

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42021
Docket No. MW-41968
14-3-NRAB-00003-120280**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn 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 [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. S. Brodtko by letter dated May 5, 2011 for alleged violation of MOWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS) in connection with charges of failure to associate HLCS number to main track authority with the east end dispatcher as revealed by remote desk at approximately 1048 hours on April 12, 2011 at Lisle, IL on the Chicago Subdivision was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-11-D040-24/10-11-0431 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Brodtko shall now receive the remedy prescribed by the parties in Rule 40G.”**

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 Claimant is employed by the Carrier as a Foreman. On May 5, 2011, he was assigned to operate a Hy-Rail vehicle to transport him, other employees and welding equipment to perform work on main line tracks. The Claimant's assigned vehicle was equipped with a Hy-Rail Limits Compliance System ("HLCS"), which is a safety overlay to protect employees by monitoring movements within track authority. It uses GPS to verify the locations of HLCS-equipped vehicles. The system gives warnings to employees nearing or outside of their track authority limits and if they come in close proximity to trains, machines etc. Not all vehicles are equipped with HLCS and not all parts of the railroad use the system.

To activate the system, the Operator of an HLCS-equipped vehicle must notify the Train Dispatcher that his vehicle is so equipped and provide the Train Dispatcher with the vehicle identification number so that the Train Dispatcher can associate the vehicle with the track authority. Use of the system is mandatory. The briefing is required even for Operators of vehicles not HLCS-equipped; Operators must so advise the Train Dispatcher.

On the day at issue, the Claimant was operating his assigned vehicle and communicated with the Train Dispatcher to obtain authority, but failed to conduct that portion of the briefing that would provide the Train Dispatcher with his vehicle ID number. It is not disputed that the Train Dispatcher did not ask the Claimant for the number. The absence of the vehicle ID number precluded the Train Dispatcher from matching the number and activating HLCS coverage. This lifesaving safety overlay system supplements the protection afforded by grants of and restriction of on-track authority.

The Carrier's Operating Practices Department found the Claimant's failure to brief the Train Dispatcher regarding his vehicle's HLCS ID number when it conducted a remote audit of the system. The Carrier convened a formal Investigation regarding the alleged failure. Based on the evidence adduced at the Hearing, as described above, the Carrier found the Claimant guilty of violating MWOR 6.50.5, deemed the violation to be a "Serious Violation" under PEPA and assessed the Claimant a 30-day Level S suspension with a three-year review period.

The Carrier argues that it conclusively proved the Claimant's violation of the cited Rule. It points out that the Claimant repeatedly admitted having failed to conduct an HLCS briefing with the Train Dispatcher. It rejects the Claimant's attempt to shift blame to the Train Dispatcher by pointing out that the Train Dispatcher failed to ask him for the vehicle ID number. The Carrier urges that the Claimant's responsibility to comply with the Rule is not obviated because some other employee may also have violated the Rule.

The Carrier rejects as tortured the Claimant's interpretation of the Rule to conclude that he was not obligated to comply with HLCS procedures because his vehicle did not occupy or foul the track while using the assigned track time. However, the Carrier asserts, that there is no exception in the Rule to the fact that the equipment the Claimant's vehicle carried was, indeed, used both on and across the track and to the fact that the Claimant's vehicle might well have been located so as to occupy or foul the track at some point during the work day. Indeed, points out the Carrier, the Claimant was obligated under the Rule to brief the Train Dispatcher even if his vehicle had not been HLCS-equipped.

Although the Claimant maintains that he had not been properly trained on the system, the Carrier points out that the Claimant admitted that he had conducted HLCS status briefings before, and asserts, on that basis, that he understood both the procedure and the importance of compliance in order to protect the workers for whom he was responsible.

The Carrier points out that the purpose of the HLCS system and the briefing trigger is to improve safety. Accordingly, it contends, the Claimant's failure to comply constituted a "Serious Violation" within the coverage of PEPA. For such a

violation, the Carrier asserts that the penalty imposed was appropriate. In conclusion, the Carrier urges that the claim be sustained.

Conversely, the Organization argues that the Carrier misapplied the Rule used to discipline the Claimant. It asserts that the Rule only requires an HLCS briefing when the vehicle at issue occupies or fouls the track. Because the Claimant's vehicle did not occupy or foul the track, the Organization maintains that the briefing requirement was not triggered. Accordingly, urges the Organization, the Carrier failed to prove that the Claimant violated the Rule.

The Organization further argues that the discipline was unwarranted because the Carrier failed to properly instruct the Claimant as to his obligations under the Rule. Moreover, maintains the Organization, any violation which might be established was no more than a mere technical violation, for which a determination of a "Serious Violation" and the invocation of discipline based thereon is unwarranted. The penalty was, therefore, arbitrary and excessive, as well as punitive, rather than corrective.

In conclusion, the Organization urges that the claim be sustained, the discipline rescinded, the Claimant's records adjusted, and that he be made whole for all wages and benefits lost.

The Rule cited required the Claimant to brief the Train Dispatcher with respect to HLCS by providing his vehicle's ID number so that the Train Dispatcher could activate the vehicle in the system. Admittedly, the Claimant failed to provide that briefing.

The Organization argues on the Claimant's behalf that the briefing obligation was not triggered because the Rule covers only vehicles occupying or fouling the track. The Board is not persuaded. The Claimant could not know at the time of the briefing where the vehicle might be located during his tour of duty; and the tools carried in the truck were, in fact, occupying or fouling the track. The clear intent of the Rule is to cover situations like those at issue. Indeed, the Claimant had participated in such briefings on previous occasions and knew, or should have known, the intent and coverage of the Rule. Any ambiguity which the Claimant

might have perceived should have been brought to Management's attention by him and the Rule clarified.

The Organization raises several arguments to the effect that the Claimant was not trained regarding the Rule, that the Train Dispatcher did not ask him for the vehicle ID number and that there is no evidence that the Train Dispatcher was disciplined for his failure to ask for the ID. The Board is not persuaded by any of them. As a Foreman, the Claimant was obligated to be familiar with all applicable Rules. Moreover, any violation which he committed is not excused because some other employee may also have violated the Rule. Some situations where one employee is disciplined and another not disciplined might give rise to a claim of disparate treatment. However, the burden of showing disparate treatment rests with the Organization. There is insufficient evidence to know how the Train Dispatcher was treated under the separate Agreement covering his craft. Thus, concludes the Board, the Carrier met its burden of proof.

In this case, as well as others, PEPA was obligated to apply the just cause standard. The Board is not persuaded by the Carrier's argument that, because the governing Agreement has no express "just cause" language, it is not required to assess penalties based on just cause. However, the Board is convinced that the penalty imposed is consistent with PEPA and not inconsistent with just cause.

The Board does not find the Claimant's violation to have been minimal or technical. His failure to comply with the briefing requirement of the Rule deprived him and his co-workers of the protection afforded by HLCS. That compromised safety, constituted a "Serious Violation" under PEPA and properly subjected him to the level of discipline imposed.

Because the Carrier proved the Claimant's violation of the cited Rule and established that the penalty imposed was not arbitrary or excessive, the claim is denied.

AWARD

Claim denied.

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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 28th day of August 2014.