

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY
(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 27
Carrier File No. 12-09-0034
Organization File No. B-3001-4
Claimant: Joseph M. Day

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on January 23, 2009, when Claimant Joseph M. Day was dismissed for violation of Engineering Instructions 2.1 – Purpose of Track Inspector, 2.2.3 – Authority and Responsibility of Inspectors, 2.5.1 – Turnouts, and your failure to protect known defects in Chaffee, Missouri yard that were identified by FRA Inspection on January 21, 2009.
2. As a consequence of the violation referred to in part (1) above, we request that the charges be removed from the Claimant's record, the Claimant be returned to work, and paid for all time lost.

NATURE OF THE CASE

The Claimant, Joseph M. Day, was dismissed from his position as Assistant Track Inspection Foreman for allegedly failing to protect known defects in the Carrier's Chaffee, Missouri yard in violation of Engineering Instructions 2.1 – Purpose of Track Inspector; 2.2.3 – Authority and Responsibility of Inspectors; 2.5.1 – Turnouts. The defects for which the grievant was disciplined were discovered by a Federal Railway Authority Inspector on January 21, 2009. Thereafter, the Carrier was fined for willful violation of FRA regulations for failing to correct safety defects of which it was aware.

The Organization grieved the imposition of discipline as being improper and without just cause, contending that the Claimant had not failed to protect the track that he had inspected, that he had complied with all applicable regulations, and that the penalty of dismissal was excessive even if the Claimant had not fully and completely complied with all applicable regulations.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted to Public Law Board 6986 for adjudication.

FINDINGS AND OPINION

Public Law Board No. 6986 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

On January 21, 2009, an FRA Inspector attempted to inspect the main line tracks near the Chaffee, Missouri yard. Because he could not gain access to the main line, an inspection was instead made of the tracks within the Chaffee, Missouri yard. During this inspection, the FRA inspector discovered six or more instances of defects in tracks or related equipment or other instances of non-compliance with applicable track gauge standards. These defects had previously been painted orange, but not repaired. The FRA inspector also observed a train moving through the yard. Based on this observation, the FRA inspector concluded that the Carrier had flouted FRA regulations by ignoring known defects and continued to operate in willful disregard of these defects. The Carrier was ultimately cited and fined for these violations.

That the defects were known to Carrier employees who painted the affected areas bright orange so that they could be repaired by a Section Gang is beyond dispute. At issue in the instant case is whether the

discipline imposed upon the Claimant for his role, if any, in permitting trains to traverse tracks with known defects and for his failure to protect tracks that fell under his responsibility should be sustained.

The evidentiary record convincingly established that there was no valid basis to discipline the Claimant more severely than his colleague, the Patrol Gang Foreman, or to ascribe culpability to the Claimant for failure to fulfill his responsibility for inspecting track and protecting defective stretched of track or for permitting trains to run across defective track in the Chaffee Yard. The Carriers determination to dismiss the Claimant was predicated on unsubstantiated assumptions, not on demonstrated misconduct or failure to perform his duties.

The Claimant testified credibly that he attempted to protect the tracks within the yard until the defects he had identified and marked with orange paint could be repaired by the Section Gang servicing the Chaffee Yard. In order to accomplish this result, the Claimant locked and tagged the switches at the north and south entrances to the yard from the main line, thus prohibiting any trains from moving into the yard. The Claimant testified without contradiction that no trains were in the yard when he locked out and tagged these switches, and that he advised the Trainmaster in charge of the Chaffee Yard of the procedure that he had followed.

Nothing in the evidentiary record demonstrated persuasively that the Claimant ignored defects of which he was aware or failed to discern defects of which he should have been aware. Rather, the Claimant conducted an inspection on December 17, 2008 in which he identified the defects that he and a co-worker painted orange. The Claimant testified credible that he had communicated these defects to the crews responsible for repairing the defects. In the interim, he took actions that he reasonably believed were sufficient to take Track 3211 out of service until suitable repairs could be effectuated.

The Carrier has established that the Claimant did not properly secure the track by following all of the procedures necessary to identify that sections of Track 3211 itself, as well as the two switches at each end of the yard, were in need of repair. Consequently, when an unidentified person unlocked one of the switches after it had been repaired, and thus permitted trains to travel into the yard, an unsafe condition occurred. However, this condition is in no way attributable to any dereliction of duty by the Claimant. At worst, the Claimant failed adequately to protect the track by identifying in Carrier records that the track itself should be held out of service because of a wide gauge condition regardless of whether the Claimant had properly rendered inoperative the switches at

either end of the yard until they could be repaired. Such repairs were outside the scope of the Claimant's duties.

The Claimant's shortcoming in taking Track 3211 out of service, and thereby protecting the yard and the track within the yard more completely can be explained both by his lack of formal training as a Track Inspector and his short tenure as an Assistant Foreman on the Patrol Gang. The Claimant testified without refutation that he was not sent to the full Track Inspector Foreman training school. Moreover, the disparity in the discipline imposed on the Claimant and his co-worker, the Foreman of the Patrol Gang, precludes sustaining the Claimant's dismissal.

The Foreman of the Patrol Gang, who left work on the day in question to attend to personal business, was issued a thirty-day record suspension for his involvement in the protracted failure to protect Track 3211 after it had been inspected on December 17, 2008. Nothing in the record justifies imposing a more stringent penalty on the Claimant. According to the testimony, the Claimant acted in good faith in trying to protect the tracks within the yard. He did not hide defects, but communicated the need to repair defects to persons responsible for effectuating such repairs. Therefore, the Claimant did not violate the

rules cited by the Carrier in a manner that should jeopardize his employment.

According to the Carrier, the Claimant failed to lock out the switch or to put a service tag on the lock. However, the Claimant credibly refuted these unsupported allegations leveled by the Carrier. His testimony is buttressed by documents in evidence that support his contention that he locked out switches at either end of the yard. That this technique may have been insufficient and may have been contrary to the procedures and best practices implemented by the Carrier does not render the grievant so grossly negligent that he must forfeit his employment.

In the investigation preceding the imposition of discipline, the Road Master failed to review the TIMs records prior to December 28, 2008. Thus, he was unaware that the Claimant had properly referred Track 3211 for repair when he attempted to take the track out of service and to protect the yard on December 15, 2008.

Furthermore, the Carrier was unable to identify with certainty, or even by a reasonable inference, that the Claimant was connected in any way with reopening the track before patent defects that the Claimant had marked with bright orange paint to assist the Section Gang in locating

and repairing them. had been repaired. Nothing in the record suggests that the Claimant, in his position as an Assistant Patrol Gang Foreman, was responsible for removing the tags from switches or otherwise permitting trains to enter the Chafee yard, presumably after a Section Gang had repaired a switch at one end of the yard. Having reported the defects when he attempted to take Track 3211 out of service on or about December 15, 2008, it was not incumbent upon the Claimant or within the scope of his duties repeatedly to ascertain thereafter whether the track had been put back in service by someone else.

Testimony by Road Master Adam Govando regarding a conversation he had with the Claimant on January 23, 2009 regarding whether the track was out of service that day is irrelevant to resolution of the instant case. The Carrier acknowledges that Track 3211 was taken out of service by the Claimant from South D rail to South switch number 3213 on December 15, 2008 at 18:20 (Transcript, page 40). The defects cited by the Claimant, which included head web separations and Dutchmen within the yard remained unrepaired from December 15, 2008 through the FRA inspection on January 21, 2009. However, the Claimant should not be made the scapegoat for the failure of others to respond to his documentation describing these defects, or to his communication to other Carrier employees charged with repairs

regarding the orange markings he had painted so that the Section Gang could easily find the defects.

The Claimant's contention that, despite his failure to implement a derail, he adequately protected the yard is insufficient to insulate him completely from all discipline. However, the penalty of dismissal is excessive, especially when viewed in the context of the Claimant's meager training as a Track Inspector Foreman and his short-term experience as a Track Inspector. The Claimant and his Patrol Gang Foreman reasonably expected that the Road Master would direct a Section Gang to repair the defects that had been identified and reported by the Claimant.

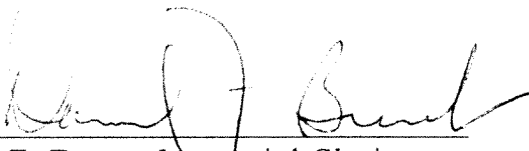
DECISION AND AWARD

Based on the evidence submitted, there was not just cause for the dismissal of the Claimant, Joseph M. Day. The Claimant shall be reinstated immediately to his former position, with uninterrupted seniority and benefits. The dismissal shall be reduced to a Level S thirty-day record suspension and one year probation from the original date of the discipline, and the Claimant shall be compensated by payment of full back pay and benefits from the date of his dismissal through the date of his reinstatement, less any substitute interim earnings.

The Claimant shall be precluded from utilizing his seniority as a foreman until he has successfully completed an FRA Track Inspection course. The Carrier shall reserve a place for the Claimant in the first scheduled FRA Track Inspection class after the date that he returns to work pursuant to the Board's Order in the instant case.

The Board retains jurisdiction to resolve any dispute that may arise regarding the implementation of the remedy herein ordered.

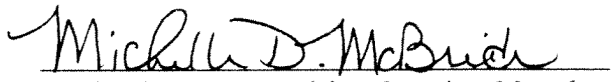
We so find.



Daniel F. Brent, Impartial Chair

Dated: 12-30-09

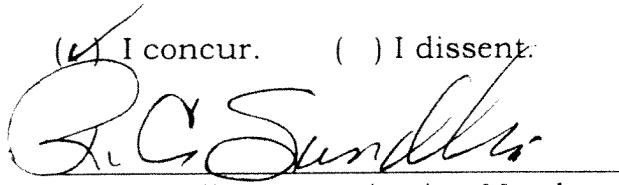
() I concur. () I dissent.



Michelle D. McBride, Carrier Member

Dated: 2/15/2010

(☒) I concur. () I dissent:



R.C. Sandlin, Organization Member

Dated: 2/10/10