

PUBLIC LAW BOARD NO. 6538

**BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYES)**

and)

BNSF RAILWAY COMPANY)

AWARD NO. 14

CASE NO. 14

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Track Inspector N. W. Herman under date of August 24, 2005, for alleged violation of BNSF Railway Maintenance of Way Operating Rules 1.1.2 'Alert and Attentive,' Rule 6.21 'Precautions Against Unusual Conditions,' and BNSF Railway Engineering Instruction 5.4 'Gage,' in connection with charges of alleged failure to detect and take proper remedial actions for non-standard track conditions allegedly resulting in derailment of Amtrak Train #27 at or near Mile Post 58.4, Fallbridge Subdivision on April 3, 2005 at approximately 0935 hours, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File S-P-1154-G/11-06-0026 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. N. W. Herman shall now'...have his record cleared of any and all wrongdoing. He should be reinstated with full seniority and should be fully compensated for each and every day, including any overtime missed, and any and all benefits he would have otherwise been entitled, that the Carrier has held him out of service and continues to hold him out of service, all at the Track Inspector's rate of pay.'"**

FINDINGS:

Public Law Board No. 6538, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Prior to his dismissal from service, Claimant had been employed by the Carrier for approximately ten years. He worked as a Track Inspector, and had

regularly been inspecting track on the Fallbridge Subdivision for approximately eighteen months. Claimant's duties primarily consisted of ensuring that the track was in a condition that would allow the safe passage of trains.

On Sunday, April 3, 2005, Amtrak Train #27 derailed at Mile Post 58.4 on the Fallbridge Subdivision. Dozens of passengers reported injuries and the property damage was extensive. A lengthy investigation, initially scheduled for April 14, 2005, was held on July 6 and 26, 2005, to determine whether Claimant failed to detect and take proper remedial action for non-standard track conditions that were determined to have caused the derailment. After the hearing, Claimant was found guilty of the charges and dismissed from service.

The record shows that there were four separate trouble reports made during the twelve days prior to the accident. The first report of rough track was submitted on March 23, 2005 by an FRA inspector who noted two trouble locations in the curve at Mile Post 58.4. He forwarded his report to a Carrier Roadmaster, but the Roadmaster did not inform the track inspectors about the FRA report. A second rough track report was submitted by an Amtrak train crew on March 28, 2005. A substitute track inspector was dispatched to evaluate the area. He found no improper track conditions.

Two days later, on March 30, another Amtrak crew reported that there was rough track from Mile Post 58.4 to 58.7. Claimant was dispatched to the area. He identified some low spots in an area about ¼ mile east of the derailment site, between Mile Posts 58.6 and 58.8, and indicated that five concrete ties were in need of replacement or repair. There is no indication that he inspected the area around Mile Post 58.4.

On April 1, two days before the accident, a BNSF train crew reported rough track at Mile Post 58.6. The same substitute track inspector who had inspected the track on March 28 was again dispatched to evaluate the track. He tamped some cross-ties and reported that the gage was good.

Carrier contends that this was the Claimant's territory. He was supposed to inspect this general area of track as part of his regularly assigned duties. Moreover, Claimant was specifically notified of reported problems with this particular segment of track, yet he failed to report to the correct location and instead focused his

inspection on an area east of the identified trouble location. Carrier further argues that Claimant was an experienced, knowledgeable track inspector who would have been able to detect the obvious trouble spot on the tracks if he had reported to the correct location. His gross negligence and clear violations of the pertinent rules were serious offenses that fully warranted the penalty of dismissal, Carrier argues.

The Organization contends that Claimant was not afforded due process or a fair and impartial investigation. It further argues on the merits that Claimant was not the only person who inspected the derailment area. No one determined that a defect existed. To the Organization, this suggests that the rail seat abrasion, which ultimately caused the gage to widen, was not as readily apparent as the Carrier would have the Board believe. Moreover, there were circumstances present which should have been considered in evaluating the propriety of the penalty in this case, the Organization submits. Claimant had received little, if any, formal training on concrete crosstie inspection. In addition, Claimant, by all accounts a conscientious employee, had been required to inspect approximately 60 miles of territory with a high amount of daily train traffic, making it difficult to traverse the area. Claimant often used a hi-rail vehicle and on occasion he conducted walking inspections of curves, but this became more difficult after his helper was assigned to other duties.

Other factors are relevant as well, the Organization argues. There were no clear standards for identifying concrete tie abrasion defects, as evidenced by the fact that Carrier changed its practices and developed specific training on this subject after the derailment to protect against further instances of concrete tie abrasion. While it is unfortunate that a derailment occurred, the Organization asserts that all the blame does not rest with the Claimant for the incident. The discipline assessed was overly harsh and excessive under all these circumstances.

The Board has reviewed this voluminous record in its entirety. Although the Organization has alleged several procedural errors on the part of the Carrier in the handling of this matter, the Board is unable to ascertain any irregularity of a sufficiently serious nature which would have been materially prejudicial to Claimant's rights. Overall, we find that Claimant was afforded due process and was given a fair opportunity to defend against the charges presented. Thus, the resolution of this matter turns upon the merits of the case itself.


We find that substantial evidence on this record shows that Claimant violated the rules as charged. Claimant was specifically advised to check the trackage that was identified as a trouble location. He failed to do so. For whatever reason, Claimant instead inspected an area east of the trouble spot. He missed the track defect that ultimately caused the April 3, 2005 derailment. None of the arguments advanced by the Organization address or refute that salient fact.


The remaining question is whether the penalty imposed was reasonable. Under the Carrier's disciplinary policy, known as PEPA (Policy for Employee Performance Accountability), a rule violation that results in "serious collision and/or derailment, serious injury, fatality or extensive damage to company or public property" is deemed a dismissible offense. While there may have been others who also bear some responsibility for the derailment, that fact does not exculpate the Claimant. He was responsible for properly performing his track inspection duties. Carrier places its confidence in the ability and competence of track inspectors to identify defective or problematic track conditions. Carrier is not precluded from issuing summary discipline when it has been demonstrated that its confidence has been misplaced. Based upon the record as a whole, the Board finds that the action of the Carrier in dismissing the Claimant was consistent with its disciplinary policies and was not arbitrary, capricious or an abuse of discretion. Accordingly, we must rule to deny the claim.

AWARD

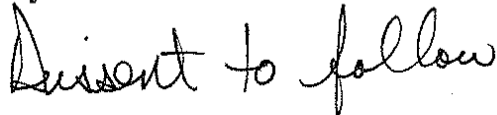
Claim denied.


ANN S. KENIS, Neutral Member


Carrier Member
William A. Osborn


Organization Member
Roy C. Robinson

Dated this 4th day of Sept., 2007.


Dissent to follow