

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41878  
Docket No. MW-41929  
14-3-NRAB-00003-120220**

**The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.**

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. R. Cross by letter dated February 18, 2011 for alleged violation of MOWOR 10.3 Track and Time in connection with charges of alleged failure to obtain proper authority to perform track inspections on the Brookfield Sub between EES Lakenan and WWS Card on December 28, 2010 at approximately 0950 hours was arbitrary, capricious and in violation of the Agreement (System File C-11-D040-18/10-11-0240 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the discipline assessed upon Claimant R. Cross shall ‘. . . be overturned and this hearing and discipline be removed from his 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 undisputed facts indicate that on December 28, 2010, the Claimant, a Track Inspector, was preparing to perform a track inspection on a segment of main track in hy-rail vehicle No. 20723, which was equipped with the Hy-Rail Limits Compliance System (HLCS). The Claimant decided to utilize the Smart Mobile Client (SMC) application to obtain a track authority from the Train Dispatcher for on-track protection. The Carrier alleged that the Claimant failed to obtain proper authority, and because of that, charges were brought against the Claimant.

On December 30, 2010, the Carrier directed the Claimant to report for a formal Investigation on January 6, 2011, which was mutually postponed until February 1, 2011, concerning, in pertinent part, the following charge:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged Critical Decision violation when you allegedly failed to obtain proper authority to perform track inspection on the Brookfield Sub between EES Lakenan and WWS Card on December 28, 2010, at approximately 0950 hours, while assigned as Track Inspector.”

On February 18, 2011, the Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a three-year Review Period.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because the Hearing Officer displayed a fundamental bias towards the Claimant. Specifically, the Organization asserted that he asked leading questions of the Carrier's primary witness against the Claimant so as to secure the answers he was looking for and was essentially offering testimony by eliciting “yes” or “no” answers from the Carrier witness. It asserted that the Hearing Officer acted as a

prosecutor rather than as an impartial trier of the facts. Additionally, it argued that the discipline was improperly rendered by a Carrier Officer who did not attend the Hearing and that the decision should have been made by the Hearing Officer who was in attendance and could make more accurate credibility decisions than a non-attende. It asks that based upon those procedural errors, the discipline should be set aside without reviewing the merits because the Hearing was unfair and the transcript was tainted.

Turning to the merits, the Organization asserted that the record shows that the Claimant electronically attempted to use the SMC application to request track authority from the Train Dispatcher in order to perform an inspection of Main Track One (M1) between West Lakenan and East Palmyra when that system malfunctioned. Our review of the Claimant's testimony reveals that the Claimant thought that he put in the correct electronic request for his track authority via the SMC application on the date of the incident prior to setting his vehicle on M1 to perform the track inspection. However, for some unknown reason, the SMC application did not provide him with the limits he requested and not long after he began his inspection on M1, the exceed alarm on the HLCS application in his vehicle sounded and the Claimant immediately followed the proper procedures to correct the situation. It argued that the record shows that the Claimant was never provided with any formal training opportunities so as to gain a comprehensive understanding of the function associated with the SMC application and that lack of training should mitigate in behalf of the Claimant. Lastly, it argued that if the Carrier had proven its charges, which it did not do, the discipline assessed by the Carrier was excessive for the Claimant who had 36 years of good service. It concluded that the Carrier did not meet its burden of proof and requested that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that there were no procedural errors in the handling of the Claimant's case and the Organization has not shown that it did anything that prejudiced the Claimant's contractual rights. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that the evidence shows that the Claimant admitted his violation of MOWOR 10.3 during the Hearing and that admission verifies that he was negligent and indifferent to his duties on December 28, 2010. It argued that dismissal would have been appropriate for this serious violation, even if it were a first offense. However, this was not the Claimant's first offense. Less than three months before this incident, the Claimant accepted a 30Day Record

Suspension for the same Rule violation. It further argued that coupled with the Claimant's admission that he understood the Rules relating to track authority, as a 36-year employee (with six to seven years of experience with HLCS), his negligence was all the more inexcusable. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the record of evidence and will first address the Organization's procedural arguments. The Organization asserted that the Claimant's Agreement due process rights were violated because the Hearing Officer did not render the discipline. That issue has been dealt with on numerous occasions by various Boards. Suffice to say that it has repeatedly been determined that there is nothing in the parties' Agreement that specifies which Officer is required to issue the discipline. The Board examined the other procedural arguments raised by the Organization and found them unpersuasive.

During the course of the Investigation, the Claimant was questioned about the incident covered by the Notice of Charges as follows:

“Michael Heille: And, were you present on December 28th, on authority number 347-61 did, is this what you received, as far as your authority limits on this, on this day?

Randall Cross: Yes.

Michael Heille: And, did you exceed these authority limits on this day?

Randall Cross: Yes.” (Emphasis added.)

In the aforementioned testimony, the Claimant admitted that he did not comply with his authority limits and he subsequently admitted that he violated MOWOR 10.3.

In the Claimant's defense, the Claimant testified that the sun shining on his SMC screen prevented him from seeing the track limits granted him by the Train Dispatcher. Assuming that was correct, the Board is puzzled as to why the Claimant chose not to put the SMC in a shady spot in order to verify the track limits before progressing. The Claimant further asserted that following the incident, he contacted someone in Fort Worth and was advised that HLCS did not track his vehicle until the “exceeded” alarm sounded. However, evidence was presented at the Hearing that showed that the HLCS was working correctly. Lastly, the Organization argued that the Carrier did not

provide the Claimant sufficient training for the implementation of the SMC and HLCS applications. Contrary to that argument, the record shows that the Claimant had been using the HLCS since its implementation in 2004 and there was no showing that the Claimant requested any additional training regarding the use of SMC. The Board does not find the various arguments raised by the Claimant as a viable defense of the Claimant's actions because he admitted that he did not read the track limits correctly. In the final analysis, substantial evidence was adduced at the Investigation so as to warrant the conclusion that the Carrier met its burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident, the Claimant had approximately 36 years of service with a good work record. However, this was the Claimant's second Level S 30-Day Record Suspension in less than a 90-day period and both incidents involved the Claimant exceeding his authorized track limits. The Board finds and holds that the discipline will not be disturbed because it was neither contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of June 2014.