

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44253
Docket No. MW-45679
20-3-NRAB-00003-190649**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. R. Remington, by letter dated June 22, 2018, for alleged violation of MW OR 6.3 Track Occupancy in connection with reports of Hy-rail Limits Compliance System (HLCS) Exceeds Alarm and of Vehicle 24I23 occupying the track outside its authority while assigned as track inspector on May 10, 2018 was on the basis of unproven charges, without just and sufficient cause and excessive (System File C-18-D070-17/10-18-0316 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Remington shall be reinstated to service with seniority and other benefits unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated ‘... for all lost wages, including but not limited to all straight time hours, overtime hours, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, and any and all other benefits to which entitled ***’.”**

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's HLCS system is designed as a safety system to protect employees hy-railing on the tracks. It uses global positioning systems to verify the locations of vehicles in relation to their track authorities. HLCS provides visual and audible warnings to a holder of track authority when (s)he nears the limits of that authority.

On the day in question, HLCS notified the Claimant that he had exceeded his track authority. BNSF found this to be a violation of Maintenance of Way Operating Rule 6.3. Because he was already under a review period for a serious violation, he was dismissed.

The Claimant was granted authority between Eastbound Control Signal CP2890 and Westbound Control Signal at MP 286.0. The GPS report of the Claimant's assigned company vehicle (24123), shows that at approximately 0857 hours on May 10, 2018, the Claimant exceeded the limits of his authority when he passed MP 286.0. The Claimant does not contest the HLS report:

"ALLAN BREDEN: Mr. Remington, in your own words, if any, what is your involvement on the events that took place on May 10th, 2018?

RICHARD REMINGTON: I was traveling eastbound when my Exceeds Alarm went off. I stuck it put the pick-up in reverse and backed up because they always say if your Exceeds Alarm goes off, you are to back up, get it into the get backed up.

ALLEN BREDEN: Mr. Remington, do you believe you exceeded your limits on 5/10/2018?

RICHARD REMINGTON: I do not believe that I exceeded my limits, but I'm not going to contest it because according to the HLCS, I did. TR 15"

The Organization maintains the Carrier violated Rule 40C of the Agreement when it failed to specify the exact charge against the Claimant in its Notice of Investigation dated May 11, 2018. In this regard, Rule 40C requires that the investigation notice “must specify the charges for which investigation is being held. ***” In this case, however, MWOR 6.3 Track Occupancy was not cited in the Carrier’s Notice of Investigation or even referenced during the investigation. In the Organization’s assessment, the Carrier had an obligation to enter a copy of the MWOR 6.3 Track Occupancy into the record during the investigation. It references PLB No. 7564 Award 51, which contains the following explanation:

“The investigation was not fair and impartial regarding MWOR 8.3 Main Track Switches. The rule was not introduced as an exhibit during the investigation. As a result, the Claimant was not put on notice as to the standard against which his conduct was being measured and the Board cannot say whether the Claimant’s behavior on April 8, 2014 met or fell short of the standard. Consequently, the Carrier has not proved with substantial evidence that Rule 8.3 Main Track Switches was violated.”

The Organization insists that the Carrier could not possibly prove that the Claimant violated MWOR 6.3 Track Occupancy when the rule is not even part of the record. Further, the Carrier presented no firsthand knowledge of the events in dispute. Documents were supplied by people in Fort Worth. It concludes the evidence is insufficient.

The Board is persuaded by the rationale in cited precedent holding that the Carrier cannot penalize an employee for a rule which was never introduced during the investigation. We have no ability to assess whether the facts of the case are violative of a rule which is missing from the case. This would require brazen assumptions and the effective post-hearing addition of evidence into the record, an act clearly prohibited by agreement of the parties. We cannot and will not violate such a clear and firm agreement. Whether employee conduct is violative of an applicable rule can only be determined by reading the rule and analyzing employee conduct against the specific terms and standards of that rule. It is impossible to do this without the rule being part of the record on which we base our decision.

Claim sustained. The Claimant shall be offered reinstatement subject to the Carrier’s return to service policies. The Carrier shall remove the discipline from the Claimant’s record, with seniority, vacation and all other rights restored. The Carrier shall make him whole for all time lost as a result of this incident, less any interim earnings from

replacement employment. Lost overtime shall be compensated at the overtime rate. The Claimant's medical insurance shall be retroactively restored, with deduction from the backpay herein granted 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 shall be reimbursed for the premiums. His backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of 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 claims not expressly granted by this Award are hereby denied.

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 23rd day of October 2020.