

PUBLIC LAW BOARD NO. 7564

Case No./Award No. 2
Carrier File No. 10-11-0564
Organization File No. C-11-D040-33

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES DIVISION - IBT)

Statement of Claim:

The Carrier violated the Agreement when on July 22, 2011 Claimant Tommie J. Lovell was issued a Level S 30-Day Record Suspension and a 3-year review period for violating EI 2.1 Purpose of Track Inspections, EI 2.2.3 Authority and Responsibility of Inspectors, EI 2.4.3.F Critical Yard Tracks, EI 2.4.6 Record of Track Inspections and EI 5.4.1 Measuring Gauge.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimant's personal record

Facts:

By letter dated May 31, 2011 the Claimant was directed to attend an investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to inspect, detect and take proper remedial action for non-standard track conditions resulting in the derailment of train C NAMCGK0 06 at/or near MP 94, east Switch Track 202 in the Guernsey Yards, Guernsey, Wyoming on Thursday, May 26, 2011 at approximately 1825 hours, while assigned as a track inspector on gang TINS1264 headquartered in Guernsey, Wyoming." After agreed-upon postponements, the investigation was conducted on June 24, 2011, with the above-noted discipline issued on July 22, 2011.

Carrier Position:

A fair and impartial hearing that did not prejudice the Claimant established that the Claimant knew that he was responsible for a critical area that should have been inspected more often than non-critical areas. The Claimant admitted to inspecting the area only once a month, had last inspected on May 6, 2011, and had failed to detect the non-standard track conditions and take recommended action. The Board must accept the

determination of the conductor of the investigation that the Carrier's witnesses were credible.

Organization's Position:

The hearing was not fair and impartial because the Organization's pre-hearing request for documents was denied and because the Carrier said that the Claimant's prior discipline was considered but did not make the discipline a part of the record so that the Claimant could check for discrepancies. The Claimant had not been formally trained on Carrier rules and did not know he was inspecting critical track, as nobody had told him and nobody had taken exception to his once/month inspections for the four previous years. Supervisor Grove and Division Engineer Turnbull, experienced railroad men, disagreed over the condition of the track, but agreed that the condition that caused the derailment took from 2-4 weeks to develop and that it worsened over time. Photos taken are hard to believe because they do not show damage that would occur with a derailment. The Carrier cannot say what the gauge was prior to the derailment or what the impact was on rail traffic.

Findings:

The Claimant is responsible for knowing Carrier rules and for the requirement, more stringent than Federal regulations, that he inspect the area where the derailment took place twice a month. But, the fact that he had inspected only once a month for four years without ever being told that he was not compliant with Carrier rules for this critical track raises issues about the quality of supervision. The Board need not speak further to these issues because the credible testimony of Supervisor Grove and Division Engineer Turnbull is sufficient to resolve the claim.

Although there is no reason to believe that the Claimant would have inspected east Switch Track 202 a second time in May 2011, because the month was not over he was not in violation of the Carrier rule of two monthly inspections at that critical track location. Supervisor Grove testified that it would have taken 2-4 weeks for the non-standard gauge to have developed to the point of causing a derailment. In other words, the gauge was not a standard 56 1/2 one day and 58 3/4 the next. This leaves open the possibility, since 20 days passed between the date of the Claimant's inspection and the date of the derailment, that the gauge had not started to separate when the Claimant inspected on May 6, 2011 and that he noted no irregularities because there were none to note.

Division Engineer Turnbull testified that the condition had been worsening over time and that "in my opinion" the conditions existed at the time of the inspection. That is less than a definitive statement and does not answer the question of why, if conditions were such that a non-standard condition should have been noted on May 6, 2011, a derailment did not occur for another 20 days. Furthermore, Supervisor Grove and

Division Engineer Turnbull disagreed about the condition of the track at the point of derailment. This disagreement lends further uncertainty to the any conclusion about the condition of the track on May 6, 2011.

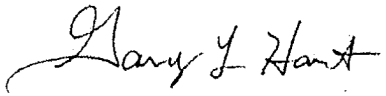
The Carrier bears the burden of showing with substantial evidence that the Claimant failed "to inspect, detect and take proper remedial actions for non-standard track conditions" on May 6, 2011. For the reasons noted above, the Carrier cannot establish that non-standard conditions existed and therefore cannot show that the Claimant was negligent when he reported no non-standard conditions on May 6, 2011.

Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above hereby orders that an award favorable to the Claimant be made and that the 30-Day Record Suspension and 3-year review period be expunged from the Claimant's personnel records. The Carrier is to make the award effective on or before 30 days following the date the award is adopted.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Member

Austin, Texas
November 1, 2012