

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43670
Docket No. MW-44570
19-3-NRAB-00003-170670**

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S thirty (30) day record suspension] imposed upon Welder B. Gallatin by letter dated May 20, 2016 for alleged violation of MWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS) in connection with alleged failure to associate his vehicle with track authority resulting in an exceeds limit alarm on April 8, 2016 at/or near Mile Post 128.5 on the Canyon Subdivision was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-16-D040-14/10-16-0262 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Gallatin's record shall be cleared of the charges leveled against him and he shall be compensated 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.

This dispute involves the Carrier's imposition of a 30-day record suspension and a three-year review period on the Claimant for a safety violation. The record shows that on April 8, 2016, the Claimant was hirailing a welding truck to his work location using various authorities obtained by other employees, and he entered onto Foreman Mills' Track and Time authority without coordinating this move with Mr. Mills, whose gang was occupying the track to surface a switch. The Claimant proceeded onto Mr. Mills' authority based on the Claimant's assumption that he was allowed to do so because another welding truck he was following had proceeded onto Mr. Mills' track authority. After entering Mr. Mills' authority, the Hy-rail Limits Compliance System ("HLCS") exceeds limits alarm in the Claimant's vehicle went off. The Claimant stopped momentarily, but then he proceeded on without contacting anyone about the alarm.

The Carrier argues that there is substantial evidence in the record to support its position that the Claimant violated a Maintenance of Way Operating Rule and as a result, he received the appropriate punishment. The Organization argues that the discipline imposed by the Carrier was arbitrary, disparate, unwarranted and without merit, given numerous mitigating circumstances surrounding the alleged incident in question. The Organization also argues that, even if the discipline was warranted, the discipline imposed was excessive. Finally, the Organization argued that Rule 40G required the remedy requested by the Organization, and that the Board should fully sustain the claim.

The Claimant was charged with failure to associate a welding truck he was operating with track authority granted to another employee – Mr. Mills – prior to placing the Claimant's truck within Mr. Mills' authority, which caused the Claimant's truck to receive an exceeds limit alarm. The Carrier determined that this conduct violated Maintenance of Way Operating Rule (MOWOR) 6.50.5, which states, in part:

"The Hy-Rail Limits Compliance System (HLCS) is a safety system designed to monitor the position of HLCS equipped on-track equipment.

On subdivisions where HLCS is in effect, all HLCS equipped on-track equipment fouling or occupying the track authorized by Track and Time, Track Warrant or Track Permit must be associated with the authority and the system must be activated. The HLCS thumbwheel must be set to indicate the authorized track when the equipment is fouling that track.”

In discipline cases, the Carrier has the burden to prove that there is substantial evidence that the Claimant engaged in the alleged misconduct. Third Division Award 39872; Public Law Board 6204, Award 20; First Division Award 16785. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison v. NLRB, 305 U.S. 197, 305 (1938). In this case, the Claimant admitted during the on-property investigation that he was in charge of the welding truck he was operating, and that he was required by rule to have a briefing with Mr. Miller before entering Mr. Miller’s track authority so that Mr. Miller could associate the Claimant’s vehicle to Mr. Mills’ authority. The Claimant also admitted that he did not have a briefing with Mr. Mills because he assumed that a welding truck in front of him operated by Mr. Arnold had already done so. The Claimant also admitted that he received an exceeds limits alarm in his vehicle when he entered Mr. Mills’ authority. It is well-established that when an employee admits guilt, there is no need for further proof. See Third Division Award 28484; Fourth Division Award 4779. Thus, the Carrier has proven by substantial evidence that the Claimant failed to associate the truck he was operating with track authority granted to another employee prior to placing his truck within the other employee’s authority.

The Organization raised several arguments in support of its contention that the discipline imposed on the Claimant was unwarranted. Specifically, the Organization argues that (1) the investigation was not fair and impartial as required by Rule 40(A) because Mr. Arnold – who was driving the welding truck ahead of the Claimant – was not present and did not testify; (2) the Claimant was subject to disparate treatment because Mr. Arnold was not disciplined despite engaging in the same misconduct; and (3) the Claimant’s disciplinary penalty was excessive.

Rule 40(A) requires that an employee will not be disciplined until a fair and impartial investigation has been held. The Organization argues that the investigation into the Claimant’s conduct was not fair and impartial because Mr. Arnold – who was driving the lead truck – was not present at the investigation and

did not testify. The Organization submits that the communications Mr. Arnold had with Mr. Mills concerning entering Mr. Mills' authority, associating his vehicle, or any other communications between these employees was a crucial part of this investigation. The Carrier contends that it is not required to call more witnesses than necessary to meet its burden of proof, and that the Claimant is responsible for requesting his own witnesses. See Third Division Award 37322.

As discussed above, the Carrier met its burden of proof through its testimony from the Claimant. Included in that testimony was the Claimant's admission that he was in charge of the vehicle he was operating. For that reason, it does not appear that the circumstances under which Mr. Arnold entered Mr. Mills' authority were particularly relevant to the Claimant's failure to brief with Mr. Mills because the Claimant had an independent obligation to brief with Mr. Mills. Moreover, if the Organization believed that Mr. Arnold had relevant testimony that was crucial to the investigation, it could have called him to testify. Under these circumstances, it cannot be concluded that the investigation was not fair and impartial.

The Organization also argues that the Claimant was treated differently than Mr. Arnold, who it contends was not disciplined at all despite engaging in the same conduct as the Claimant. Regardless of any possible merit to this argument, it was not presented on property, and it will not be considered by the Board for that reason.

The Organization's final argument is that the Claimant's penalty was excessive. In discipline cases, the Board sits as an appellate forum. Arbitral precedent is clear that boards do not grant pleas for leniency or compassion, but may set aside disciplinary penalties that are unjust, unreasonable, or arbitrary. See Third Division Awards 27742, 30124, 30429 and 41038.

The Carrier contends that the disciplinary penalty arrived at in this case was justified under the circumstances and its Policy for Employee Performance Accountability ("PEPA"). Under PEPA, disciplinary violations are categorized by degree of severity as (1) standard; (2) serious; and (3) stand alone dismissible. The PEPA definition of "Serious Violations" includes "[v]iolations of any work procedure that is designed to protect employees, the public and/or others from potentially serious injury(ies) and fatality(ies)," and the Carrier concluded that the Claimant's conduct met this definition. The PEPA also provides for a progression of penalties for serious violations, and states that:

“A. Progression:

The first Serious violation will result in a 30-day record suspension and a review period of 36 months. Exception: Employees qualify for a reduced review period of 12 months if they demonstrate a good work record, defined as having at least 5 years of service and having been both reportable injury-free and discipline-free during the five years preceding the date of the violation in question.

A second Serious violation committed within the applicable review period may result in dismissal.”

In this case, the Carrier determined that the Claimant’s conduct was a serious safety violation and he received the penalty provided for a first violation in the PEPA. There is no evidence in the record that he met the conditions of the exception that would have led to a lesser penalty.

The Organization argues that the Claimant’s penalty was excessive because his actions were not intentional and he rightly believed that the vehicle he followed onto Mr. Mills’ track had been granted authority to do so. As discussed above, the Claimant had an independent obligation to get track authority that was not relieved by his assumption that the vehicle he was following had authority. As to whether the Claimant’s actions were intentional, his actions could be treated as such because he chose not to follow a work rule, but even if they were merely negligent, the Carrier’s contention that many railroad accidents occur because of negligence is credited. Under these circumstances, the 30-day record suspension and three-year review period the Claimant received fit within the Carrier’s established disciplinary policy and was, therefore, not unjust, unreasonable, or arbitrary.

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 17th day of May 2019.