

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 43692
Docket No. MW-45097
19-3-NRAB-00003-180602

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

(Brotherhood of Maintenance of Way Employes 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 (dismissal) imposed upon Mr. T. Jacobs by letter dated March 10, 2017 for alleged violation of MWOR 6.50.5 in connection with his alleged failure to activate HyRail Limits Compliance System (HLCS) while occupying the track on January 9, 2017 was on the basis of unproven charges, arbitrary, and excessive and in violation of the Agreement (System File C-17-D070-5/10-17-0184 BNR).
- (2) As a of the violation referred to in Part (1) above, Claimant T. Jacobs shall be reinstated to service with seniority and all other rights and benefits unimpaired, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits.”

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 alleges Claimant Jacobs, a 23-year veteran employe, failed to activate the HLCS device in Vehicle 25147 while occupying track on January 9, 2017.

The Claimant did not deny his failure to properly activate the system; when asked if he was able to tell whether the switch had been activated or not, the Claimant said he thought it was activated.

"I'm not sure if I didn't notice it didn't activate or, I can't tell you as to why I didn't know that wasn't activated, but I, just the use of the thumbwheel would show you that I thought it was on." (TR 34)

The Organization insists the Carrier has committed serious error in failing to remove prior discipline from his record after agreement to do so. It notes the Carrier argues this is the Claimant's third Level S when it is not. It protests that the Carrier presented a witness who knew nothing then replaced him with an expert witness testifying from his phone, asserting this fell short of being a fair procedure. It points to the Carrier's assertion that the Claimant has a short career when 23 years is hardly short. It maintains there is no dispute that he was protected at all times, rather the only question is whether his HLCS was on as back up to the protection.

The Organization also contends that the HLCS System is dysfunctional. It gives concrete examples: there has been grease on antennae from installation; the switch in the Claimant's truck has been relocated no less than three times due to loss of power. Other trucks have had same issue: problems with activation. It notes that at the time this case arose, trucks were being retrofitted so that activation became automatic when the driver sits down. Further, on the day in question, the Claimant tested his system three times in an obvious intent to make sure it worked so he could use it. In fact, the Claimant operated the thumbwheel seven times during the 1 hour 21 minutes that the HLCS was off. 'Why would you do that if you never turned it on?' the Organization asks. It notes the indicator lights that are supposed to flash when the system is not working are obstructed from the driver's range of view while operating the truck.

The Carrier contends no trouble tickets are related to this incident, and the Claimant took no exception to the HLCS equipment on the date of concern. It maintains the Claimants three tests all showed the HLCS was properly functioning on the day in question. It notes the Claimant has admitted he was not sure whether it was on. At the time of the incident, the Claimant was already under a Level S Record Suspension review period. The Carrier concludes its disciplinary action was proper.

The evidence submitted in this case establishes multiple repetitive problems with the power supply to the units in question. The Claimant's repeated testing of the system supports his assertion that he thought it was on. Certainly, there would be no reason to utilize the thumbwheel fully seven times unless he thought the system was running; there would be no imaginable point in trying to advise the dispatcher of track occupation if the Claimant knew the dispatcher could not receive the input. At the time, the Carrier was actively replacing switches in the trucks because they were so unreliable. They just had not gotten to the Claimant's truck yet.

This evidence strongly supports the conclusion that the HLCS system in the Claimant's truck did not activate properly without his knowledge. Insofar as the Carrier cannot meet its burden of proof on the merits, we need not address the procedural issues in the case.

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 18th day of June 2019.

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**INTERPRETATION NO. 1 TO AWARD NO. 43692
DOCKET NO. MW-45097
OLD NRAB Case No. 3-180602
NEW NRAB Case No. 3-200066**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

STATEMENT OF CLAIM:

Whether BNSF complied with the Award No. 43692 when its retroactive compensation to Claimant Jacobs consisted of what he would have earned from BNSF less any outside earnings?

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 T. Jacobs was reinstated to BNSF Railway by Third Division Award 43692, with the claim being deemed “sustained.” The Organization argued this meant the contested discipline would be removed from his record, and the Claimant would be reinstated with compensation “for all wage loss suffered including lost overtime, expenses and benefits.” BNSF calculated the backpay, but the Organization objected to the deduction of interim wages and the failure to reimburse medical expenses and monies that were not contributed to the Claimant’s 401(k) while he was dismissed.

BNSF contends the Claimant need only submit his claims to his retroactively reinstated insurance, and he will receive the benefits at issue. It does not consider such claims or 401(K) claims to be wage loss. It submits that its deduction of earnings from outside employers was entirely appropriate. Both sides have cited various precedential awards in support of their positions.

Insofar as the claim herein concerned has been sustained, the Claimant must have been offered reinstatement subject to the Carrier’s return to service policies. It is also clear that the Carrier must remove the invalidated discipline from the Claimant’s record, with seniority, vacation and all other rights restored. We are not of the view that all work done during the time away from work should be deducted from the backpay calculation; an employee who worked weekends in a bakery prior to dismissal from BNSF should not have his bakery earnings deducted from backpay because they are not part of his lost earnings. We therefore find the calculation of time lost should be reduced only by interim earnings from replacement employment. Likewise, lost overtime shall be compensated at the overtime rate.

The object of a make whole remedy is to recreate the same circumstances as if the improper dismissal had not occurred. Retroactive restoration of the Claimant’s medical insurance meets this objective, with deduction from backpay of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent the Claimant purchased replacement insurance during his time of separation, he must be reimbursed for the premiums.

Clearly, the Carrier must have reasonable means of verifying the accuracy of its calculations. Hence, the Claimant's backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of any replacement insurance premiums and any claims paid under that insurance. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in applicability to the extent of its remaining duration at the time of his dismissal. Any other claim not expressly granted by this Award is hereby denied.

AWARD

Claim sustained in accordance with the Findings.

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 10th day of June 2021.