

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimant:
S. F. Lawler**

**CASE NO. 46
AWARD NO. 47**

On February 2, 2001 the Brotherhood of Maintenance of Way Employees ("Organization") and the Burlington Northern/Santa Fe ("Carrier") entered into an Agreement establishing a Special Board of Adjustment in accordance with the provisions of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 1112 ("Board").

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railroad Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, although the Board consists of three members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with the provisions of Section 3 of the Railroad Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier's service or who have been censured may choose to appeal their claims to this Board. Effective from the date of the discipline, the employee has a sixty (60) day period to elect to handle one's appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended, or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

This Agreement further established that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of one's desire for expedited handling of this appeal, the Carrier Member shall arrange to transmit one copy of the notice of the investigation, the transcript of the investigation, the notice of discipline and the disciplined employee's service record to the Referee.

These documents constitute the record of the proceedings and are to be reviewed by the Referee.

The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified, or set aside, will determine whether there was compliance with Schedule Rule 40; whether substantial evidence was adduced at the investigation to substantiate the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof.

In the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

Claimant, S.F. Lawler, a Relief Track Inspector, was charged with a ten (10) – day record suspension and a one (1) – year probation for his alleged failure to detect, correct and protect variations from BNSF track standards. He was also charged with failure to ensure safe train operations at authorized speeds at or near MP 58.17 on Main Track #1 on the Orin Subdivision, headquartered at Wright, Wyoming. This incident was discovered on Tuesday, February 5, 2002. Subsequently, an investigation and hearing was held on March 27, 2002 at 107 N. Gillette Ave. in Gillette, Wyoming.

Applicable rules, Maintenance of Way Engineering Items Part A. Roadmasters and Track Inspectors, Part B. Track Inspectors and Table 2-1 Inspection Items to consider are as follows:

Part A #3

Perform a close visual inspection of rail during track inspections. Note the general condition of track, roadbed, and right-of-way to determine the required maintenance and to schedule annual work programs.

Part B #6

Inspect for the specific items and conditions in Table 2-1. Table 2-1. Item Inspected/Rail – specific Items and Conditions Broken, vertical or horizontal split heads, crushed head, corrugation, wear, shelling, engine burns, rail-end batter, discoloration, rust streaks, damaged by equipment, running, crushed welds (See Section 6.6.3 [Defect Descriptions].)

Track inspection has two basic purposes:

- **First, it allows employees to detect, correct, and protect variations from BNSF track standards and to ensure safe train operations at authorized speeds.**
- **Second, it allows a planned program of repairs and improvements to ensure that employees are productive and use materials efficiently.**

Perform at least the minimum track inspections required in this section.

Item 2.4.4

Track Inspectors and Track Supervisors have the following safety responsibilities during inspections:

- 1. Be aware of train movement on or near the tracks being inspected. Comply with operating rules and use common sense.**
- 2. If you detect unsafe conditions or deviations that exceed the allowable limits, initiate corrective or remedial action. Analyze irregular surface and/or alignment conditions by recording measurements on the Track Supervisor's Track Measurement Notes (see Figure 2-7). Carry the proper tools to handle routine track deviations that may be found during the inspection.**
- 3. If you cannot correct the conditions, immediately protect the safety of the railroad.**
- 4. Properly inspect, maintain, and care for your vehicle.**

It is the position of the Carrier that the discovery of a corrugated rail with joints in the location and a missing bolt is a very serious defect. This twenty-two (22) foot gap was visible to the naked eye and could have caused a train derailment. The Carrier points out that this type of condition did not happen overnight. The Carrier contends that such a situation took a period of time to develop and that the omission to discover it lies within the responsibilities of the Track Inspector. In particular, the Carrier asserts a monthly, visual walking inspection would have detected such a defect. Moreover, the Carrier notes that the Claimant should have discovered the defect and taken corrective action, as the rules require. Lastly, the Carrier adds that the Claimant's failure to comply with said regulations is a violation of the prevailing Engineering Instructions, Item 2.4.4. Thus, the Carrier concludes that his appeal should be denied and his suspension should stand.

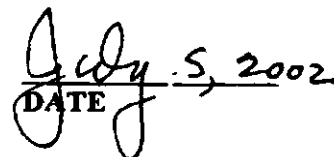
The Organization rebuts that Claimant was only the "Relief" Track Inspector, not the primary Track Inspector. Therefore, the Organization argues that the omission to discover the defect does not mean that the Claimant is culpable. The Organization further asserts that the omission to discover could have been another person, namely the "Track Inspector", whose primary responsibility was to have regular visual inspections. The Organization further points out that the Claimant "only relieves" the "Track Inspector" when he's on vacation and on his days off. In addition, the Claimant contends that he performed both a "walking" inspection on January 29, 2000 and a "visual" inspection by "hi-rail" on February 4, 2002. Moreover, the Organization adds that this type of defect does not require the imposition of a "10 MPH slow order", as the Carrier contends. Based on all the above, the Organization asserts that the Claimant complied with the prevailing regulations to the best of his determination. Lastly, the Organization adds that the Claimant has been with the Carrier for more than twenty (20) years and has a good solid record. Therefore, the Organization maintains that the charges are not supported by a preponderance of evidence as required. Thus, the Claimant's appeal should be sustained.

Based on all evidence, the Board finds that the Claimant's appeal should be sustained for the following reasons. The testimony of Foreman Alleman was most revealing, as he has more than thirty (30) years with the Railroad. In sum, his testimony reveals that a "crushed head" and/or the presence of "corrugation" are not considered serious defects. When asked about the appropriateness of a "slow order", his response was when "it [corrugated rail] is starting to elongate". More importantly, Foreman Alleman's testimony corroborates the testimony of the Claimant and two others (Danesha and Hill), both Supervisors at Herzog. All determined that the corrugated rail, at issue, was not defective. Based on this collective expertise testimony, the Board finds that there was no mentioning of the presence of "elongation" throughout the transcript. The Board also finds that the Claimant did comply with the prevailing, aforementioned operating rules, as required. Lastly, the Claimant had been with the Carrier for more than twenty (20) years and has maintained a good work record with only one prior infraction. Based on the composite of information and testimonies, the ten (10) - day suspension with one-year probation is vacated.

AWARD

The Claimant's appeal is sustained.


Referee
Neutral Chair SBA No. 1112


DATE July 5, 2002