

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42710
Docket No. MW-43279
17-3-NRAB-00003-150529**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Track Inspector J. Santoy by letter dated April 29, 2014 for alleged violation of ‘... MWOR 1.6 Conduct, EI 2.4.5 Record of Track “Inspections, MWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS) and FRA Track Safety Standards 213.15 Penalties.’ in conjunction with his alleged ‘... falsification of required Federal Railroad Administration track inspection records on the Yakima Valley Subdivision, dishonesty, failure to create and save inspection records the same day as the inspection; and failure to activate the HLCS system when fouling the track as prescribed in multiple instances starting on December 30, 2013 and continuing through March 11, 2014, while you were working as Track Inspector (TINS0456).’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File S-P-1879-C/11-14-0270 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Santoy shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered.”**

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 Carrier asserts that substantial evidence shows that the Claimant negligently and dishonestly falsified track inspection reports. While the Claimant claims that he used his private vehicle at times, the explanation is not supported by mileage requests. His multiple violations constitute a dismissible offense without regard for his years of service. Should the claim be sustained, the Claimant should be returned to service and should receive only lost seniority and wages, less outside earnings.

The Organization insists that the tardy notice of Investigation received only four days prior was not cured by a subsequent postponement. Moreover, the Investigation was not scheduled within 15 days of Carrier's first knowledge. Additional defects include the conduct of the Investigation and the absence of a key witness. The burden of proof was not met due to reliance on HLCS data, as HLCS can lose communications and be shut off if the on/off switch is inadvertently hit. The Claimant provided plausible explanations for his actions, had worked defect-free for his previous two years as a Track Inspector and could have been the victim of computer malfunction. The 20 year Claimant's discipline was excessive and at a minimum must be reduced so that the Claimant is returned to service with lost seniority and wages undiminished by outside earnings.

The Organization has alleged that the failure of the Carrier to produce Mr. Aguayo as a witness resulted in an Investigation that was not fair and impartial. We disagree. The testimony of Roadmaster Vulgas showed that the Carrier attempted in good faith to produce the witness, who was on vacation and could not

be located. With the Claimant having been withheld from service, admittedly the Organization was confronted with a choice of proceeding without Mr. Aguayo's testimony or postponing the Investigation until the witness returned from vacation. The Organization elected to proceed and cannot now convince this Board that the Investigation did not comply with Rule 40.A.

The Carrier's evidence is circumstantial. Three observations are relevant. First, circumstantial evidence may be stronger than eyewitness evidence because of the imperfections of the human memory and the various motivations that may drive testimony. Second, prior to the time frame considered herein, Roadmaster Vulgas had never taken exception to the Claimant's work, according to Mr. Santoy's uncontroverted testimony; thus, it appears as though the Claimant performed his track inspection duties properly. Third, there is no evidence that previously the HCLS on the Claimant's assigned vehicle needed repair or had acted up even for short stretches of track, that inadvertently knocking the HCLS switch to off was a problem or that the Claimant had submitted duplicate or late reports.

When the evidence as a whole is considered, the Claimant's explanations for the discrepancies about which he was questioned are unpersuasive and the implicit determination of the Conducting Officer that the Claimant was not a credible witness is accepted without question. The inadvertent tripping of the HCLS off switch, seemingly a new phenomenon in the Claimant's experience as a Track Inspector, is met with unbridled skepticism. The Claimant could not explain the indications of use of his personal vehicle and his Carrier-assigned vehicle within the same time frame. The last trouble ticket for the HCLS was dated September 2013, only three months before the HCLS supposedly acted up. The Claimant testified to his use of his personal vehicle on several occasions, but never claimed mileage to which he would have been entitled. Alleged walking distances necessary for inspections, while possible, would have been lengthy in some instances. The series of implausible explanations advanced by the Claimant leave him without an adequate response to the Carrier's allegations. The evidence, circumstantial that it is, is clearly substantial.

The Claimant has been dishonest, negligent and careless of safety. He has violated rules and FRA safety standards as noted in the dismissal letter, which this Board finds justified.

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 31st day of August 2017.