

**PUBLIC LAW BOARD NO. 7585**

**Case No. 42/Award No. 42  
Carrier File No.: 10-14-0204  
Organization File No.: C-14-D040-13  
Claimant: James H. Thomas**

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**BNSF RAILWAY COMPANY** )  
**(former Burlington Northern Railroad Company)** )  
 )  
-and- )  
 )  
**BROTHERHOOD OF MAINTENANCE** )  
**OF WAY EMPLOYEES DIVISION - IBT** )  
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**FACTS:**

On February 21, 2014, Claimant James H. Thomas was working as a Track inspector at Murray Yard on the St. Joseph Subdivision. The Carrier alleges he failed to detect and properly protect a wide gauge condition in the turn out portion of South Switch A11. As a result he received a Level S 30-day record suspension with a three year review period.

The rules deemed to have been violated are: MOWOR 1.1.2 – Alert and Attentive; 1.6 – Conduct as well as EI 2.1 Purpose of Track Inspection and EI 2.2.2 Track Inspector Evaluation.

Claimant conducted the following inspections of the track in question:

- Jan. 2, less than two bolts per rail;
- Jan. 24, no defects;
- Jan. 28, no defects;
- Feb. 5, no defects, tracks covered with snow;
- Feb. 15, broken rail.

On Feb. 21, FRA Inspector Tim Hecker filled out a report recommending a Code 1 violation because the gauge dimension on the track in question (line segment 465, track number 0111, A11 South Switch) exceeded the allowable gauge at the turnout of the switch. According to Hecker, the track measured 58 ¼" at the joint; this fact is not contested. The A11 switch is Class 1 track with a standard gauge of 56 ½ inches. The FRA Track Safety Standards allow for a maximum gauge measurement not to exceed 58 inches for Class 1 track.

### **CARRIER POSITION:**

The Carrier maintains the only explanation for the excessively wide gauge was soft ties, and this should have surfaced in a prior inspection. It is concerned that no defect for tie condition was listed for any of the six preceding inspections.

### **ORGANIZATION POSITION:**

Claimant explained that the typical cause of excessively wide gauge is soft ties, though other conditions, such as a loose joint, could account for it. Claimant stated the tie condition upon inspection was "fairly decent," and he could not explain the gauge width. He stated he is required to inspect that switch once a month. Because the switch is only inspected once a month, it would only have been inspected twice, not six times, Claimant pointed out.

Claimant said he inspected the switch on Feb 18 and found 57 ½ inch gauge, so there was no defect to report. Claimant had no idea how the gauge went from 57 ½ to 58 1/8 in three days. He acknowledged the standard gauge is 56 ½. He explained that 57 ½ would not go into the TIMS system because it was not considered a defect.

The Organization maintains the weather was warming up, which could affect the gauge, though numerous other factors could have intervened as well. In its view, there is no evidence that Claimant failed to do his job.

### **DECISION:**

The Organization alleges a Rule 40 violation in that the hearing afforded Claimant was not fair and impartial. It cites conduct by the hearing officer that it deems to have been prejudicial. The Board does not agree. Reading rules into the record does not distort the record since they are already in evidence. Speculating about causation does not establish premature decision-making. There was no Rule 40 violation.

The repair for the Feb. 21 defect was described as follows: "The turnout was gaged by pulling the spikes, replugin the ties and pulled into gage." This establishes that the ties were likely to have been soft, a condition which would account for the defective gauge. The Carrier apparently believes Claimant should have known the ties were soft, even though his inspection on Feb. 18 was in cold weather. Further, the Carrier appears to believe Claimant was negligent in failing to inspect the wider-than-normal track as soon as the weather began warming.

General Manager Greg Lawler stated to Vice General Chairman Anderson in a May 30, 2014 letter: "With the weather events that were occurring, Mr. Thomas should have been concerned that the gauge was one inch wider than the standard gauge of 56 ½'. His lack of responsibility resulted in an FRA fine three days later." This statement seems to expect Claimant to be able to predict when track without defect will come out of compliance due to weather.

Engineering Instruction 2.4.1 on Minimum BNSF Inspection Frequency states: "The following schedules are minimum frequencies. Perform inspections when ordered by the Roadmaster or whenever conditions arise that could endanger the safety of train operations."

The Carrier appears to expect Claimant to predict that warming weather would pull the already somewhat wide switch in question out of compliance. The Board does not find this supposition to be reasonable. There was no testimony about responsibilities of track inspector when the weather changes. Indeed, the testimony about the variation in temperature readings between Feb. 18 and 21 lacked any objective foundation and were based solely on subjective recollection. Further, there was no credible evidence that warming weather is known to widen track. The record consists entirely of conjecture. It is not clear to the Board how a track inspector can be expected to identify softening ties if they are frozen hard. In sum, there is no evidentiary basis on which to rest a conclusion that Claimant should have realized the warming weather would increase the gauge in question to such a degree as to pull it out of compliance. As a result, there is no basis in the record for finding Claimant to have been negligent, inattentive or derelict in his duties.

**AWARD:**

The claim is sustained. The discipline shall be removed from Claimant's record.

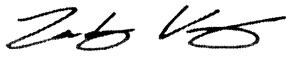
**ORDER:**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

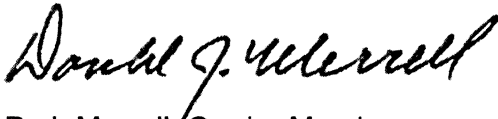
July 15, 2015

A handwritten signature in cursive script, reading "Patricia T. Bittel".

Patricia T. Bittel, Neutral Member



Zachary Voegel, Labor Member



D. J. Merrell, Carrier Member