

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 76

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

and

BNSF RAILWAY

BNSF FILE NO. 10-18-0063

BMWE FILE NO. C-18-Do40-6

Claimant: S. Brennemann

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STATEMENT OF CLAIM

Appealing to 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 10 Day Record Suspension and a one (1) year review period for alleged violation of FRA 213.109 Cross Ties, EI 2.4.4 Items to Consider When Inspecting and EI 2.4.5 Record of Track Inspections.

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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 1300 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 tie defects in accordance with FRA Compliance Manual on August 16, 2017, resulting in three FRA violations.

Following postponements, a hearing was held. Following the investigation, Claimant received a letter advising him:

As a result of investigation held on Wednesday, September 20, 2017 at 1300 hours at BNSF Depot, 100 Clayton Street, Brush, CO, 80723 you are hereby assessed a Standard 10 Day Record Suspension for your failure to identify and report tie defects in accordance with FRA Compliance Manual on August 16, 2017, resulting in three FRA violations.

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 FRA 213.109 Cross Ties, EI 2.4.4 Items to Consider When Inspecting and EI 2.4.5 Record of Track Inspections.

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 tie defects at MP 454.06 on the Brush Subdivision during his regular inspection. The defect was later found during an FRA inspection on August 16, 2017. 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 August 14, 2017. The Carrier witness agreed that Claimant's inspection was within the proper timeframe for investigations. However, there is not substantial evidence that Claimant failed to note defective ties because the ties were not defective.

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 the notice of investigation for the same date. Like this notice, none contained a location for the alleged infraction on August 16, 2017. 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 Carrier states that it notified the Organization about the location of each investigation prior to the hearing and that it was sufficient notice to apprise the Organization. A review of the record shows that the Carrier notified that the alleged site of the infraction was on the Brush Subdivision. The Brush Subdivision is over 85 miles – not counting the Sterling Main Line. At the hearing, the Carrier was able to pinpoint to alleged violation to MP 454.03 – a 1/100<sup>th</sup> of a mile degree of certainty. The Carrier was aware of where the alleged infraction occurred, but did not share that information with the Organization despite having it readily available. Moreover, the Carrier scheduled three cases in succession and put the Organization at a distinct disadvantage for each of those hearings. The Organization was forced to guess what the Carrier was investigating.

This case also fails on the merits. The Carrier official introducing the exhibits did not know why the ties were defective save for his reliance on the FRA inspector's



conclusions The FRA inspector did not testify. Moreover, a Track Inspector with 38 years of Carrier service did testify and his testimony was not contradicted:

ALLAN BREDEN: Or uh just to the right side of it. Mr. Moellers, on Exhibit 10 and 12, there are pictures of the area where the tie defect was found, and it was stated by Mr. Sintas that the green marks are ties to be replaced to become to come back into a compliance for this track and the speed of track. Does it appear that the ties are effectively holding or are effective ties in that area?

JERRY MOELLERS: Well, you know, that's ties that are defected, I don't really like to dispute because everybody has got a different judgement on tie. And the way I look at ties, usually, is if they're spreading or not, and yes, I see the spikes are loose, but I do not see where the ties or the plates are spreading. They're just plate-cut, so I really can't say whether I would take exception to them or not.

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JIM VARNER: Do you see any defective ties in Exhibit #10 that you would call defective that need to be removed, that are completely defective according to Exhibit 14 of this definition?

JERRY MOELLERS: Um possibly, one.

JIM VARNER: And why is that?

JERRY MOELLERS: Just because it's just deteriorated, rotted, got rock coming through right there, and right here, it looks like, at one time, maybe a grinder train came over and burned, possibly.

JIM VARNER: Are these plate-cut more than 40% in there can you that you can see?

JERRY MOELLERS: No, they're not even plate-cut to our standard from what I can tell.

JIM VARNER: What's uh

JERRY MOELLERS: Our standard is two inches, and I don't think they're deeper than inches.

JIM VARNER: Um on Exhibit 7A here, this is the defect wrote up, uh it would be starting uh on the top end of this one here, it it's uh it uh says failure to maintain number or maintain the minimum number of crossties per per FRA track and class for a 39- foot of track. It

says he only has six good ties in a 39-foot segment, um in that 39-foot.

JERRY MOELLERS: And I don't take any exception to that. I don't even see any real high spikes.

JIM VARNER: Okay. On Exhibit 7B, on the FRA Report; now this is the lower section here, or this section here. This is a little closer

JERRY MOELLERS: Uh huh.

JIM VARNER: view. It's uh saying the failure to maintain 39-2 foot track, they say he's only got seven good ties in 39 foot of that track. I don't understand. That 39-foot is hard to determine. Here is a uh that's uh the first defect is off the bridge or

JERRY MOELLERS: Yeah, and

JIM VARNER: the first defective is back here towards you, and then these are

JERRY MOELLERS: Yeah, and I don't see where they're counting less than seven. I wouldn't take exception to it.

JIM VARNER: Now, you're a Track Inspector. Correct?

JERRY MOELLERS: Correct.

JIM VARNER: If you had come upon this that day, what you're seeing in these pictures, I'll even show you Exhibit Number #11 which is a close-up view of this area right here, I believe, if I crisscross, I assume they're right here. Right uh right here, a close-up view of this. Would you take that track out of service?

JERRY MOELLERS: No. No, I would not. I mean it doesn't look like it's spreading or anything.

JIM VARNER: What would you do at that point? Would you would uh again, on 7B, the last uh uh Item 3 that he charged him with is seven ties in succession which you said you didn't uh or he he says uh on uh of this end, of this part here, he said there's seven ties in succession, 171 inches in length allowing the profile excess one half inch. What do you consider profile? Is that uh profile of a track is what I believe he's considering.

JERRY MOELLERS: Yeah, profile would be up and

JIM VARNER: Okay.

JERRY MOELLERS: of it.

JIM VARNER: Do you see  
JERRY MOELLERS: I don't see any ties swinging. I don't see  
JIM VARNER: And this one here on the  
JERRY MOELLERS: Yeah, that's  
JIM VARNER: Exhibit 11, the  
JERRY MOELLERS: just a little bit  
JIM VARNER: third tie up.  
JERRY MOELLERS: And that's the tie that I said that I would have  
replaced. I mean of all of them.  
JIM VARNER: So  
JERRY MOELLERS: That's the only one that I can see any profile in.  
JIM VARNER: Do you see seven ties in succession?  
JERRY MOELLERS: No.

Claimant also provided a detailed account of the ties in his testimony. Like the other experienced Track Inspector, he did not see the defects cited by the FRA Inspector.

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 ties were not defective and 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.

Corey Kellam  
Carrier Member

Zary Uy  
Organization Member

B. Chan  
Neutral Member

Dated: July 9, 2019