

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 220, (Case No. 220)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, 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 June 15, 2016, when Claimant, Larry Barner (1562834), was disqualified for one year from the position of Foreman for his inability to properly inspect track before removing a slow order.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove this disqualification with all rights unimpaired and pay for all wage loss including overtime commencing June 15, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-16-0448) (Organization File No. 2417-SL13D3-161)**

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 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 June 15, 2016, Claimant was disqualified as a Foreman. On June 17th the Organization contested the disqualification and asked for a formal Investigation. On June 20, 2016, Claimant was directed to attend a formal Investigation on June 30, 2016, which was mutually postponed until July 25, 2016, concerning in pertinent part the following charge:

“...in connection with your disqualification of Foreman Rights in a letter dated June 15, 2016.”

On August 24, 2016, Claimant was notified that Carrier’s prior decision to disqualify the Claimant’s Foreman Rights for one year would remain in effect.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because the transcript was incomplete as it was only furnished the first 32 pages of the transcript and that hindered its appeal. It further argued that the Hearing Officer badgered witnesses. Organization asked that because of the aforementioned procedural errors the discipline should be removed without reviewing the merits.

Turning to the merits, it asserted the Carrier failed to meet its burden of proof. Claimant testified that as the Surfacing Gang Foreman he inspected the location that he had surfaced, he did not inspect track outside of the area he disturbed as that responsibility belonged to the Track Inspector and because no defects were found in the area he worked on he raised the slow order from 10 MPH to 25 MPH. It further argued that the area the Carrier alleged the Claimant had not done his work properly was not the actual site of where the work of the Surfacing Crew was done. Lastly, it argued that even if the Carrier could produce evidence to support its charges (which it did not do) the disqualification of Foreman Rights for one year was excessive since the only thing Claimant had a problem doing was performing a level board test account of nervousness before a Carrier Officer that he did not know. It concluded there was no basis for discipline and requested that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier’s position that if it failed to submit a complete transcript to the Organization all the Organization had to do was pick up the phone and contact the Carrier and a complete copy would have been furnished. Additionally, it pointed out that the Organization stated it only received the first 32 pages of the transcript, however, the entire transcript consisted of 34 pages and pages 31 – 34 was the union representative’s closing statement, therefore, it reasoned that it was illogical to believe that the Organization’s appeal was harmed because of a lack of knowing what was said. It further argued there was no tangible evidence that the Hearing Officer badgered witnesses or conducted himself in an inappropriate manner during the Investigation. It requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier asserted the evidence shows that Roadmaster, Jason Baiamonte, Claimant’s Supervisor, testified that on June 13, 2016, his Track Supervisor informed him that a train was going over a section of track that had been surfaced the day before by the Claimant and his Surfacing Crew and the cars were “swaying an awful lot” (See page 3 of the transcript). It argued that the Roadmaster called the Claimant to talk about that section of track

and Claimant stated he removed the slow order and “bumped it up” from a 10 MPH to 25 MPH based upon a visual assessment and without making any measurements. Mr. Baiamonte further testified he subsequently asked the Claimant to perform a leveling test and Claimant failed that test which according to the Carrier shows that the Claimant was unable to perform a core function, therefore, he was properly disqualified as a Foreman for one year. 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 will first address the Organization’s procedural arguments. The Organization is correct that a failure to furnish the Organization a complete transcript can be grounds for setting aside discipline without reviewing the merits and in addition it is not the Organization’s responsibility to correct the Carrier’s error. However, there must be a showing that because of that incomplete transcript the Organization was hindered in its appeal. In this instance the transcript was 34 pages in total and it was not refuted that the Organization’s closing statement began on page 31 and continued through page 34. The Board finds on a non-precedential basis there was no showing in this case that the Organization’s appeal was harmed. Additionally, the Board is not persuaded by the other Organization’s alleged procedural errors. The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was afforded his “due process” Agreement rights. The case will be resolved on its merits.

Examination of the record reveals that on page 3 of the transcript, Roadmaster, Jason Baiamonte, Claimant’s Supervisor, testified that on June 13th his Track Supervisor informed him that a train was going over a section of rail surfaced by the Claimant and his crew and the cars were “swaying an awful lot”. Claimant testified on page 14 of the transcript that after his crew had performed their work on the 12th he took no exception to that work after looking at it thoroughly and after Track Supervisor Gilliam assured the Claimant that the work was okay. Baiamonte was recalled to testify and on pages 15 and 16 and he stated that Claimant should have taken track notes and Claimant should have measured the rail before he decided to increase the speed limit. Roadmaster Baiamonte went on to testify on pages 22 and 23 he performed a field audit on June 14th at the site of where the surfacing work had been done and after four attempts the Claimant was unable to level the level board. Claimant told his superior he knew how to do the task, but was nervous doing it in front of the interim boss. Baiamonte went on the state on page 24 he showed the Claimant how to level the level board, but wasn’t sure if he let the Claimant try again after the Claimant had calmed down (See page 29).

On pages 28 and 29 the Claimant was questioned as follows:

“THOMAS BLACKWELL: In the testimony given by Mr. Baiamonte, the company witness, earlier, where did he state the defect that he found, where, what location was the defect that he found?

LARRY R. BANNER: From the switch points going east, is what he stated, I believe.

THOMAS BLACKWELL: Is that the location that you had surfaced?

LARRY R. BANNER: No.” (Underlining Board’s emphasis)

Claimant’s testimony was not refuted that the area and rail that the Carrier alleged was not properly tamped was not the same area that Claimant and his Surfacing Crew had worked on the date of June 12th. Claimant and Mr. Baiamonte both testified they could not recall the Supervisor giving the Claimant another opportunity to retest on the level board after the Supervisor showed the Claimant how to do it. Baiamonte testified that he was not the Claimant’s regular Supervisor and was filling in for a few days which could have attributed to the Claimant’s nervousness around a stranger. The record also reveals that the Claimant did more than eyeball the rail as he testified that Track Supervisor Gilliam stated that the track work was okay, therefore, it stands as un rebutted fact that the Claimant did his work in a proper manner and area the Carrier alleged that had not been properly tamped was not the same section that the Claimant and his crew had worked on. The only thing the Carrier has proven is the Claimant failed to perform a field audit test which Claimant attributed to nervousness and was not disputed by his Supervisor. The Board is not persuaded that the Carrier met its burden of proof that the Claimant should have been disqualified as a Foreman over his failure to perform a level board test. After the Supervisor showed the Claimant how to do the test he should have given the Claimant another opportunity to perform the test using it as a teaching opportunity with a Warning to always be careful when doing his work. At the time of the disqualification the Claimant had approximately 13 years of service, ten of which was as a Foreman with no discipline or injuries on his personnel record. It is clear that the Claimant is a valuable employee and the disqualification was in error. The Board finds and holds that the Claimant is to be made whole for the difference in monies earned between the positions he held and what he would have earned as a Foreman. The monetary loss period runs from the date of his disqualification until the date his Foreman rights were reinstated.

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AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman and Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 1/5/18