

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41879  
Docket No. MW-41931  
14-3-NRAB-00003-120228**

**The Third Division consisted of the regular members and in addition Referee William R. Miller 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 [ten (10) day record suspension and a one (1) year review period] imposed upon Mr. J. Bradley by letter dated February 8, 2011 for alleged violation of MOWOR 6.50.5 in connection with charges of failure to test the HLCS system while operating BNSF 98027 before occupying the track on December 1, 2010 while working as a machine operator on the Ottumwa Subdivision was arbitrary, capricious and in violation of the Agreement (System File C-11-D040-19/10-11-0273 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid discipline shall now be overturned and all reference of that discipline shall be removed from Claimant J. Bradley'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.**

**It was alleged that the Claimant failed to test the Hy-Rail Limits Compliance System (HLCS) while operating BNSF 98027 before occupying the track on December 1, 2010, while working as a Machine Operator on the Ottumwa Subdivision, and because of that, charges were brought against the Claimant.**

**On December 6, 2010, the Carrier directed the Claimant to report for a formal Investigation on December 15, 2010, which was mutually postponed until January 18, 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 failure to test the HLCS system, while operating BNSF 98027, before occupying the track on December 1, 2010, while working as a Machine Operator on the Ottumwa Subdivision. The Carrier’s first date of knowledge with this alleged violation was December 2, 2010.”**

**On February 8, 2011, the Claimant was notified that he had been found guilty as charged and was assessed a 10-Day Record Suspension with a one-year Review Period.**

**It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because the charges were not precise and the Hearing Officer asked leading questions of the Carrier's witnesses against the Claimant to secure the answers that he was looking for and was essentially offering testimony by eliciting “yes” or “no” answers from the Carrier witnesses. 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 decision 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 testified that he properly tested the HLCS in the truck that he was working with on December 1, 2010. It argued that the Claimant was the only eyewitness to what actually happened and the relatively new HLCS technology had been prone to malfunctioning across the Carrier's system. It further argued that HLCS is a supplement to the on-track protection/communication protocols between Train Dispatchers and personnel working in the field and there was no allegation that the Claimant ran afoul of those standing protocols. The Organization reasoned 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 record evidence shows that on the date of the incident, a remote audit was conducted on the use of the HLCS. It stated that the remote auditing process involves three phases of auditing: (1) review the Operating Authority (Authority To Occupy the Main Track); (2) review radio transmissions associated with the authority; and (3) review event logs associated with the HLCS to determine if it was properly tested. It argued that two Carrier Officers substantiated that the remote audit showed that the Claimant failed to properly test the HLCS equipment on the truck he was operating prior to occupying the track and the Organization did not effectively refute their testimony. Therefore, the Claimant was guilty as charged. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and record of evidence and determined that the Investigation was "fair and impartial" and the Claimant was afforded his "due process" Agreement rights.

The issue in this dispute is whether the Claimant performed a HLCS test on the date covered by the Notice of Investigation. The Claimant asserted that he did so, whereas the Carrier alleged that he did not perform the required test as interpreted by a technician during a "remote audit" of the HLCS data.

The Organization argued that the Claimant testified to having completed the test on December 1, 2010. He said the screen properly illuminated and showed the HLCS was performing and had functioned correctly. Nonetheless, the Carrier contended that its remote audit computer records suggested otherwise. The Organization countered that assertion and stated the HLCS has a history of like and/or similar failures and the Claimant should not have been disciplined for a technological failure of the system. The Organization further pointed out that the Carrier did not deny the fact that the HLCS failures had been commonplace.

The record is not clear as to whether the Claimant performed an HLCS test or whether the HLCS was performing correctly. What is clear is that the Organization argued that HLCS failures were not unusual and the Carrier did not refute the statement. Therefore, in accordance with the long-established principle in the industry that unrefuted assertions must be accepted as being factually correct (Third Division Awards 12840, 16430, 20041 and 20083) the Board concludes that the Claimant's argument constituted a valid defense. That defense coupled with proof showing that the Claimant followed all protocols to obtain his track authority throughout the day leads to the inescapable conclusion that the Carrier failed to meet its burden of proof in this case. The Board finds and holds that (1) the discipline assessed the Claimant must be set aside, (2) his record should be cleared of any mention of this incident and (3) the claim is sustained in accordance with Part (2) of the Statement of Claim.

**AWARD**

Claim sustained.

**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 16th day of June 2014.