

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43849
Docket No. SG-44976
19-3-NRAB-00003-180424**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of B.A. Kirk, for any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a Level S, 30-day record suspension, with a 1-year review period to the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on February 13, 2017. Carrier’s File No. 35-17-0010. General Chairman’s File No. 17-016-BNSF-129-SP. BRS File Case No. 15787-BNSF. NMB Code No. 106.”

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 held the position of Signalman in the Carrier's service. On January 20, 2017, the Claimant was given notice of an investigation in connection with the following charge:

"An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to position the HLCS thumbwheel to indicate the correct track on which your equipment was authorized to occupy on the Cherokee Subdivision January 16, 2017. The date BNSF received first knowledge of this alleged violation is January 17, 2017."

After a formal investigation on February 13, 2017, the Claimant was found in violation of MWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS) and was assessed a 30 Day Record Suspension and a One Year Review Period.

On January 16, 2017, the Claimant was the passenger in a vehicle assigned to work with the SC35 Track Crew. In order to support the track crew, the Claimant and another employee had to set on the tracks in a hy-rail vehicle. The Carrier uses the Hy-Rail Limits Compliance System (HLCS) as a safety overlay to protect employees. The system uses global positioning systems (GPS) to verify the locations of HLCS-equipped vehicles in relation to their authorities. The vehicle was operating under two types of track authority to protect them while supporting the track crew.

The operator of the on-track equipment obtained the proper authority to set on the track, and they began their work supporting the track crew. There is no dispute regarding their protection while under track and time authority. For a certain section of track, Claimant's vehicle also needed a Form B authority from the Employee in Charge (EIC) who had exclusive controlling right on that section of track. Employees must get permission to foul the track within the limits controlled by the EIC.

Initially, the operator and the Claimant operated the vehicle with the HLCS thumbwheel set to the appropriate setting. When they came to the point where the Form B was in effect, the operator and Claimant had a job briefing. They reviewed the instructions on the equipment's decal in light of their training and set the thumbwheel to the "N/A" setting. The next day, General Construction Supervisor Nathan Whiteneck received an email informing him that the BNSF vehicle had been moving on the main track with track authority but without its HLCS unit activated on the Cherokee Subdivision.

The decal in the vehicle provided the following instructions:

“HLCS OPERATING INSTRUCTIONS

Operators of HLCS equipped Hy-Rail Vehicles must follow these procedures:

- 1) During Pre-Authority Briefing, tell the Dispatcher your Truck Number.
- 2) Obtain Authority from the Dispatcher, where required.
- 3) Set-on within Authority Limits.
- 4) Place the Thumb Wheel setting to the track the Hy-Rail Vehicle is occupying:
S = Siding; M = Single Main Track; M5 = Main 5; M4 = Main 4;
M3 = Main 3; M2 = Main 2; M1 = Main 1; N/A = Industry track, Yard Track, or when a Form B is used as authority.
- 5) Active the Steering Wheel Lock, or use the HLCS Activation Switch.
- 6) Verify TRACKING LIGHT is illuminated GREEN for any Main Track.
- 7) Push the test button to verify operation of the VDU.

Both the operator and Claimant were charged with violation of MWOR 6.50.5,

MWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS)

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.”

The Carrier contends that although the Claimant was a passenger in the hy-rail vehicle, he was responsible to comply with MWOR 6.50.5. The Carrier contends that although they had authority to be on the track, the operator and the Claimant improperly set the thumbwheel on the equipment at N/A, making it impossible for other trains, work groups, or equipment to see where the hy-rail vehicle is located. The

Carrier further argues that while the HLCS was inactive, the operator and the Claimant could have exceeded the limits of their authority without realizing it.

The Carrier contends that working under a Form B does not eliminate the requirement to properly use the HLCS. The Carrier contends that the operator and the Claimant were trained that the thumbwheel must be set to M1, not N/A, when occupying a main track. The Carrier contends that the overlapping track authority did not negate their responsibility to follow the rules.

The Carrier contends that the level of discipline was appropriate even if there was no accident because the Claimant and the operator took unsafe actions which put themselves and others at serious risk of injury.

The Organization contends that the Carrier has failed to present substantial evidence that the Claimant was in violation of MWOR 6.50.5. The Organization contends that the Claimant was a passenger in the vehicle and not responsible for the HLCS. Further, the Organization contends that when the vehicle came to the point where Form B protection was used, the thumbwheel was properly positioned according to the training that the Claimant and the operator received regarding the HLCS and the decal in the vehicle.

This Board recognizes that the burden of proof in a disciplinary proceeding rests on the Carrier. Here, although the Claimant admitted that the thumbwheel was set to "N/A," it is not clear that the Claimant was properly instructed to do otherwise. The Claimant and the operator of the hy-rail testified that they were trained to set the thumbwheel to "N/A" when a Form B is used as authority, regardless of the type of track. The Claimant's testimony that he acted in conformity with his rules training was un rebutted and was supported by other employees' statements. Furthermore, the decal that was affixed to the HLCS equipment at the time of this incident certainly could have been read in the same manner. The training on the HLCS provided by the Carrier prior to this incident was confusing at best, and misleading, at worst. In fact, it was revealed during the on-property investigation that additional training regarding the HLCS was provided after this incident occurred to clear up any confusion.

In other words, given the widespread confusion regarding the HLCS thumbwheel setting at the time of the incident herein, the Carrier has failed to show that the Claimant knew and understood that the thumbwheel should have been set differently under these circumstances. It would be improper to permit discipline

against the Claimant to stand where the Carrier had failed to fulfill its obligation to properly train and qualify employees. The discipline must be set aside.

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 4th day of September 2019.