

**PUBLIC LAW BOARD NO. 5850**

---

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY**

---

Case No. 460 – Award No. 460 – Claimants: Gilliam and Richey

Carrier File No. 14-13-0347

Organization File No. 170-SF13NI-1377

---

**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 19, 2013, when Claimants, Track Supervisors: C. E. Gilliam (3619111) and W.L. Richey (6541775), were disciplined with a Formal Reprimand for their alleged failure to detect, correct, protect, and properly report variations from BNSF track standards to ensure safe train operations at authorized speeds. This violation resulted in multiple defects found by an FRA Inspector that caused significant delays to train operations near Winslow on the Seligman Subdivision on Wednesday, June 19, 2013. The Carrier alleged violation of Engineering Instructions (EI) 2.1 Purpose of Track Inspections, EI 2.2.2D Authority and Responsibility of FRA-Qualified and EI 2.4.4B Track Inspectors.

2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimants' record this discipline and they be reinstated, if applicable, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing June 19, 2013, continuing forward and/ or otherwise made whole.

**FINDINGS:**

Public Law Board No. 5850, 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 Charles Gilliam, has been employed by the Carrier since 1978. Claimant William Richey has been employed by the Carrier since 1979. On June 27, 2013, the Carrier notified Claimants to attend an investigation to ascertain the facts and determine their responsibility, if any, in connection with their alleged failure to detect, correct, protect, and properly report variations from Carrier track standards to ensure safe train operations at authorized speeds, resulting in multiple defects found by a FRA inspection, which caused significant delays to train operations near Winslow on the Seligman Subdivision on June 19, 2013 while they were working as track supervisors on TINS0568 and TINS0687, respectively. Following the investigation, on August 16, 2013, the Carrier found Claimants guilty of the allegations, in violation of EI 2.1 Purpose of Track Inspection, EI 2.2.2D Authority and Responsibility of FRA-Qualified and EI 2.4.4B Track Inspectors. Both Claimants were assessed Standard Formal Reprimands with one-year review periods.

Carrier Assistant Roadmaster Jonathan Garcia testified at the investigation that he was covering the Flagstaff territory at the time at issue. On June 19, 2013, he became aware that the FRA had discovered some track defects, primarily worn frogs, in his area. The necessity to repair the frogs resulted in substantial train delay.

Mr. Garcia stated that the worn condition was visible on the two frogs he inspected with the FRA inspector. With respect to one frog, Mr. Garcia stated, from examining a photograph, that one frog showed a large amount of damage, that it had, in fact, "blown out." He stated that this could occur overnight or between one train and another going over the track. In other words, a frog with no defect could develop one after just one train crossed over. The other three defects were simply worn tread.

Mr. Garcia explained that the area in question is high-traffic, with approximately 100 trains per day traveling over the track. He stated that he did not know if the frogs showed the objectionable wear when Claimants inspected them, or whether they could have done anything differently to avoid having been charged with Rules violations. He added that these two inspectors had never failed to meet his expectations, and he did not believe they failed to meet the Rules' requirements.

Division Engineer Matthew Keller explained that the FRA found three frogs past the applicable wear limits, which thus needed 10 mile per hour speed restrictions, and a fourth one the inspector wanted checked by the end of the day, which Claimant Gilliam in fact found to be defective.

Mr. Keller explained that these defects occurred on Claimants' territory, where they perform normal inspections. Claimants performed their inspections as required, approximately Claimant Gilliam on June 17 and Claimant Richey on June 18, 2013, but he did not believe they took the necessary special consideration to identify the problems before they became defects. He did not observe the area until June 21, 2013.

Both Claimants testified that they did not observe any serious defects when they performed their inspections.

Mr. Keller stated that it would be an unusual or extreme situation where the inspector would fail to see an advance indicator of a problem, before the frog fell below FRA standards. Tread wear, he explained, is a focal inspection point.

The Carrier states that this case is not complicated. Although the Organization denies that Claimants were at fault, the evidence shows that Claimant Richey on June 17, 2013 and Claimant Gilliam on June 18, 2013 failed to inspect their assigned track and report defects. The result was major train delays and slow orders on June 19, 2013. The testimony of the Carrier's witnesses shows that there were problems at four areas that Claimants should have, and did not, identify.

The Carrier notes that both Claimants admitted that they took no measurements and no exception to the track or frogs when they performed their inspections. Thus, their guilt has been proven by substantial evidence, the Carrier asserts. The Carrier concludes that the discipline was appropriate given the Carrier's Policy for Employee Performance Accountability (PEPA) and Claimants' personal records.

The Organization states that Claimants are guilty of no violations. They properly inspected the track. There was nothing wrong at the time, and some 42 hours elapsed before these defects were noted, during which, according to the Carrier's witnesses, between 90 and 180 trains moved across the area. A failure can occur in a frog under any train at any time. In particular, the Organization notes the substantial period of time that elapsed between the last inspection and the FRA's determination that there were failures.

The Organization asserts that even the Carrier's witnesses conceded that these failures could have occurred in the intervening period, due to no fault of Claimants. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. The defects at issue were discovered by the FRA one to two days after Claimants performed their inspections, in an area where that track could have been traversed by as many as 200 trains during the intervening time. Claimants' supervisor testified that the defects could well have occurred after Claimants did their inspections. He expressed his view that they were very good inspectors, and he did not believe they violated Carrier Rules. On this record, it is impossible to conclude that the Carrier has presented substantial evidence of guilt. It is at least as likely that Claimants are completely blameless as it is that they neglected their duties. The claim will be sustained.

**AWARD**

**Claim sustained. The Carrier is ordered to rescind the discipline issued against Claimants and correct their personal records accordingly. The Carrier will comply with this Award within 45 days.**

  
**DAN NIELSEN**  
Neutral Member

  
**JOY MENDEZ**  
Carrier Member

  
**DAVID SCOVILLE**  
Organization Member

Dated this 9<sup>th</sup> day of June, 2016.