

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 179, (Case No. 179)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Joy E. Mendez, Carrier Member
David R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing March 13, 2014, when Claimants M. W. Artis (6463251) and Kevin P. Jack (0041871) were disciplined with a Level S 30-day Record Suspension and a 3-year review period. Discipline was for their alleged improper installation of a replacement rail with a 7/16” mismatch of the rail joint caused a tank car to derail in the Goodyear plant on March 13, 2014. The Carrier alleged violation of Engineering Instruction (EI) 6.7.5 Removing Rail Defects.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from The Claimants’ records this discipline and they be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss, if applicable, commencing March 13, 2014, and continuing forward and/or otherwise made whole.”
(Carrier File No. 14-14-0228) (Organization File No. 110-SF13N1-1443)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within all 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 have participated in accordance to the Agreement that established the Board.

The facts indicate that on March 13, 2014, the Claimants installed a replacement rail in the Goodyear Plant. It was alleged that the Claimants work was defective and resulted in the subsequent derailment of a tank car and because of that allegation the Claimants were directed to attend a formal Investigation on March 27, 2014, which was mutually postponed until April 15, 2014, concerning in pertinent part the following charge:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged installation of a replacement rail with a 7/16” mismatch of the rail joint causing a tank car to derail in the Goodyear plant on March 13, 2014, at approximately 1400 hours.

This investigation will determine possible violation of EI 6.7.5 Removing Rail Defects.”

On May 12, 2014, Claimants were notified that they had been found guilty as charged and were assessed a Level S 30 Day Record Suspension with a Three (3) Year Review Period.

It is the position of the Organization that the Carrier failed to notify the Claimants in advance of the postponement of the formal Investigation in violation of Rule 13(c) and, additionally, one of the Claimants Mr. M. W. Artis never received the original Notice of Investigation, therefore, it argued that the discipline should be set aside. Lastly, it argued that the discipline was unwarranted, excessive and unjustified. The Organization concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that the Organization's allegation that the Investigation Notices were not received by the Claimants and should have been grounds for cancelling the entire Hearing and discipline issued, is without merit because the Claimants and their Representative were both at the Hearing and were well aware of the incident being investigated. The Carrier attached a copy United States Postal Service (USPS) Tracking Information showing an attempt was made to deliver the Notices to the Claimant's addresses and they went unclaimed by the Claimants through no fault of the Carrier. Additionally, the Carrier argued that the Notices were sent to the Claimant's listed address on the PATS Timekeeping System, therefore, it reasoned that the Organization's allegations of a procedural errors were without merit. It requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier argued that the review of the transcript shows that Claimants improperly installed a replacement rail with a 7/16” mismatch of the rail joint that caused a tank car to derail in the Goodyear Plant on March 13, 2014. It further argued that after having proven its allegations, it appropriately disciplined the Claimants. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and has examined the Organization's procedural arguments. The Board is not persuaded that the Carrier failed to notify the Claimants of the Investigation and/or postponement. It is determined the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11.

On page 15 of the transcript Roadmaster James McClain testified and provided photographic proof of what he observed at the derailment site, Goodyear Plant, that the replacement rail installed by the Claimants had a mismatch greater than allowed for safe traversing.

On page 37 of the transcript Claimant Artis was questioned as follows:

“Aaron Whitney: Mr. Artis, with your 20-plus years of experience as a Track Supervisor, do you have the ability to identify railing mismatch defect.

M. W. Artis: Yes.

Aaron Whitney: And when the railing mismatch is only 1/8 of an inch, it’s considered a defect?

M. W. Artis: Yes.

Aaron Whitney: This rail that was installed in the picture has it showing 7/16 of an inch mismatch. Would that be considered a defect?

M. W. Artis: Yes.” *(Underlining Board’s emphasis)*

The defect identified by Claimant Artis in the photograph was of the replacement rail installed by the Claimants at derailment site on March 13, 2014.

On page 21 of the transcript Claimant Jack was questioned as follows:

“Aaron Whitney: After you had changed out the rail at the location at Goodyear that, that the car derailed on, or after you, after you changed out the rail, did you make an inspection of the joint?

Kevin Jack: No, I did not.” *(Underlining Board’s emphasis)*

On page 31 of the transcript Claimant Artis was asked the following question and responded as follows:

“Aaron Whitney: No. How did, how did the, how did it not meet the requirement, uh-

M. W. Artis: Well, I didn’t measure it.” *(Underlining Board’s emphasis)*

It is clear that the Claimants admitted their guilt when both acknowledged that they did not inspect the joint or measure it, therefore, substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimants were guilty as charged.

The only issue remaining is whether the discipline was appropriate. The Claimants violation was of a serious nature and the discipline was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, the Board finds and holds that the discipline exercised by the Carrier was corrective in nature and it will not be set aside because it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David R. Scoville, Employee Member

Award Date: July 27, 2014