

PUBLIC LAW BOARD NO. 7425

**PARTIES) SMART - TRANSPORTATION DIVISION
TO)
DISPUTE) BNSF RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of Lake Superior First Seniority District (Twin Cities, MN) Switchman M. J. Lang, hereinafter referred to as Claimant, for reinstatement to service with seniority rights unimpaired, removal of censure from his personal record and pay for all time lost including but not limited to the following: payment of vacation allowance, health and welfare costs, reimbursement of all expenses related to the pursuit of alternative employment, reimbursement for any damages incurred as the result of discharge from service including proceeds of any property, real estate or financial instruments sold to replace lost compensation, as a result of an investigation held on December 3, 2013. (Organization File No. D1000-021-14B; Carrier File No. 54-14-0019)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

This claim appeals a Carrier determination that testimony and exhibits brought forth at an investigation conducted on December 3, 2013 show that the Claimant was negligent and indifferent to duty in a failure to properly protect a shoving movement, causing a bypass coupler and two cars to derail at approximately 0855 hours on October 31, 2013 at Midway Yard on the Midway Subdivision while working as a Switchman member of a yard crew.

It is the position of the Organization that the Carrier failed to properly conduct an investigation in accordance with the Uniform Investigation Rule; failed in its obligation of burden of proof; and, the discipline assessed is harsh, excessive and unwarranted under the facts brought forth at the investigation. The Organization thus says that for these reasons the claim should be sustained.

As concerns the investigation, the Organization contends it shows that the Carrier had predetermined the guilt of Claimant in that the hearing officer was in no way interested in hearing about any concerns regarding the overall condition of the

M&M 2 track on which the shove was made having caused the derailment. In this respect, the Organization describes the track as having tie plates with missing spikes, broken ties, broken rail, and the track being out of gauge. The Organization urges that these are not track conditions that can be merely thrown aside as having little or no relevance to the derailment.

Further, as concerns the condition of the track the Organization asserts that the Carrier's only witness to testify at the investigation gave conflicting testimony about checking with the Maintenance of Way Department on the condition of the track.

The Organization also maintains that the derailment having occurred on straight track, and not in a curve, makes it highly unlikely that bypassed couplings were the only contributing factor to the derailment, and to discount the condition of the track "smacks of prejudice" toward the Claimant.

A further contention of the Organization is that the Carrier hearing officer took every answer from the Helper on the assignment at face value with no additional questions about his responses, whereas it was a different story with the Claimant.

Lastly, the Organization says even assuming, *arguendo*, the Carrier had proven its charge, which it maintains the Carrier did not, that permanent dismissal is patently excessive for the alleged infraction at issue.

In study of the record, the Board finds no merit in Organization contentions that the Claimant had been denied due process. Certainly, more than mere assertion is necessary to show the manner in which an investigation was allegedly unfair. Further, it is evident in overall study of the record that the investigation was held in a fair and impartial manner and that there was no prejudice of guilt.

In regard to Organization contentions that there was a difference in the extent to which the Claimant was questioned as opposed to the Helper, it is evident this was because the Helper was not assigned to protect the shoving move. As the Helper himself testified at the investigation: "I was on the head end protecting any east movements."

As concerns Organization argument about the condition of the track on which the shoving move was made was the cause of the derailment, and its presentation at the investigation of photographs that were said to have been taken by the Claimant two days after the derailment showing broken rail on the track at issue having been flagged by the Maintenance of Way employees, there is no doubt this casts some question about the condition of the track on the date at issue.

Notwithstanding the above mentioned concern, the Board finds it noteworthy that the Claimant did not offer any photos in support of contentions about the other

alleged defective condition of the track. It also seems to the Board that since the hearing officer accepted the photos of the broken rail to be introduced into evidence despite the photos not having been provided the Carrier prior to the hearing, that the hearing officer should have recessed the hearing to call upon an official from the Maintenance of Way Department to be examined as to whether the broken rail was the consequence of the rail rolling over. Further, it is significant that the Claimant did not report the existence of a broken rail or any of the other alleged track defects either before or after making the shoving move; the Claimant having testified to having had a clear, unobstructed view of the entire movement. The Claimant also testified to being approximately one foot away from the cars as move was being made, yet was not able to recall if the knuckles were in an open or closed position.

In this latter respect, the Carrier presented at the investigation photographs taken of the incident that show the position of the draw bars to be in a bypassed position. Other photographs in evidence show fresh metal scrape marks on the knuckle indicating that the draw bars were bypassed, the Carrier offering that this put pressure on the track rails, causing the rail to roll over and the cars to derail.

In view of the Organization contentions concerning testimony of Trainmaster Sanford being of a conflicting nature, the Board carefully reviewed his testimony and we find no basis to conclude that it was other than forthright in explanation of the results of his investigation of the derailment. Trainmaster Sanford found it necessary to clarify certain testimony due to the representative for the Claimant seeking to establish argument that Trainmaster Sanford should have made inquiries of Maintenance of Way track employees about the condition of the track *prior to* the incident. As Trainmaster Sanford testified, there was no need to have made such inquiry because the track was in service at the time of the shoving move. Trainmaster Sanford also stated that Maintenance of Way track employees were part of the cleanup and repair of the track following the derailment, and as concerned the derailment told him: "They said the rail rolling, it looks like force from this car pushed the rail that way and force from the other car pushed it the other way."

As concerns Trainmaster Sanford's testimony, although he went into detail on direct and cross examination, the Board notes this particular statement as being a summary of his testimony:

The evidence I observed upon my field investigation showed that the car was shoved back a certain length, shoving bypass because there was force, there was evidence of force going to the left and to the right, stretching the wheel, causing the wheel to roll. So upon investigation, that's what I observed.

As concerns its assessment of the penalty of dismissal from service, the Carrier says that this was in view of not only the Claimant's guilt in the incident at issue but full review of the Claimant's past record. In this respect, the Carrier submits that this was the Claimant's second Level S serious violation in less than 36 months; its PEPA progressive discipline policy stating: "A second Serious violation committed with the applicable review period may result in dismissal."


There is no question that the Carrier has shown sufficient evidence of record to support a finding that the Claimant had failed to properly protect the shoving move at issue and that in view of the seriousness of this incident and the Claimant's past record that sufficient reason existed for the Carrier to assess stern discipline. However, the Board finds that discipline should be short of the ultimate penalty of dismissal from service. We will, therefore, direct that discipline be modified to time out of service, without pay for all time lost; the Claimant be returned to service with seniority and other benefits unimpaired; imposition of a one year review period commencing on the date of return to service; and, the Claimant being required to pass all usual return to service examinations.

Award:

Claim disposed of as set forth in the above Findings.


Robert E. Peterson
Chair & Neutral Member


Melissa A. Beasley-Coke
Carrier Member


J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: 4/18/17