

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41390
Docket No. SG-41394
12-3-NRAB-00003-100208**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
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(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of J. T. Pullen for reinstatement to his former position with compensation for all lost wages, including skill pay, with all rights and benefits unimpaired and any mention of this matter removed from his personal record; and for the following Claimants, C. K. Maurizi, S. R. McCormick, D. E. Peterson, Jr., for compensation of all lost wages, including skill pay, (35 day suspensions) and their personal record to be cleared of any reference to the discipline issued or to this event. Account, Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it imposed the harsh and excessive discipline to the Claimants without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on November 14, 2008. Carrier’s File No. 35-09-0003. General Chairman’s File No. 09-001-BNSF-20-C. BRS File Case No. 14326-BNSF.”

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 Claimants are members of a signal crew that was working on November 4, 2008, using a hy-rail boom truck to remove old signals on a stretch of track between Galesburg, Illinois, and Fort Madison, Iowa, on the Chillicothe Subdivision. They were all disciplined following an accident that resulted from their being out of track and time authority: their truck was overtaken, rear-ended, and totaled by an oncoming train on the same track. Fortunately, there were no injuries to the Claimants or any other Carrier personnel. The accident was the result of a combination of factors. The crew had been working all day on the stretch of track from Smithshire to Stronghurst. In the late afternoon, Temporary Foreman J. Pullen, sought permission from the Train Dispatcher to extend their authority on that same stretch of track. Initially, the Train Dispatcher indicated that the crew would be able to do that, and the record includes a transcript of the conversation between Pullen and the Train Dispatcher to that effect. However, when the Train Dispatcher assigned the crew's actual authority, it was for the stretch of track on the opposite side of Smithshire – from Smithshire to Ormonde. Despite verbally confirming that authority, the Foreman wrote down the wrong track authority – from Smithshire to Stronghurst, instead of from Smithshire to Ormonde. As a result, the crew was on the wrong track at the wrong time. In addition, the Hy-Rail Limits Compliance System (HLCS) a back-up safety system, was not engaged, so neither the crew nor the Train Dispatcher realized that they were out of their limits. The crew's normal truck was out of service, and the HLCS unit on the vehicle they were using was different than the type of unit on which they had been trained. Nor were there any instructions in the boom truck on how to operate it. In most vehicles, the HLCS unit is activated when the steering wheel lock is released, whereas the HLCS unit in question had a toggle switch that required separate, independent activation. Both units used the same or similar thumb wheel for adjustment. The crew had been using the truck all week without realizing that the unit was not activated. Following the Investigation, Claimant J. Pullen, the Temporary Foreman, was terminated. The remaining crew members, who had been withheld from service pending the Investigation, were ultimately assessed a Level S suspension and returned to work after 35 days, when the Carrier completed the Investigation and made its final decision.

The Carrier contends that the discipline assessed to all the Claimants was appropriate. There is no real dispute as to the facts, which have been acknowledged by the Organization. Pullen was responsible for the initial error in writing down the wrong

track authority, especially after having verbally confirmed the correct authority to the Train Dispatcher. The entire crew was negligent in failing to ensure that the HLCS was activated and working properly. Employees are trained regarding HLCS operation, and if there are any questions, they know whom to contact. Their failure to engage the HLCS meant that the Train Dispatcher was unaware of their location and the fact that they were out of limits, and was unable to notify the oncoming train in order to prevent the collision. The Investigation was conducted in a fair and impartial manner, and the testimony substantiated the charges against the Claimants. The Claimants' actions, or inactions, resulted in a collision between their hy-rail boom truck and a train. The discipline assessed was appropriate. The Foreman was terminated for his violation of Engineering Instructions 1.1.1 – Fouling Track, and Maintenance of Way Operating Rule 6.3.1 – Main Track Authorization. The remaining Claimants were assessed a Level S, time served, suspension of 35 days for their violation of Special System Instruction 21, Maintenance of Way Safety Rules S-1.1 – Job Safety Briefing, and S-1.2.5 – Safety Rules, Training Practices Policies.

According to the Organization, the discipline was harsh and excessive in violation of Rule 54, for a number of reasons. The Carrier unilaterally postponed the Hearing for its convenience, despite the fact that Rule 54 requires mutual agreement to any postponement. In addition, the Carrier improperly removed the Claimants from service pending the Investigation. They posed no danger to the Carrier or to any other individuals. In order to hold someone off service pending an Investigation, the Carrier must demonstrate that a serious infraction of the Rules has occurred and that the individual would endanger his safety or that of his fellow employees. It failed to do so here. Moreover, the penalty assessed against the three Claimants who were suspended – 35 days, or “time served” – was excessive. Finally, the merits of the case do not support the Carrier's decision to discipline the Claimants. There is no evidence that Claimants Maurizi, McCormick and Peterson violated any Rules while occupying Main Track One between Stronghurst and Smithshire on November 4, 2008. They had no part in the Foreman's clerical error and followed the instructions he gave them during the job safety briefing in the belief that they were working within their track and time authority. Moreover, the Claimants were not trained in or familiar with the toggle switch on the HLCS unit on Vehicle No. 19384. They believed that adjusting the thumb wheel switch on the unit was all that was necessary to operate the unit. Nor were there any instructions in the truck on how to operate the HLCS unit. Dismissal from service was too harsh a penalty for the Foreman, Claimant Pullen. He was an Acting Foreman with only one month's experience and with no training. He was not properly trained on the vehicle's HLCS unit. He made a serious mistake in writing down the wrong limits, but he had asked for and been told he would get one set of limits, then the Train Dispatcher gave him

a different set. Claimant Pullen was under the impression that he would receive his requested track limits and ended up copying down the wrong limits. This sort of clerical error has occurred before on the Carrier's property, but none of the other employees were permanently dismissed. The discipline assessed by the Carrier was solely to punish the Claimants, not to guide them in the performance of their work. The Board has held numerous times that it is an abuse of discretion for the Carrier to impose discipline only to punish the employee.

There is no dispute that the collision that occurred on November 4, 2008, was very serious, and indeed, the Claimants were lucky to have escaped without injury to themselves or others. There is a temptation in cases of such accidents to assume that the parties involved were guilty of the grossest Rules violations or negligence and to discipline them accordingly. Safety truly is a paramount concern for both the Carrier and the Organization. At the same time, it is important to examine the Claimants' actions and to make sure that any discipline imposed is proportional to the seriousness of their misconduct.

The record in this case establishes that the accident occurred as the result of two factors operating in combination: (1) the Foreman mistakenly wrote down the wrong track limit and (2) none of the Claimants were aware of how to properly operate the HLCS unit on the hy-rail boom truck they were using. Had either of these two conditions been different, the accident would not have occurred. The Board will address the three Assistant Signalmen, who were suspended, separately from the Acting Foreman, who was terminated.

Relative to Claimants Maurizi, McCormick and Peterson, the three Assistant Signalmen who were suspended for 35 days, the Organization raised three objections: (1) procedurally, they should not have been withheld from service pending the Investigation into the accident (2) the discipline imposed was harsh and excessive because they did not know that they were on the wrong track and (3) the discipline was harsh and excessive because they were not trained on the unfamiliar HLCS unit, nor were there instructions on how to use it on the boom truck. The procedural issue is entwined with the safety issue raised in the third of the Organization's objections, and the two will be discussed together. First, the Board will address these Claimants in relation to the crew being on the wrong track. The record clearly establishes that the Assistant Signalmen had no knowledge that they were not operating under the correct track and time authority, nor any reason to know that they were on the wrong track. They did not hear Pullen's conversation with the Train Dispatcher. The entire crew had previously discussed requesting authorization to extend track authority for the work they had been doing all day between Smithshire

and Stronghurst, and Pullen briefed them on that assignment after he wrote down the wrong track authority. As far as these three Claimants knew, they were working on the section of track for which they had received authority. As a result, they had no responsibility for the crew being on the wrong track, and any discipline imposed by the Carrier can only relate to their failure to realize that the HLCS unit was not engaged and operational.

Forces are expected to know how to operate all equipment to which they are assigned, including – perhaps especially – safety equipment. HLCS is a backup safety system, and had it been operational, both the crew and the Train Dispatcher would have known that they were outside their track authority well before the accident, in time for the crew to have moved the boom truck and avoided the collision. The Organization points out that the crew was not in its usual truck and had not been trained on the type of HLCS unit that was in the vehicle they were using. From the record, it appears that the unit lit up at some point when the truck was started, which led the crew to assume, incorrectly, that it was on and operational. Moreover, there were no instructions in the truck itself on how to operate the HLCS unit. The Organization further points out that since the accident, the Carrier modified its training and safety procedures to include training on the HLCS units with toggle switches and to require that Supervisors make sure that crews operating unfamiliar vehicles are briefed on all safety equipment that is different from what they are used to. It is true that the crew members should have double-checked to make sure that they were operating the HLCS unit correctly, but the Carrier's failure adequately to train and brief the crew mitigates – but does not entirely erase – their culpability. The Claimants must bear some responsibility for their role in failing to make sure that the HLCS unit was operating properly.

This brings the Board to the issue of the level of discipline that was imposed on the three Assistant Signalmen. The Carrier withheld them from service pending the Investigation pursuant to Rule 14, which permits the Carrier to withhold from service employees who have been charged with “serious offenses.” All the Carrier knew in advance of the Investigation was that the Claimants’ actions (and inactions) had resulted in a near-fatal collision that totaled their truck that would not have happened if proper safety procedures had been followed. It did not know who was responsible for what aspects of the safety failures that led to the accident. The crew members were informed in the Carrier’s November 6, 2008 letter that the Hearing was being held to “. . . determin[e] your responsibility, if any, for your alleged occupying Main Track One . . . without proper authority.” Occupying track without authority is a “serious offense.” Accordingly, the Carrier did not violate Rule 54 when it withheld them from service. However, in light of the Carrier’s failure to train the employees on all aspects of operating

the different HLCS units, the penalty imposed by the Carrier on the three Assistant Signalmen was disproportionate to their misconduct. At most, they should have been assessed a Level S, 30-day record suspension, and awarded the pay they missed while being withheld.

The facts involving the fourth Claimant, Acting Foreman Pullen, present different issues for the Board to consider. Pullen is in the same situation as the other three Claimants regarding the operation of the unfamiliar HLCS unit. But it was his mistake regarding the time and track authority in the first place that put the boom truck on the wrong track at the wrong time. The record establishes that at the time of the accident, Pullen believed that the Train Dispatcher had authorized the crew to continue to work between Smithshire and Stronghurst. After hearing the transcript of the tape at the Investigation, Pullen freely acknowledged that he had been mistaken and that the actual track authority granted was between Smithshire and Ormonde. The Carrier contends that his admission of guilt is the end of the case. The Board cannot agree. Claimant Pullen must bear the consequences of his mistake, but the Board finds that there were significant mitigating factors operating at the time he sought authority from the Train Dispatcher to extend the crew's work between Smithshire and Stronghurst. For one thing, Pullen had only been an Acting or Temporary Foreman for about three weeks. Previously, he had substituted for other Foremen for a week here or there, but he was significantly inexperienced as a Foreman. More important from the Board's perspective, the transcript of the exchange between Pullen and the Train Dispatcher establishes that their conversation was confusing and contradictory on the part of the Train Dispatcher, which gave conflicting information to Pullen, with no recognition or acknowledgment of the eventual change in authority from what he had initially indicated would be forthcoming. In the audio transcript (included in the transcript of the investigatory Hearing) Pullen first asks if his crew can "give One to you for Main Two between Smithshire and Ormond and go ahead and take Smithshire to Stronghurst on Main One instead?" The Train Dispatcher answered, "Yes. . ." Pullen acknowledged that the crew was going to release its original assignment. The Train Dispatcher queried "Smithshire and Ormonde at 1418, 1-4-1-8 is that correct?" Pullen responded only that his crew was releasing its earlier assignment. The Train Dispatcher stated, "I understand the BNSF 4607 is on by location requesting Smithshire, now Ormonde, now behind that train. Is that correct over?" Despite the fact that he had not requested Ormonde, Pullen stated "That is correct over." A few seconds later he acknowledged "Granted on Main One track 018 track East crossover Smithshire switch now through to west crossover Ormonde" The communications between Pullen and the Train Dispatcher were conflicting and confusing, and the Train Dispatcher played a role in how events unfolded when he initially told Pullen that his crew would be able to work between Smithshire and

Stronghurst, then appeared to have gotten confused about what Pullen was requesting, and finally granted track authority between Smithshire and Ormonde. Although Pullen verbally acknowledged the authority, the fact that he wrote down and briefed his crew on Stronghurst instead indicates that he did not, in fact, mentally register the change. Pullen's prior record was unblemished, and he appears to have been eager to do his job conscientiously and well. His mental slip was a common type of mistake that ordinarily would not have had serious consequences or been cause for termination. Had the HLCS unit been operating, the accident would have been prevented. From the Board's perspective, Pullen's mistake was not caused by gross negligence on his part, but by confusing and conflicting communications from the Train Dispatcher that anyone might have failed to pick up on. Pullen did make a mistake, in failing to register the change from Stronghurst to Ormonde, but the Train Dispatcher played a significant contributing role in the accident as well. It is the Board's considered opinion that Claimant Pullen was subject to significant discipline, but that discharge was excessive. He shall be returned to work with his seniority unimpaired, but without any backpay or benefits.

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 25th day of July 2012.