

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 75

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF FILE NO. 10-18-0062

BMWE FILE NO. C-18-Do40-5

Claimant: S. Brennemann

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STATEMENT OF CLAIM

Appealing the decision of Powder River Division General Manager Leif Smith in his letter dated January 26, 2018, to uphold the discipline assessed to Mr. Steve Brennemann as appealed in letter from Vice General Chairman Jim Varner dated December 2, 2017, when Mr. Brennemann, hereinafter referred to as Claimant, was assessed a Standard Formal Reprimand and a one (1) year review period for alleged violation of EI 5.4.1 Measuring Gage and EI 5.4.2 Gage Correction.

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The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7602 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimant received a letter advising him to attend a formal Investigation:

An investigation has been scheduled at 1000 hours, Wednesday, August 30, 2017, at the BNSF Depot, 100 Clayton Street, Brush, CO, 80723, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to identify and report wide gage in accordance with FRA Compliance Manual on August 16, 2017, resulting in FRA violation.

Following postponements, a hearing was held. Claimant was advised of the results of the investigation:

As a result of investigation held on Wednesday, September 20, 2017, at 1000 hours at BNSF Depot, 100 Clayton Street, Brush, CO, 80723 you are hereby assessed a Standard Formal Reprimand for your failure to identify and report wide gage in accordance with FRA Compliance Manual on August 16, 2017, resulting in FRA violation.

In addition, you are being assessed a One (1) Year Review Period that commences on October 16, 2017. Any rules violation during this review period could result in further disciplinary action.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of EI 5.4.1 Measuring Gage and EI 5.4.2 Gage Correction.

In assessing discipline, consideration was given to your discipline record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).

Enclosed are copies of the investigation transcript and exhibits entered during the investigation. Copies of these documents have been sent to your Representative.

The Carrier maintains that Claimant violated the cited rules when he failed to report a wide gauge defect during his July 21, 2017, inspection and that defect was later found during an FRA inspection on August 16, 2017. The gauge measured 58 ¼ inches when the maximum allowable was 56 inches. The Carrier further argues that the notice was not unduly vague because the Organization was aware of the locations two weeks before the hearing. The Carrier also argues that separate investigations were proper because there were three separate locations where Claimant did not notice defects. Moreover, the FRA Manual was not introduced because Claimant was not charged with an FRA violation.

The Organization contends that the Carrier committed errors in the investigation notice that should serve as a procedural bar. The notice was far too vague for the Organization to prepare a defense. Claimant inspects a lot of track and there was no way for the Organization to ascertain where the complained-of defects were located. On the merits, the Organization asserts a lack of substantial evidence of the violation. Further, the Carrier cites no rule violations and relies upon an FRA violation in the notice.

On the merits, the Organization argues that Claimant performed his inspection on July 21, 2017. The Carrier witness agreed that Claimant's inspection was within the proper timeframe for investigations. However, there is not substantial evidence that Claimant improperly measured the defective track at the East Wiggins Track House Switch on July 21, 2017.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

The Board notes that the instant matter is one of three cases in which Claimant received a notice of investigation for the same date. Like this notice, none contained a location for the alleged infraction. The Organization raises valid issues about the notice of investigation. The notice is devoid of any location within the territory in which Claimant performs his Track Inspector duties. Absent some idea of location in the notice, it would be impossible for the Organization to prepare a coherent defense to the three investigations.

The Organization objected to the faulty notice as follows:

JIM VARNER: Uh anyway, I'd like to point out in Exhibit 5 and 6, the Investigation uh Notices; uh the Exhibit 5 is the first page and it talks about the investigation scheduled on August 30th, and it goes on to ascertain; this is where I'm talking about the vagueness of investigation. We don't know uh it just says resulting in FRA violation, wide gage, we don't know uh of a location; we don't know what Subdivision; we don't even know what Division it's on. It's so vague that it's hard to prepare uh a good defense here when we have no uh no clue if this is on the Sandhills Sub, the Black Hills Sub, the uh you know, Powder River Division, Powder River. I mean it's so vague, you're, Mr. Conducting Officer, I believe that this should be canceled because of the vagueness of this investigation. There's no milepost, no



nothing. It's hard for the organization and Mr. Brenneman to prepare a defense in this case.

ALLAN BREDEN: Your objection is duly noted. I believe that the information regarding this in will be brought out inside the investigation, and more information will be revealed as this investigation continues. I'd like to begin with the questions for Mr. Sintas. Mr. Sintas, please state your name.

The response of the investigating officer underscores the confusion caused by the vague notice. The notice did not provide the degree of specific necessary for the Organization to prepare a defense.

The Organization asserts error because the substantially similar notices were not consolidated. This Board need not reach that issue because of the above-discussed procedural violation. Moreover, even absent the above-cited procedural violation, there is no substantial evidence in the instant matter of the cited infraction. Claimant received discipline for violating Rule 5.4.1 regarding measuring gauge and 5.4.2 regarding gauge correction. However, the Carrier witness agreed that Claimant's July 21, 2017, inspection was within normal time constraints. Claimant performed an inspection and noticed nothing that would cause him to take exception to the gauge.

The Carrier witness testified about the gauge:

AUGUSTINE SINTAS: Augustine Sintas.

ALLAN BREDEN: How long have you worked for the railroad?

AUGUSTINE SINTAS: Approximately 12 years.

ALLAN BREDEN: What is your position?

AUGUSTINE SINTAS: Roadmaster.

ALLAN BREDEN: How long have you been in your current position?

AUGUSTINE SINTAS: Approximately a year and eight months.

ALLAN BREDEN: Do you supervise Mr. Brenneman or are you responsible in the area where Mr. Brenneman was working on August 16th, 2017?

AUGUSTINE SINTAS: Yes.

ALLAN BREDEN: How long have you supervised Mr. Brenneman?

AUGUSTINE SINTAS: Uh for the full uh one year and eight months.

ALLAN BREDEN: What is Mr. Brenneman's position?

AUGUSTINE SINTAS: He is a Track Inspector.

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ALLAN BREDEN: Mr. Sintas, do you believe that between the timeframe of the last inspection of that area in at 478.701 on the Brush Subdivision until August 16th when the FRA inspection happened, the gage had could have widened or become a defect by that severity?

AUGUSTINE SINTAS: Uh due to the amount of uh how much it was over, it's my personal opinion, I don't think it could have run out that much within that timeframe.

Roadmaster Sintas was clearly offering his "personal opinion" that traffic did not affect the gauge because it was used two or three times a week. There were no witnesses to discuss track movement out of gauge in addition to the personal opinion offered by the Roadmaster. Further, Claimant testified:

JIM VARNER: So on the last inspection you did July 21st, the FRA and you arrived there August 16th, approximately 24 days later, how many cars and units do you suppose had pushed in and out of that area in 24 days?

STEVEN BRENNEMAN: Well, I would guess, you know, where they switch it roughly three times a week, and if you take three cars they switch plus maybe seven or eight cars they're pushing in on top of it, so you know, there could have been roughly 50 cars pushed over that in that time, if not more.

JIM VARNER: In that week's period or in a

STEVEN BRENNEMAN: In in a week's period, I would say they're probably pushing 25 cars at least over it.

JIM VARNER: So we're we're talking three weeks; we're close to 75.

STEVEN BRENNEMAN: Close to 75 cars, yes.

JIM VARNER: So 75 cars, roughly pushed over this, and engines got pushed over this location since the your last inspection.

STEVEN BRENNEMAN: Yes.

Claimant provided a much more detailed account of the traffic in his testimony, it was not “personal opinion” but rather the testimony of a track inspector. In addition, Claimant testified that when he performed his gauge check on July 21, 2017, the track measured at 57 7/8 inches – within the 58 inch limit for Track 1 line. Also, he testified that he had been keeping an eye on the track during prior inspections.


This Board finds that the notice of investigation did not provide any details on the location of the possible violations under investigation. Given the three substantially similar notices and three consecutive hearings from those notices, the Organization did not receive sufficient specificity with which to form a defense. On the merits, there is no substantial evidence of a failure to comply with the applicable rules because Claimant performed a timely test and the track was within limits.

Award:

Claim sustained.

Order:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made:

  
Carrier Member

  
Organization Member

  
Neutral Member

Dated: July 18, 2019