

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 98, (Case No. 98)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES 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 March 9, 2011, when Claimant, D. W. Dyer (6592778), was issued a 10-day Record Suspension, by letter dated April 6, 2011, for failure to identify defects while inspecting east end of Track 117 which resulted in a derailment on February 7, 2011. The Carrier alleged violation of E.I. 2.1 Purpose of Track Inspections, EI 2.2 Qualifications of Track Inspectors and Employees Supervising Restorations and EI 2.2.3 Authority and Responsibility of Inspectors, MOWOR 1.1.3 Accidents, Injuries and Defects and MOWOR 1.3.1 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. 14-11-0106) (Organization File No. 150-13N1-1112.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 TINS1320.

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

On April 6, 2010, Claimant was notified that he had been found guilty as charged and was assessed a 10-Day Record Suspension.

The Board notes that this is a companion case to Award No. 92, (Case No.92) of this tribunal. 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 T. L. Widner. It asserted that the Claimant testified that he and Mr. Widner work together and at the end of each month they determine what defects exist and what repairs should be made. It argued that the derailment occurred on one of the most heavily used tracks in the Yard wherein thousands of tons of traffic move over the track daily and that combined with the roadbed being wet from snow and ice was the cause of the 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 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 arguments by the parties are nearly identical to those raised in Award No. 92 and the transcripts of both Investigations are very similar. For the sake of brevity those arguments will not be reiterated, however, the reasoning that was applied in that case is equally applicable in this instance as well. In both cases Terminal Manager Bryant testified that the primary cause of the derailment was the pre-existing condition of the ties and missing fasteners, tie plates and spikes. Bryant's testimony was not effectively refuted. Additionally, the record is clear that the Claimant was the last employee to check the east end of Track 117 prior to the derailment. Substantial evidence was adduced at the Investigation that the Claimant had a dual responsibility for the inspection and 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 31 years of service with a prior dismissal reduced to an actual 120 day suspension on his 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 Members


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 9/24/2012