

PUBLIC LAW BOARD NO. 6102

Award No. 7
Case No. 7

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern Santa Fe Railway
(Former St Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when suspending Mr. B. R. Joiner from service beginning on August 29, 1997, [sic]¹ for allegedly failing to maintain proper track.
2. As a consequence of the Carrier's violation referred to above, Claimant should be paid for all time lost, and the discipline shall be removed from his record." [Carrier's File MWC951220AC. Organization's File B-1128-11].

FINDINGS AND OPINION:

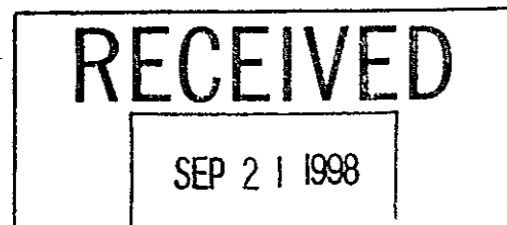
Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, a Track Foreman, was suspended by Roadmaster M. J. Brown on August 28, 1995, for fifteen (15) days, (effective August 29), when it was discovered that the Claimant had left three rail joints unbolted when his track gang changed out a switch frog and its adjoining rails on a yard track on August 2, 1995.

When the Claimant's track gang had completed the job on August 2, it was intended to drill bolt holes in the rail ends at the joints, for the purpose of installing joint plates and bolts to secure the rail ends together. At that point, it was found that the rail drill was inoperable. At the same time, the Claimant was being summoned to provide immediate assistance in a derailment at a critical location.

The Claimant observed that the joints were tight and the rails securely spiked to good crossties. It was his judgment that the joints could be safely left unbolted, as a temporary measure, while he and his gang attended to the more urgent derailment emergency elsewhere

¹The year date, "1997," is an obvious typographical error. The record confirms that the Claimant was suspended on August 29, 1995.



in the yard. The Claimant, however, forgot the unfinished task, until it was brought to his attention by the Roadmaster on August 28, who found the undrilled rails and unbolted joints on that same date. The Claimant immediately finished the job, having an operable rail drill on this date, but he was suspended when he returned to his tool house later in the day.

The Parties' Agreement permits an employee to be disciplined without an investigation; however, if an investigation is timely requested, it must be afforded, and a precise statement of the charges must be provided in writing. The Union's General Chairman requested an investigation on August 29, and after one agreed-upon postponement, it was held on September 14, 1995.

A procedural objection was raised in the investigation which bears some comment. Agreement Rule 91(a) provides that "Employees disciplined or dismissed will be advised of the precise charge of such action, in writing if requested." [Underscoring supplied]. The General Chairman asked that he be advised of the precise charge when he requested the investigation. The charge, according to the Carrier's initial response, reads as follows: "There will be an investigation held September 11, 1995 at 10:00 a.m. to determine the facts and Mr. Joiner's responsibility, if any, in this matter." [Underscoring supplied]. "This matter" was not defined by the Carrier. At the investigation, the General Chairman noted that the Carrier had still not advised the "precise charges." The conducting officer merely affirmed that the General Chairman's objection would be noted in the record.

The Board believes that the Carrier did not comply with the precise notice requirements of Rule 91(a). Nevertheless, it is quite clear that the Claimant knew the purpose of the investigation. When he was suspended, the Claimant was told exactly why. Furthermore, he requested, through the General Chairman, the presence of two other employees as witnesses, indicating knowledge of what matters would be the subject of the investigation.

The Board finds that the Claimant's ability to defend himself was not compromised by the Carrier's failure to provide a precise notice. The Carrier is cautioned, however, that continued failure to provide a proper notice, precise as to the charge, may result in an arbitral decision based solely on procedural error. The investigations are within the control of the Carrier; there is simply no reason a precise charge cannot be produced. A precise charge is for the protection of the employee's due process rights. It not only provides the employee with a statement of what he must defend himself against, it also precludes surprise fishing expeditions.

Substantial evidence was adduced at the investigation to prove that the Claimant failed to comply with the Carrier's Maintenance of Way Circular No. 6, which requires that all track joints must be tightly bolted with at least two bolts on each rail end. The Board finds, however, that the discipline is excessive, for the reasons discussed below.

During the course of the investigation, there was considerable testimony, particularly by the Roadmaster who supervised the Claimant, who found the unbolted joints, and who suspended him, alleging that the unbolted joints were in violation of the Federal Railroad Administration's Track Safety Standards and subjected the Carrier and the Claimant to fines up to \$15,000 each. On the other hand, a Track Inspector's report dated August 29, 1995, which appears as an exhibit in the investigation record, indicates that the subject track is excepted from the FRA's Regulations. While this case was still open on the property, this fact was brought to the Carrier's attention. No rebuttal was made by the Carrier, notwithstanding that five time limit extensions were subsequently agreed upon. Generally, a discipline case should rest upon the record made in the investigation. However, exculpatory evidence subsequently becoming known to the Claimant, which is known or should have been known to the Carrier, may be considered. The Carrier's officers and supervisors are presumed to know whether its property is excepted from the FRA's Regulations. An employee may or may not know.

The Board believes that the quantum of discipline may have been colored by the Roadmaster's assumption that the track involved was subject to the FRA's Track Safety Standards.

The Board is also troubled by the arbitrary imposition of a pre-determined, "automatic" 15-day suspension for a safety violation. Such "mandatory sentencing" (to lift a term from the federal court system and that in some states) does not allow for mitigating circumstances, such as we find here, does not distinguish between willful and unintended violations, such as we find here, nor consideration of an employee's past record.

The Board finds there were mitigating circumstances. First, the defective rail drill prevented the Claimant's track gang from immediately completing the task they had begun, i.e., changing out the switch frog and restoring the track structure to the Carrier's prescribed standards. The emergency situation of a derailment, which called them away, distracted the Claimant from completion of the job, which could have entailed borrowing a drill from another gang. From August 2 through August 5, which was a rest day, the Claimant worked 12 hours of overtime. He was heavily engaged in necessary work during the following weeks, including substantial overtime requirements. These circumstances do not excuse his forgetting to finish the job, but they do suggest why.

The Board also believes that the failure to return and finish the task was not a willful act. Indeed, when he was asked about the joints 26 days later, the Claimant forthrightly acknowledged that he had forgotten them, and immediately caused the joints to be drilled and bolted. No accident or incident had occurred at that location during the interim.

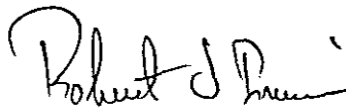
The Claimant has a very good work record. He was employed on November 2, 1970, and promoted to Track Foreman on March 17, 1972. During the ensuing period, almost 25 years, there was only one disciplinary entry, a censure, in 1986.

The General Chairman complained that he did not receive copies of all the exhibits entered into the investigation. The Board believes that such omissions, if any, were inadvertent and did not diminish the Organization's ability to represent the Claimant. References by the Claimant's representative to other defective track in the Roadmaster's territory which allegedly had been left unrepaired were apparently intended to demonstrate that the Claimant was singled out for severe discipline, while other like offenses were excused or overlooked. The Board's decision to reduce the disciplinary penalty is based on other considerations discussed above, and the photographic evidence of faulty track was given no weight, but the Board notes that poor xerographic reproduction of the numerous photographs entered as exhibits makes them practically useless as evidence.

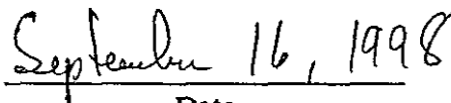
The fifteen (15) day suspension is reduced to four (4) days. Payment for the excess number of lost work days encompassed by this reduction shall be made within the time limit prescribed in the Award below.

AWARD

Claim sustained in accordance with the opinion. The Claimant shall be compensated in accordance with the opinion above within sixty (60) days from date of this Award.



Robert J. Irvin, Referee



Date