

Award No. 50
Case No. 50
NMB Case No. PLB-07602-000050

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-15-0051
Organization File No. C-15-D040-7

Claimant — Troy D. Little

BACKGROUND:

This claim challenges a Standard Formal Reprimand with a one-year review period that the Carrier's imposed on the Claimant for violating EI 2.1, Purpose of Track Inspection. At the time of the events giving rise to the discipline, he had worked for the Carrier for approximately seven years and was working as a Track Inspector in the Denver area. He had been a Track Inspector for three and one-half years and had held his current assignment for about eight months.

On October 2, 2014, a "minor derailment"—as the Assistant Roadmaster, Cason Cole, characterized it—occurred on the territory inspected by the Claimant. A six-axle locomotive was performing a shoving movement somewhere in the vicinity of MP 3.5 on the Market Main track. The weather was clear; the track was curved. The two cars being shoved by the locomotive moved across the track where the derailment occurred without incident, as did the leading edge of the locomotive. The trailing edge, however, ran off the track. There were no injuries and very little damage to equipment. During an investigation, management determined that the derailment was not caused by either operational or equipment failure. It concluded, therefore, that defective track was the cause. The track area around the derailment was characterized by mud, standing water, buried ties, holes caused by water erosion, and fouled ballast.

None of these would necessarily have caused the accident. Management concluded that the most likely cause of the accident was wide gage.

The Carrier sent Claimant a Notice of Investigation dated October 10, 2014, informing him that an investigatory hearing had been scheduled “for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to provide proper protection for a defective track condition which resulted in a track-caused derailment on October 2, 2014.”

Following a mutually agreed postponement, the hearing was held October 29, 2014. At the hearing, the Claimant and Assistant Roadmaster Cole testified to the facts as above. Mr. Cole described the scene of the derailment and photographs that he had taken of the area, although there were none of the derailment itself. He was unable to identify the exact site of the derailment. At one point in his testimony, he referenced track defects that the Claimant had noted at MP 3.7 on his last inspection before the derailment, on September 23, 2014. Mr. Little had conducted that inspection in the company of the other Roadmaster, Ryan Akers, who had not commented on any particular problems. Later, in response to a question about where the derailment occurred, Mr. Cole testified “This derailment was on the Market Line, okay, this line segment 904, milepost is, to my knowledge, it’s roughly ... 3.2, 3.4, somewhere in there. .. I’m a little sketchy on the milepost. The intersection is just... that crossing ... is just east of the 48th and Valley intersection.”¹ After the derailment, the track gage was wide, at 58 ¾ inches, but the track could have been pushed apart by the derailment. Cole acknowledged that it is more difficult to move six-axle locomotives around a curve because of their length: the physics of moving a massive, long, inflexible locomotive around a curve puts significant pressure on the higher side of the rail to spread and roll outward. Cole also testified that the general track conditions were not uncommon in the area. They may have contributed to the derailment but were not a significant cause. The Claimant testified to his practices as a Track Inspector; the record includes a number of his inspection reports noting “Uncontrolled water undercutting track structure or embankment” at MP 3.7. A more specific note adds: “Washout does not undercut the track but a 3 ft hole on the shoulder definite walking hazard for crews.”

¹ Tr. 47-48.

The Carrier's Decision Letter, issued November 26, 2014, concluded that the Claimant was "in violation of EI 2.1, Purpose of Track Inspections to ensure safe train operations at authorized speeds," and assessed a Standard Formal Reprimand with a one-year review period. The Organization filed a timely appeal protesting the Carrier's decision. The parties having been unable to resolve the matter through their grievance process, the matter was submitted to the Board for a final and binding decision.

According to the Carrier, the facts establish that the derailment occurred due to wide gage on the track as a result of track defects. Conditions around the track where the derailment occurred (mud, fouled ballast, etc.) would make testing the gage very difficult. In addition, the Claimant admitted to seeing loose spikes "but not enough to make it a defect" and admitted that there was a longstanding structure issue with standing water. The photographs of the derailment site demonstrate that Claimant exercised poor judgment in making his inspections and thus compromised the integrity of the track for which he was responsible, which led to the derailment. Engineering Instruction 2.1, Purpose of Track Inspections, sets forth as one of the purposes "To detect, correct, and protect variations from BNSF track standards and to ensure safe train operations at authorized speeds." Claimant clearly failed to perform his duties properly and was properly disciplined. Moreover, the level of discipline, a Standard Formal Reprimand, was appropriate.

The Organization contends that the Carrier failed to meet its burden of proof to establish Claimant's guilt, and the discipline imposed on him was excessive and arbitrary. The Hearing Officer did not conduct the investigation in a fair and impartial manner. There is a failure of substantial evidence. The Notice of Investigation is unacceptably vague and does not provide a definite charge against the Claimant. The Carrier could not even identify the location of the "derailment." There is no evidence that connects the derailment with any failure of performance by the Claimant; the evidence in the record shows that he is a conscientious Track Inspector. The general area of the derailment was within gage when Claimant last inspected it on September 23, 2014, accompanied by a Roadmaster. The track is infrequently used, only twice a day, and there is no reason to assume that the derailment was caused by some defect that the Claimant had overlooked. The fact that the track was out of gage after the derailment proves nothing about its condition before the derailment—the derailment itself could have pushed the rails apart. Whatever the cause of the

derailment, the responsibility for track condition does not belong to the Claimant alone, but is shared by everyone involved in track maintenance. The charges against the Claimant have not been proven and the claim should be sustained.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

The Carrier found that the Claimant violated Engineering Instruction (EI) 2.1, Purpose of Track Inspections, which states in relevant part:

Track inspection has two basic purposes:

- To detect, correct, and protect variations from BNSF track standards and to ensure safe train operations at authorized speeds.
- To assist in prioritizing track maintenance.

Perform at least the minimum track inspections required in this section.

Track inspection frequency requirements must be met and take precedence over all other assigned duties. The Track Inspector is responsible for informing the Roadmaster if other assignments or duties will interfere with his or her ability to meet the Track Inspection frequency requirements. (Emphasized in bold in original.)

The Board has reviewed the record in detail and has concluded that the Carrier has not met its burden of proving that the Claimant violated EI 2.1. The evidence does not establish any single cause for the derailment. The track in question was within gage when last inspected by the Claimant. He was accompanied by his Roadmaster, who made no comment, which suggests that he was satisfied by Claimant's inspection. The evidence does not establish that there was any single cause of the derailment. To the extent that there were problems with water, mud, and the like, the Carrier's witness acknowledged that they were not the likely causes of the derailment. Moreover, Claimant had noted the defects on prior inspections, but the Carrier had not taken steps to remediate them. There is no evidence that the track at the site of the derailment was out of gage before the trailing end of the locomotive slid off the rails. The fact that two cars and the leading edge went over the same area without incident suggests that the track was in gage. Indeed, the most likely explanation appears to be

one that was put forth at the hearing and acknowledged by the Carrier's witness as a definite possibility: the act of moving a heavy six-axle locomotive around a curved track puts stressors on the track that could move it out of gage as a result of the movement. There is no evidence that ties the derailment to any act or omission on the part of the Claimant relative to performing his job duties; there is only speculation. The Carrier ruled out equipment failure and operational failure. That left defective track as the remaining possible cause for the derailment. It does not follow from there, however, that the Claimant must have failed to perform his job duties satisfactorily. There has to be concrete evidence that would tie his performance to the derailment, and there is none in the record before the Board. The objective evidence in the record establishes that the track was within gage when it was last inspected by the Claimant and that he had noted the minor defects associated with mud, standing water, and the like on his inspection. The evidence also establishes that those minor defects would not have in and of themselves caused the derailment. Accordingly, there is no evidence that relates the derailment to Claimant's job performance. The claim is sustained and the discipline shall be removed from his personnel file.

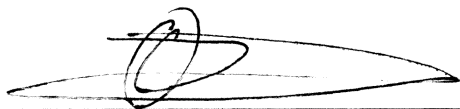
AWARD

Claim sustained.

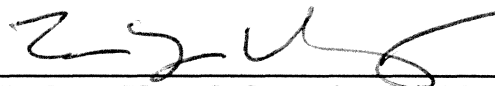
ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.


Andria S. Knapp, Neutral Member



Nathan Moayyad, Carrier Member



Zachary Voegel, Organization Member

01-13-2017

Date