13 to the circumstances of this case. As for MWOR 1.4, its subject is of such general nature, it's hard to see how it would not apply to any course of an employee's on-duty conduct. In any event, the Board finds that the notice, while not as precise as one could wish, was adequate to apprise the Claimant of the issues with which he was being charged. If anything, it is overly sweeping in its scope.

As for the argument that preparation of inspection reports is not limited to Track Inspectors (or Track Supervisors), the Organization's position is not unreasonable. One questions the theory that a Division Engineer, a Roadmaster, or a Section Foreman, making a track inspection and finding a deviation or defect in violation of the FRA's regulations, is somehow exempt from making an FRA report, thereby requiring that a Track Inspector make a special trip to see the defect and thus, be enabled to file an FRA report, because no one else can. The case the Organization is making is that since Mr. Switzer had a complete list of defects found on November 5, 2003, the Claimant expected Mr. Switzer to make the report. That may have been his expectation, but clearly they should have discussed the matter and determined, definitely, which of them would assume that responsibility. The Claimant said his list was incomplete, and he was awaiting Mr. Switzer's list. He needed Mr. Switzer's list so he could undertake repair and correction of those exceptions taken by the inspection party. Not having a complete list, he could not have prepared the report by the end of the work day, in any event. While on the face of it, one could conclude that there was no clear understanding of who would make the FRA report, the fact is that the Claimant made such reports on a daily basis; this was his assigned territory; and if he was uncertain about carrying out the usual practice of making the report, he should have asked for direction.

The Board is not persuaded that the Claimant was negligent with respect to repair of the deviations and defects found on November 5, 2003. He was given until December 31 to do the work. Although Roadmaster Gaunt stated that he had not been advised that any repairs had been made, there is no showing that it was not done.

The Claimant successfully defended himself against charges that he failed to carry out his assigned duties on any dates after November 7, 2003. He was assigned to other duties during those dates included in the notice of charges, and the Carrier has not shown otherwise.

The notice of charges alleged the Claimant's failure to inspect, document, repair, or protect track deviations and conditions about November 5 through 11, 2003.

The Carrier has not shown that the Claimant failed to inspect track between those dates. The fact that so many deviations and defects were noted by the inspection party on November 5, according to Mr. Switzer and Mr. Gaunt, leaves the unspoken inference that the Claimant had not been inspecting track and making repairs as he should have prior to that date. The inference is not unreasonable, but the proof is not in the record.

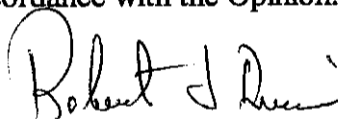
For the same reasons, there is an inference that the Claimant had not repaired minor defects that could have been repaired by one man, because so many were found on November 5. Again, the inference is not unreasonable, but the proof is not in the record.

There is no evidence at all that the Claimant failed to protect track deviations and conditions. Although it was necessary to apply a 10-m.p.h. speed restriction on November 5, there is no evidence that the condition at that site was known to be in existence before found by the inspection party.

The Claimant failed to reach a clear understanding as to who would prepare the FRA report, a job that normally was his assigned duty. This was his territory. If he was not to make the report, he should have determined who would be responsible. As for the other parts of the charge, the Board cannot find the Claimant at fault. That happens with broad charges. The Claimant has had no disciplinary entries in his record for more than 13 years. The 10-day Record Suspension will be reduced to a Reprimand. No wage loss has been shown in the record.

AWARD

The claim is sustained in accordance with the Opinion.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

July 9 2004
Date