

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41526
Docket No. MW-41687
13-3-NRAB-00003-110305**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. R. Berry by letter dated August 12, 2010 on charges of being in violation of MOWOR 1.1 Safety under General Responsibility and MOWOR 6.50.5 Hyrail Limits Compliance System in connection with his involvement in a track and time violation at approximately 0640 hours on June 16, 2010, when outside of his designated track authority on the main track at Barstow, Mile Post 43.78, setting off the HLCS as reported by C & I Dispatcher was arbitrary, excessive and in violation of the Agreement (System File C-10-D040-38/10-10-0528 BNR).**
- (2) The discipline [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. S. McGraw by letter dated August 12, 2010 on charges of being in violation of MOWOR 1.1 Safety under General Responsibility and MOWOR 6.50.5 Hyrail Limits Compliance System in connection with his involvement in a track and time violation at approximately 0640 hours on June 16, 2010, when outside of his designated track authority on the main track at Barstow, Mile Post 43.78, setting off the HLCS as reported by C & I Dispatcher was arbitrary, excessive and in violation of the Agreement.**

- (3) The discipline [Level S thirty (30) day record suspension and a one (1) year review period] imposed upon Mr. J. Mojica by letter dated August 12, 2010 on charges of being in violation of MOWOR 1.1 Safety under General Responsibility and MOWOR 6.50.5 Hyrail Limits Compliance System in connection with his involvement in a track and time violation at approximately 0640 hours on June 16, 2010, when outside of his designated track authority on the main track at Barstow, Mile Post 43.78, setting off the HLCS as reported by C & I Dispatcher was arbitrary, excessive and in violation of the Agreement.
- (4) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall now be removed from Mr. R. Berry's personal record.
- (5) As a consequence of the violation referred to in Part (2) above, the aforesaid discipline shall now be removed from Mr. S. McGraw's personal record.
- (6) As a consequence of the violation referred to in Part (3) above, the aforesaid discipline shall now be removed from Mr. J. Mojica's personal record."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers 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 Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The dispute arose from an incident that occurred on June 16, 2010 at 6:40 A.M. on the Barstow Subdivision at Mile Post 43.78 when the three Claimants set on the track in their assigned hy-rail vehicle at a location (MP 43.78) for which they did not have authority.

On the date of the incident involved here, Claimant Berry was the assigned Foreman; Claimant McGraw was the assigned Truck Driver; and Claimant Mojica was the assigned Sectionman on Mobile Maintenance Gang TMGX1176. Claimant Berry, as the Foreman, was the "Employee In Charge" (EIC) as that term is applied to the Carrier's On-Track Safety Rules and was responsible for acquiring the track authority. Inasmuch as his gang would be working within the limits of the track authority being used by Region/System Rail Gang RP-02, Claimant Berry contacted the EIC for Gang RP-02 (Vega) to seek authority to work under RP-02's track authority as a "multiple work group." Vega approved the request and provided the authority limits to Claimant Berry. The record shows that those limits were "Main Track between Westbound Control Signal, West Siding Switch Barstow, Switch Yes, and East Siding Switch Hillsdale, Switch No." The milepost limits for this track authority were Mile Post 43.8 to Mile Post 56.4, according to the Barstow Subdivision Timetable.

At the time Claimant Berry copied the track authority from Vega, both he and Claimant McGraw were in their hy-rail vehicle. Claimant Mojica was in the depot. The record shows that even though it is required under the Carrier's Rules, Claimant Berry did not conduct a job briefing with Claimants McGraw and Mojica after copying the Track Authority and before occupying the track. Rather, when Claimant Mojica returned from the depot, Gang TMGX1176 proceeded to a crossing and set the hy-rail vehicle on the main track at Mile Post 43.78. Upon occupying the main track, the Hy-Rail Limits Compliance System (HLCS) device immediately emitted an audible alarm and flashing red light. Those alarms indicated that the truck was outside of its track authority. Consequently, the Claimants immediately removed the hy-rail vehicle from the track.

Claimant Berry contacted the Train Dispatcher, as required by the Rules. The C & I Train Dispatcher advised that the Claimants did not have track authority for the area (crossing at Mile Post 43.78) where they had set on the track.

The Claimants were directed by letter dated June 16, 2010 to attend an Investigation, scheduled for June 30, 2010, to ascertain the facts and determine their

responsibility for an alleged track and time violation when they were outside the limits of their track authority. After two postponements mutually agreed to by the parties, the Investigation was held to its conclusion on July 15, 2010.

A thorough review of the Investigation transcript reveals that there is no dispute that the Claimants occupied the main track at a location where they were not authorized to do so. Neither is there any dispute that the HLCS was in working order and, in fact, worked as intended to alert the Claimants and the Train Dispatcher that they were outside of their track authority limits. The Organization argues, however, that the responsibility of Claimants Berry and McGraw for the undisputed track authority violation was mitigated by the confusing nature of the local geography and the lay of the tracks involved. Moreover, it argues that Claimant Mojica bore no responsibility for the violation because (1) he was not present when the track authority was obtained (2) the track authority limits were not communicated to him prior to the incident and (3) he was assigned as a Sectionman and, as such, he worked under the direction and authority of the Foreman. The Organization argues that, therefore, the Claimants' violation was of a technical nature due to a misunderstanding and that they had no intent to occupy the track outside of the track authority they had. In addition, the Organization points out that the Claimants vacated the track immediately when the HLCS alarms were triggered and that, in any event, there was no harm done as a result of the incident.

The Carrier takes the position that it met its burden of proof. The Claimants were afforded a fair and impartial Hearing in accordance with the requirements of the parties' Agreement and the track authority violation was proven. The record evidence shows that the Claimants clearly did not conduct a proper job briefing before occupying the track. A proper job briefing is required and in this case, the review of the track authority required in a job briefing could have prevented the track authority violation. Based on the violations, discipline was appropriate. The Carrier further argues that inasmuch as Claimant Berry (1) was the EIC and (2) his record included a previous track authority violation for which he was yet under probation, the discipline of dismissal was appropriate. Further, the longer review period assessed to Claimant McGraw (three years) than to Claimant Mojica (one year) was appropriate inasmuch as Claimant McGraw was present when the track authority was obtained.

After a thorough review of the record made during the handling of this dispute on the property, we find that the Carrier presented substantial evidence to

meet its burden of proof. There is no dispute that the Claimants set their assigned hy-rail vehicle on the track at a location where they did not have authority to do so. Fortunately the HLCS worked as designed and alerted all concerned to the error so that the Claimants were able to vacate the track almost immediately. However, that fact does not diminish the responsibility of the Claimants to ensure that they did not violate their track occupancy limits. Moreover, the fact that the Claimants occupied the track for only a very short period does not mitigate their proven failure to conduct the Carrier-mandated Job Safety Briefing before occupying the track.

In view of the fact that at the time of the incident Claimant Berry was on probation for another track authority violation, we find that the Carrier did not abuse its discretion when it imposed upon him the penalty of dismissal. However, we find that the Carrier has not shown a reasonable basis to impose greater discipline on Claimant McGraw than on Claimant Mojica. We especially note that neither was functioning as the EIC and nothing within their disciplinary history would support such a differentiation in our view. Consequently, we find that the discipline assessed Claimant McGraw must be reduced to a Level S 30-day record suspension and a one year review period.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of February 2013.