

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 181

AWARD NO. 182

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1517726

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

R-0948U-301

STATEMENT OF CLAIM

1. The Level 3 discipline [one (1) day training without pay] imposed upon Track Inspector T. Gilkerson for violation of General Code of Operating Rules (GCOR) 1.13 in connection with allegations that while employed as a track inspector he failed to identify four (4) bridge joints on the Falls City Main Track 4, approximately Mile Post 473.75 was unjust, unwarranted, based upon unproven charges and in violation of the Agreement.
2. As a consequence of Part 1 above, Claimant Gilkerson's record must be cleared of these charges and that he be made whole for lost work hours at the applicable rate of pay.

STATEMENT OF BACKGROUND

At the time the incident occurred that resulted in the filing of the subject claim, Claimant Ted Gilkerson with nearly eleven (11) years of service with the Carrier was working on the Falls City Subdivision and assigned as a Track Inspector on Gang 5272 under the supervision of Manager Track Maintenance, C. George Rewczuk. Instructions issued

by Supervisor Rewczuk to Track Inspectors including Claimant were given in several forms, to wit, verbally, by cell phone, or by email among others. At 4:51 p.m. on December 3, 2008 while Claimant was on vacation and did not return to duty until Monday, December 8, 2009, Supervisor Rewdzuk forwarded the following email instructions to him to complete a Continuously Welded Rail (CWR) Joint Inventory Count in the Track Inspection System:

The week of Sunday Dec. 7 through December 13, 2008 all track Inspectors need to complete a CWR Joint Inventory Count in the track inspection system. As most of you know we are attempting to eliminate negative joints on the Northern Region and a proper inventory of joints is needed to help eliminate the problem of negative joints. I'm attaching a PDF that you can open and print that contains the joint counting instructions along with two diagrams that show switch joint's and how to count them correctly.

The Carrier explained that the CWR Joint Inventory Count scheduled for the week of Sunday, December 7 through December 13, was a special inventory project of high priority and once completed and the records updated it intended to implement a monthly joint inventory process to replace the existing quarterly inventory process. Under the joint inventory process, Management designates a week in which Track Inspectors traverse their territory and count every joint and determine which kind of joint it is, and then input that information into the system. On January 15, 2009, Carrier became aware that four (4) bridge joints located in Claimant's territory had not been inputted into the Track Inventory System. As a result, Claimant was issued Notice of Hearing dated January 22, 2009 which read in pertinent part as follows:

Please report to the Superintendent's Office . . . on January 27, 2009 . . . for investigation and hearing on charges to develop the facts and Place responsibility, if any, that while employed as Track Inspector on Gang 5272, you allegedly failed to identify four (4) bridge joints on the Falls City, Main Track 4, at Milepost 473.75, on the Falls City Subdivision. The bridge joints were allegedly not put in the T.I. System. A joint Inventory was to be completed the week of December 7th through 13th.

These allegations, if sustained, would constitute a violation of Rule 1.13 (Reporting and Complying with Instructions), as contained in the General Code of Operating Rules, effective April 3, 2005. . .

By letter dated February 4, 2009, General Superintendent Karol Burchfield apprised Claimant he found a substantial degree of evidence and testimony adduced at the hearing to warrant sustaining the charges against him. In accord with finding Claimant of having violated GCOR, Rule 1.13, Carrier assessed Claimant the minimum Level 3 discipline under its UPGRADE Discipline Policy of one (1) day of training without pay

and the development of a Corrective Action Plan. In this Plan, Claimant agreed to let the Manager know when the joint inventory is completed monthly.

In response to the assessed Level 3 discipline, the Organization filed the subject claim by letter dated February 25, 2009 that is here before the Board for resolution.

CARRIER'S POSITION

Carrier asserts the evidence substantiates that Supervisor Rewczuk emailed Claimant the subject instructions on December 3, 2008 and maintains there is no question that Claimant received those written instructions to complete a CWR Joint Inventory Count in the Track Inspection System. Carrier submits that what is clear from the record evidence is that Claimant never complied with those instructions by never completing a CWR Joint Inventory Count in the Track Inspection System as a result of his not having read the email. Consequently, four (4) bridge joint on the Falls City Main Track 4 were not entered into the Track Inspection System.

As a counter to the Organization's position that Claimant was never told to perform a joint inventory, Carrier submits the record evidence shows that communicating instructions by email has been utilized for quite awhile and testimony rendered by Claimant and Track Inspector Patrick Stuart testifying at the hearing in Claimant's behalf confirmed it is not uncommon for them to receive supervisory instructions via Lotus Notes. Carrier explained that unopened Lotus Notes that appear in an employee's inbox show up in bright red type and show the email name of the person who sent the message, the date and time the note was sent, the size of the document attached and the subject matter, if completed by the sender. In the case at bar, Carrier notes the record evidence shows that Supervisor Rewczuk's name appeared as the sender, the Lotus Note (email) was dated December 3, 2008 and the subject was designated by Rewczuk as CWR Joint Inventory. Carrier submits there is no doubt Claimant received the instructions issued December 3, 2008 and the fact established by Claimant's own testimony that he did not bother to open and read his email until January 20, 2009, almost three (3) weeks after he returned from vacation does not mitigate his failure to comply with the transmitted instructions. According to Carrier, Claimant ignored the subject instructions and, as a result, he has no one to blame for himself for his failure to perform the joint inspection. Carrier argues that any excuses proffered by the Organization and Claimant to explain away his failure to comply with the subject instructions should be totally rejected by the Board.

Based on the foregoing argument asserted, Carrier urges the Board to deny the instant claim in its entirety as the discipline assessed for Claimant's proven violation of Rule 1.13 at the most minimum of Level 3 was commensurate with the offense committed and consistent with the principle of progressive discipline to correct the subject misconduct.

ORGANIZATION'S POSITION

The Organization submits there is no question here of whether the Joint Inventory Inspection was a reasonable requirement. Rather, the issue lies in the fact that the Carrier has disciplined Claimant for a new directive it did not communicate to him through the normal process and did not acknowledge confirmation from the Claimant notwithstanding the fact Claimant was off on vacation at the time the instruction was allegedly sent via email. According to the Organization, under the facts ascertained in the instant case, Carrier cannot show either actual or constructive notice given to Claimant as the circumstances establish Supervisor Rewczuk did not disseminate the Joint Inventory Inspection in the usual verbal manner or in a follow-up verbal communication which he had the opportunity to do upon Claimant's return to duty from his vacation.

Additionally, the Organization notes that the subject December 3, 2008 Directive was a special directive and that Supervisor Rewczuk did not indicate in this directive that it was meant to supercede the previous existing March 2008 Directive to perform a quarterly joint inspection which Claimant followed. The Organization notes that the March 2008 directive provides instructions not to include joints added and that the crew that performs the repair will enter the added joints into the computer. Given this provision, the Organization further notes that on December 12, 2008, Maintenance forces installed the four (4) bridge joints in question and this section crew did not record these added joints into the Track Inventory System. Even though Claimant worked his rest day on December 12th, he did not work on the Falls City Subdivision and thus, he had no way of knowing the subject joints were installed and, insofar as meeting the December 13, 2008 deadline established for the special directive, Claimant would not have been able to meet the deadline since December 13th was also a rest day.

As a further defense of Claimant, the Organization submits that Carrier treated Claimant disparately in disciplining him by not also administering discipline to the Section Foreman of the Maintenance Force for failing to record the installation of the four (4) bridge joints into the Track Inventory System. The Organization maintains that Carrier does not deny the fact that, with regard to other employees who had responsibility to also enter the bridge joint information into the database, it knowingly ignored their failure to do so contending that Claimant was the one under investigation. According to the Organization, this position of Carrier's is absurdly unfair to the Claimant.

For all the foregoing argument asserted, the Organization submits Claimant is entitled to the full remedy requested and urges the Board to sustain the claim in its entirety.

FINDINGS

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

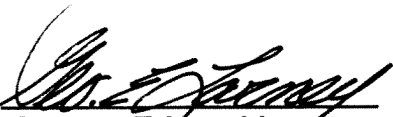
Upon a thorough review of the record evidence in its entirety, we reject the Organization's contention that Carrier's communicating by email is not a normal process or means of relaying information to employees. There is nothing in the record evidence to suggest that the use of Lotus Notes and requiring employees to check Lotus Notes was, in anyway a novel or new means used by Carrier in communicating information to its employees. As Claimant was on vacation at the time it informed Track Inspectors of the requirement to perform an interim track inventory as a prelude to converting from a quarterly report to a monthly report, emailing this directive to Claimant appears to have been the most efficient and effective means to transmit this information. Claimant acknowledged that he received this email and further acknowledged that he did not consult his Lotus Notes until some two (2) weeks after he returned from his vacation. Had Claimant checked his email upon his return to duty on December 8, 2008, he would have been apprised of the special directive instructing him to perform an interim track inventory. However, since his rest days fell on December 12 and 13, with the 13th being the deadline to perform this interim track inventory, he would have had to input the information into the Track Inventory System prior to the 13th. As he worked his off day on December 12th, he could have inputted said track inventory information on that day, but given the circumstances that the four (4) bridge joints in question were not installed until December 12th and given the fact that the Section Foreman of the Maintenance Force that installed the subject bridge joints did not input this information into the Track Inventory System, and additionally, that on the 12th Claimant did not work on the Falls City Subdivision, Claimant's report would not have captured this information in any event.

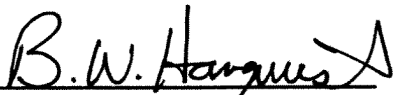
Since the charge levied against Claimant was his failure to identify the four (4) bridge joints in question and failure to input this information into the Track Inventory System by the deadline date of December 13, 2008, the Board finds that this charge cannot be supported since, as already noted, even if Claimant had performed the Track Inventory the email instructed him to perform, his report would not have captured the fact the four (4) bridge joints in question had been installed. Had the charge Carrier brought against Claimant been, that he failed to perform the interim track inventory as directed by the email, the Board would have sustained that charge since the record evidence substantiates, without any doubt, that he did not retrieve the email until well after the deadline date of December 13th and, as a result he did not perform an interim track inspection and, therefore, failed to input the aquired information into the Track Inventory System.

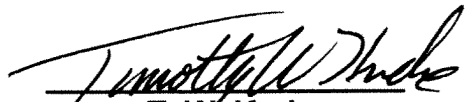
Based on the foregoing findings, we rule to sustain the claim in its entirety.

AWARD

Claim Sustained


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: Nov 19, 2010