

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY )  
EMPLOYEES DIVISION—IBT )  
 )  
v. )  
 )  
BNSF RAILWAY COMPANY )

Carrier File No. 10-12-0079  
Organization File No. C-12-D040-2

Claimant — Kip D. Gunnare

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The discipline [Formal Reprimand and a one (1) year review period] imposed upon Mr. Kip D. Gunnare by letter dated October 10, 2011, for alleged violation of EI 2.2.3 Authority & Responsibility of Inspectors and EI 2.4.5 Items to Consider When Inspecting in connection with charges of his failure to apply remedial action on an FRA defect, resulting in an FRA violation for excessive guard check, on the Black Hills Subdivision, mile post 581.64, main track 2, while working as a track inspector on TINS1468, headquartered in Gillette, WY. The Carrier's first date of knowledge with regard to this rule violation was June 30, 2011.
2. As a consequence of the violation referred to in Part (1)above, Claimant Kip D. Gunnare shall now receive the remedy prescribed by the parties in Rule 40(G).

**BACKGROUND:**

The Claimant is a Track Inspector for the Carrier on Gang # TINS 1486, operating out of Gillette, Wyoming. He has 19 years' service with the Carrier, nine of them as a Track Inspector. Along with another Track Inspector, he is responsible for that section of track that includes MP 581.64<sup>1</sup> in the Black Hills Subdivision, Powder River Division. On June 30, 2011, an FRA Inspector was conducting an inspection in a hy-rail along that section of track on Main Track One, along with another BNSF Track Inspector and the Roadmaster. In passing, the FRA Inspector noticed an anomaly in the tracks on Main Two, got out to take a closer look, and determined that the guard check gauge was 54", or 1/4" below the FRA-required minimum. He issued the Carrier a Code 1 notice of violation. Because the violation occurred on track assigned to the Claimant for inspection, the Carrier initiated an investigation into his "responsibility, if any, in connection with your alleged failure to apply remedial action on an FRA defect, resulting in an FRA violation for excessive guard check."

At the hearing, there was extensive evidence and discussion about Track Inspectors' responsibilities, the FRA requirements, and how track defects develop and evolve. Because of the incredible safety importance of the work that Track Inspectors perform, the Carrier has developed a detailed protocol for conducting inspections and reporting defects to TIMS, the Track Inspection Management System. Tracks are inspected on a regular schedule, some more frequently than others. In addition, some inspections are more detailed than others, accomplished by walking along the track to be inspected. The violation here occurred at a turnout, which is subject to a detailed inspection once a month. The Claimant had done a detailed "walking" monthly inspection at MP 581.64 on June 5, 2011; he recalled that the measurement at issue was 54 3/8", above the required minimum of 54 1/4". He had also performed a routine main track inspection, which included MP 581.64, on June 26, 2011, and had noted no

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<sup>1</sup> The original notice of investigation contained a typographical error identifying the location as MP581.4. The Organization objected to the hearing being held at all because of the error. Such a misidentification could be the basis for delaying a hearing, but the transcript of the hearing made clear that the Claimant knew the correct location of his alleged misconduct, and the Board will not address the procedural problem further.

problems. He testified that there had been ongoing problems in other sections of the surrounding track, but not at that specific location. According to both the Claimant and the Roadmaster, shims were used to tweak track levels on what was acknowledged to be an aging section of track at the end of its useful life. The Claimant testified that he had submitted a number of requests to have repairs done on the track that were not followed through on. The Carrier, he was told, planned to replace the entire switch in the fall and he was directed to continue to use shims to shore up problematic areas. Claimant testified that on certain sections of surrounding track, the shims popped out on a daily basis, due to vibrations from trains running over the tracks, and he and the other Track Inspector would have to replace them, but there had never before been a problem at the location. In the ordinary course of things, the guard rails wear out slowly, but if they are shimmed and the shims pop out, the gauge can change dramatically in a very short period of time. By and large, the Roadmaster's testimony corroborated the Claimant's. At the conclusion of the investigation, the Carrier determined that in failing to find and repair the defect, the Claimant had violated EI 2.2.3, Authority & Responsibility of Inspectors, and EI 2.4.5, Items to Consider When Inspecting.

FINDINGS AND OPINION:

The Public Law Board, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Public Law Board has jurisdiction over the dispute involved herein.

A Code 1 FRA violation is a serious matter; such track defects can lead to accidents, derailment, serious injury and destruction of property. When it is issued such a violation, the Carrier understandably wants to investigate the nature of the defect and determine, if possible, how it occurred. The central figure in such an investigation will be the Track Inspector with responsibility for that section of track. However, as this case demonstrates, an FRA violation, without more, does not necessarily mean that the Track Inspector failed in the performance of his job responsibilities.

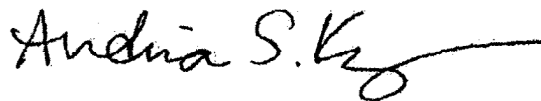
The Board has closely reviewed the evidence in the record and has concluded that the Carrier has not met its burden of proof to establish that the Claimant was guilty of any misconduct. The evidence establishes that the Claimant is an experienced Track Inspector who assiduously performs his job duties. He conducted a monthly inspection at MP 581.64 on June 5, 2011, and there were no defects. MP 581.64 was included in a routine main track inspection that he conducted on June 26, 2011. There is no evidence that those inspections were faulty or not conducted to standard. There is no evidence that MP 581.64 had presented any problems previously. The evidence is that the switch overall was old and scheduled to be replaced, and that other areas in that section of track needed constant attention. The record also establishes that when shims are used extensively to shore up the guard rails, they can pop out suddenly and the gauge can change quickly. In general, the evidence establishes that the Claimant satisfactorily performed his duties as a Track Inspector as those duties had been assigned to him by the Carrier. There is no concrete evidence that he did not perform his duties as assigned, only speculation that because a violation was found, he must not have performed his job correctly. Speculation is not sufficient to meet the Carrier's burden of proof—there must be real, objective evidence of either misconduct or a failure to act as required. There is no such evidence in this case. Instead, the testimony from both the Claimant and the Roadmaster painted a reasonable and plausible alternate scenario, of an aging section of track that the Carrier was trying to make last until it was scheduled to be replaced in a matter of months. In fact, the Claimant had put in for repairs that were never scheduled. Track Inspectors are responsible for extensive sections of track and they cannot monitor every foot of rail 24 hours a day, 7 days a week. The Claimant performed his duties as assigned; the fact that the shims at MP 581.64 gave out and the guard check gauge narrowed sometime after he last inspected it several days before was unfortunate, but not something for which he should face discipline, when there is no evidence of either wrongdoing or a failure to take action on his part.

AWARD

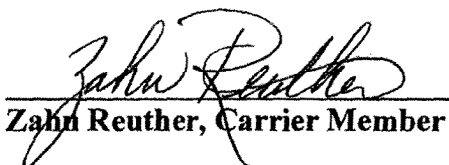
Claim sustained.

**ORDER**

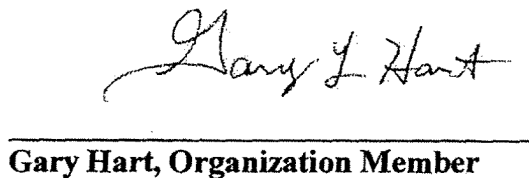
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



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Andria S. Knapp, Neutral Member



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Zahn Reuther, Carrier Member



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Gary Hart, Organization Member

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April 29, 2013

Date