

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimant:
Virgil Dabney**

**CASE NO. 47
AWARD NO. 48**

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. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her 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, Virgil Dabney, Relief Track Inspector, was charged with a ten (10) day suspension with a one (1) year review period for his alleged failure to detect, correct and protect variations from BNSF track standards. In addition, he was also charged with failure to ensure safe train operation at authorized speeds, at or near MP 58.17 on Main Track # 1 on the Orin Subdivision in Gillette, Wyoming.

Roadmaster McCoy discovered a corrugated, crushed head rail defect on Tuesday, February 5, 2002 during a hy-rail inspection trip, wherein it was determined that a 10 MPH speed restriction should be imposed. An investigation was held on March 27, 2002 in the Burlington / Northern Santa Fe Gillette Terminal building Conference Room located at 107 North Gillette One in Gillette, Wyoming. The record reflects that the Claimant is charged with violating Maintenance of Way Engineering instructions, as follows:

Item 2.1

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 2.42

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 safety 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 and notify the proper authority.**
- 4. Properly inspect, maintain, and care for your vehicle.**

It is the Carrier's position that upon a hy-rail inspection that a corrugated, crushed head rail defect was discovered. Underneath the rail's crushed head, the Carrier asserts, a deformation had developed which created a very serious condition: The concurrence of these three factors, the Carrier contends, increased the likelihood of a train derailment as the defect was approximately twenty- two (22) feet in length, with variations. Upon this discovery, the Carrier adds, a slow order of 10 MPH was imposed to prevent an accident and to ensure the safety of train operations. It is the position of the Carrier that the Claimant failed to detect, correct, protect and ensure safe operations and thus violated the Maintenance of Way Instructions, Item 2.1 and Item 2.4.4. Based on all the above, the Carrier requests that the Board deny the Claimant's appeal and affirm the ten (10) day suspension with a one year (1) probation.

The Organization rebuts the Carrier's argument that the mere presence of a corrugated, crushed head presents a danger and needs to be corrected with a slow order. The Organization points out that several Track Inspectors agree such deviations are commonplace and not serious defects in need of immediate correction. Both Supervisor Denesha and Chief Operator Hill affiliated with Herzog told Track Inspector Alleman

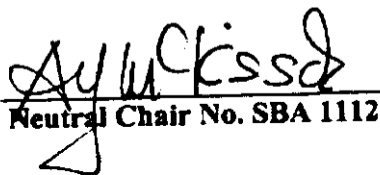
who stated in turn conditions were safe, after looking at the rail in question. Specifically, the Claimant also testified that Herzog Chief Operator Hill "got down on his knees" to inspect the track. All concluded that the track needed no remedial nor corrective action, the Organization counters. The Organization contends that the Claimant complied with the prevailing Engineering Instructions encompassed in Item 2.1 and Item 2.4.4. Lastly, the Organization adds the Claimant is a long-term employee without any prior disciplinary infractions. Based on all the above, the Organization requests that Referee vacate the ten (10) day suspension and sustain the Claimant's appeal.

After a careful review of the record, the Board finds that the Claimant's appeal must be sustained for the following reasons. Evidence presented was overwhelmingly in favor of the Organization. The Board finds that the collective opinion of two highly-trained Supervisors of Herzog, another Track Inspector as well as the Claimant, all concur that the mere presence of either a corrugated rail and/or crushed head do not in themselves present a dangerous condition. Moreover, they also concur that such conditions do not require the imposition of an immediate 10 MPH slow order, as the Carrier contends. In addition, the Board further finds that these described conditions do not present a serious, imminent threat to safety in regards to circumstances which could increase the likelihood of a possible derailment.

In response to the new revised regulations of March 1, 2002, the Board finds that the Track Inspectors require notice before the imposition of discipline. That is, due process requires that verbal as well as written notice be instituted, before a suspension can be imposed for a failure to comply with a change of regulations or a new interpretation of conditions. What is missing here is precisely what constitutes an "unsafe condition" or a "serious deviation." Based on the foregoing, the ten (10) day suspension and one (1) year probation must be vacated for the aforementioned reasons.

Award

The Claimant's appeal must be sustained.


Neutral Chair No. SBA 1112

8-4-02
Date