

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 329**

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees

**(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)**

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on November 30, 2007 when Claimants, D.R. Vinson (6441877) and G.C. Filyaw (6459374) were each assessed a Level S 30-Day Record Suspension for allegedly failing to detect and protect the track from excessively worn switch point in accordance with BNSF Engineering Instructions. The alleged conduct resulted in a train derailment at Mile Post 43.0 near Arcola, Texas on the Galveston Subdivision, and ;
2. As a consequence of the violation referred to in part 1 the Carrier should reinstate the Claimants with all seniority, vacation, rights unimpaired and pay for all wage loss commencing November 30, 2007, and remove any mention of discipline from their records.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On October 14, 2007, the Carrier experienced a derailment causing about \$275,000 in damages. In investigating the derailment, the inspectors took a close look at the switch which the train passed (partially passed). It was their belief that the derailment was caused by a switch point that deteriorated to the point that it should have been replaced.

It developed that the Track Inspectors, when they inspected the switch (which already had been protected by a 10 MPH slow order), that it should have been immediately replaced. The worn condition of the switch point did cause the Inspector to call his Supervisor and advise the replacement (or repair) of the switch should be placed in line to be worked on for Monday, October 15, 2007. Unfortunately, the derailment occurred on Sunday, October 14, 2007.

The Carrier then slated an investigation for the purpose:

"...of ascertaining the facts and determining your responsibility, if any, regarding your alleged failure to properly detect and protect and excessively worn switch point in accordance with BNSF Engineering instructions on October 11-13, 2007, while conducting track inspections, which resulted in a train derailment at Mile Post 43.0 located near Arcola, Texas on the Galveston Subdivision on October 14, 2007 at approximately 0430 hours, resulting in total damages at over \$275,000."

Following the investigation, a hearing was held on November 6, 2007, after a mutual postponement. The Carrier assessed each Claimant a Level S 30-day record suspension (no actual time lost, just an entry in each Claimant's disciplinary file).

Each Claimant is a veteran employee, both hired out in 1980; one in June and the other in August. Each kept an eye on the condition of the switch and testified the switch point met the minimum measurements.

A review of the transcript reveals much discussion concerning the technology in the use of the Gelsmar wear tool to determine for certain the measurement of the switch point. It also developed the switch point was broken. Note the following from Page 18 of the transcript. The Claimant's Representative was questioning a Carrier witness:

"Q. ...In previous testimony you stated that there was a portion of the switch point that was broken out, correct?"

A. After the derailment when I looked at it.

Q. Okay, so its possible, with the four trains going over it and this being the fifth train, it could have broke out under any one of these trains?

A. That's possible, yes sir."

Earlier, the Claimant's Representative elicited testimony from the same Carrier witness that the switch point was broken. (CR is Carrier Representative. CW is Carrier Witness):

"CR: You also stated that the switch point was broken, is that correct?

CW: Yes.

CR: So it wasn't just worn, it actually broke out?

CW: There were fresh chips on the ground, yes sir.

CR: So the chips, you said there were fresh chips on the ground, so these chips show of a, just a recent break, correct?

CW: Yes, of a yeah, fresh...

CR: A fresh break?

CW: Rights. Of something that was already within tolerance maybe broken, who knows.

CR: Okay. So there's no way that you know if it had broken, there's no way to tell when it broke, correct?

CW: That's right.

CR: But it was broken?

CW: It was broken, yes sir."

The burden of proof in disciplinary cases rests squarely on the shoulders of the Carrier. There must be sufficient evidence. The main charge was negligence. This

Board cannot find evidence that totals out to be significant. The total experience of the Claimants is 27 years each as of the date of the derailment. Each was aware of the erosion of the switch point and on Thursday believed it should be repaired or replaced. It was then put on the work schedule for Monday, October 15. Unfortunately, the derailment occurred on the 14th.

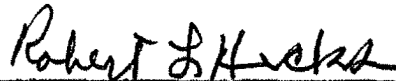
For lack of sufficient evidence, the Board will sustain the claim.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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



Robert L. Hicks, Chairman & Neutral Member



David D. Tanner, For the Employees



Samantha Rogers, For the Carrier

Dated: 10/16/08