

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 92, (Case No. 92)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing February 7, 2011, when Claimant, T. L. Widner (1221126), was issued a 10 Day Record Suspension, for failure to identify defects while inspecting east end of track 117 which resulted in a derailment in Clovis Yard on February 7, 2011. The Carrier alleged violation of Engineering Instruction, (EI) 2.1 Purpose of Track Inspections, EI 2.2 Qualifications of Track Inspectors and Employees Supervising Restorations, EI 2.2.3 Authority and Responsibility of Inspectors, Maintenance of Way Operating Rule (MOWOR) 1.1.3 Accidents, Injuries, and Defects, and MOWOR 1.2.1 Rules, Regulations and Instructions.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be compensated for his lost time and expense and otherwise made whole." (Carrier File No. 14-11-0107) (Organization File No. 130-13N1-1113.CLM)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On February 15, 2011, Claimant was directed to attend a formal Investigation on February 23, 2011, which was mutually postponed until March 9, 2011, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to identify defects while inspecting East End of Track 117 which resulted in derailment in the Clovis Yards on the Clovis Subdivision at approximately 1:00 A.M. on Monday, February 7, 2011, while working as a Track Supervisor on TINS1680.

This investigation will determine possible violation of EI 2.2.3 Authority and Responsibility of Inspectors, MOWOR 1.1.3 Accidents, Injuries, and Defects, MOWOR 1.3.1 Rules, Regulations, and Instructions, EI 2.1 Purpose of Track Inspections, and EI 2.2 Qualifications of Track Inspectors and Employees Supervising Restorations and R."

The Board notes that this is a companion case to Award No. 98, (Case No. 98) of this tribunal. On April 6, 2010, Claimant was notified that he had been found guilty as charged and was assessed a 10-Day Record Suspension.

The facts indicate that on February 7, 2011, a derailment occurred at Clovis, New Mexico, in the Clovis Yard on the East End of Track 117 that resulted in the aforementioned charges.

It is the Organization's position that the Carrier did not meet its burden of proof. It argued that the Claimant co-inspects tracks in the Clovis Yard with Track Supervisor D. Dyer. It asserted that the Claimant testified that he and Mr. Dyer work together and at the end of each month they determine what defects exist and what repairs should be made and more importantly Mr. Dyer inspects the east end of the yard tracks while he did the west end. The Organization reasoned that the Claimant should not have been held responsible for the derailment because he did not inspect the area where the derailment occurred. It further argued that a Carrier Engineering Officer testified that he did not believe it was a track caused derailment. It concluded the Claimant did nothing wrong and requested that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the Claimant was assigned as a Track Supervisor and it was his responsibility to perform a thorough inspection of the tracks and he was responsible for taking the appropriate action to either make the necessary repairs and/or steps ensuring the trains were safe. It argued that the record reflects that Track 117 was missing fasteners, spikes and plates and had poor tie conditions and was under the responsibility of the Claimant and because it was not properly taken care of Claimant was guilty as charged. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and Claimant was afforded his "due process" Agreement rights.

The Organization, in part, argued that S. Sanders, Engineering Officer testified on page 22 of the transcript he did not believe the derailment was track caused. The Organization reasoned that showed that the Claimant was not at fault. That opinion must be tempered by the fact that Sanders testified on the previous page that most of the derailment site was cleaned up before he arrived on the scene. Additionally, Sanders testified on page 32 of the transcript that this was his first derailment whereas Terminal Manager M. Bryant testified he had 20 plus years of service and had investigated at least 20 different derailments. On page 36 Bryant was questioned about the photographs taken at the site immediately after the derailment as follows:

"Sheri Ellis: And, Mr. Bryant, do you take exception to anything in picture, in that picture?"

Mark Bryant: Uh, Exhibit Number 1, uh, the tie is, uh, I guess, rotted, splitted, the tie plate is dug into the, uh, the tie.

Sheri Ellis: Now, was this an existing condition on the tie or was that caused by the derailed car?

Mark Bryant: This is an existing condition.
(Underlining Board's emphasis)

On pages 37 and 38 Mr. Bryant was questioned about additional photographs and in each instance he testified they substantiated that prior existing conditions were the cause of the derailment. Terminal Manager Bryant's was further questioned on page 40 as follows:

"Sheri Ellis: What determinations were made regarding the derailment on Track 117?"

Mark Bryant: The determinations that were made on the derailment 117 Track that the switch crew, uh, were not violating any operating rules after going back, reading the tapes and visiting with the Road Foreman, getting back the input from him. Also, uh, working with the Track Department, Medical Department and Operating Department, we could see that the tie conditions were a contributing factor to the derailment." *(Underlining Board's emphasis)*

Terminal Manager Bryant's testimony was not effectively refuted that the primary cause of the derailment was the pre-existing condition of the ties and missing fasteners, tie plates and spikes.

The Organization's alternative argument was that the inspection of the east end of Track 117 was not the responsibility of the Claimant, but instead was the responsibility of his co-worker D. Dyer. On pages 51 and 52 of the transcript the Claimant was questioned as follows:

"Sheri Ellis: What, um, what position did you hold in relationship to the?

Terry Widner: Oh, Track Supervisor, Clovis Yard.

Sheri Ellis: Okay, so, you were the responsible Track Supervisor for the Clovis Yard for track set 117.


Terry Widner: Uh, Mr. and Mr. Dyer, we shared responsibility."
(Underlining Board's emphasis)


Claimant further testified that Mr. Dyer usually checked the east end of the yard while he did the west end, however, he did state that on occasions he checked the east end. Carrier Officer Sanders also testified on page 12 of the transcript the Claimant had dual responsibility for checking Track 117. Substantial evidence was adduced at the Investigation that the Claimant had a dual responsibility for inspection and the upkeep of Track 117 and was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 14 years of service with a good work record. The discipline assessed against the Claimant will not be set aside as it was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

Claim denied.


William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 9/24/2012