

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44574
Docket No. MW-45972
22-3-NRAB-00003-200559**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 [standard formal reprimand and a one (1) year review period] imposed upon Mr. J. Johnson by letter dated December 5, 2018 for violation of MWOR 6.50.5 Hi-rail Limits Compliance System (HLCS) was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-19-D040-9/10-19-0130 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Johnson shall have his record cleared of the charges leveled against him in accordance with Rule 40 of the current Agreement.”**

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.

Factual Background:

Claimant J. Johnson holds seniority within the Carrier's Maintenance of Way Department with 24 years of service prior to the incident involved herein. On the dates giving rise to this dispute, he was assigned as a track inspector. The Carrier alleges he failed to activate the HLCS device in Vehicle 27749 while occupying track on September 7, 2018. He was issued a formal reprimand and a one (1) year review period for this alleged violation of Maintenance of Way Operating Rules (MWOR) 6.50.5 HLCS.

Rule 40 states as follows in pertinent part:

RULE 40. INVESTIGATIONS AND APPEALS

A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule. * * *

C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved. *
* *

G. If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension.

Position of Organization:

The Organization contends that the hearing officer failed to preside over the Claimant's investigation in a fair and impartial manner. On the merits, it asserts there were important mitigating circumstances: the Claimant's HLCS had not been working properly in the area for several years, and it malfunctioned on the date in question; the Claimant was required to sit on top of a hill or get to a track location beyond the location in question to get a connection for his Smart Mobile Client and/or computer; the Claimant testified that he had over twenty-five trouble tickets in the past four years for the location in question concerning faulty operations of HLCS; and there was no evidence that the Claimant was in any danger because the thumbwheel was not activated.

The Organization points out that the only knowledge witness Amador had of this alleged incident is what was given to him by someone else. The data that he provided failed to show its origins or whether it coincided with the vehicle in question.

Position of Carrier:

At approximately 1114 hours, the Claimant positioned his vehicle (BNSF vehicle 27749) on the main track at MP 90.669 and proceeded eastbound. However, before proceeding eastbound, the Claimant failed to activate his vehicle's HLCS thumbwheel and position it to indicate that he was occupying the main track. It was not until the Claimant released Track Authority 429-13 at approximately 1227 hours that he realized he did not activate his thumbwheel. HLCS provides visual and audible warnings to the holder of the authority if they are near or outside the limits of their authority. For the system to work properly, the employee must flip the toggle switch in the vehicle to activate the HLCS to "Hy-Rail" mode and position the thumbwheel to indicate the track occupied. If an employee fails to activate HLCS and position the thumbwheel correctly, then the HLCS warning system will not work. In the view of the Carrier, if the warnings do not work, the employees subject themselves and others to unnecessary and unacceptable risk.

The penalty elected by the Carrier was a Standard Reprimand with a one-year period of review. The Carrier notes that this is the lowest form of discipline that the Carrier issues and is in no way excessive.

Analysis:

We do not find that the Claimant was prejudiced by the conduct of the Hearing Officer during the investigation. The objections by the Organization raised do not call for resolution of the claim on procedural grounds.

There can be no doubt here that the Claimant's failure to activate his HLCS thumbwheel with his position marked was a breach of the Carrier's expectations. The Carrier was within its rights to impose reasonable discipline. The Organization properly notes three mitigating circumstances: unreliability of the technology in question, the fact that safety was never jeopardized and the Claimant's extremely long service to the Carrier. Each of these deserves careful consideration.

We do not feel that the reported inaccuracy of the technology is properly considered as a mitigating circumstance in this case. Regardless of whether the HLCS was fully functional that day or any other day, the Carrier was within its rights to expect the employee to use it, and the Organization cannot show that it would necessarily have failed on the particular day in question. HLCS is a warning device, and as such, it has the capacity to issue a critical alarm. The fact that safety was never jeopardized does not mean an offense is less serious. Disaster does not have to occur to prove that safety rules are needed and must be followed. Finally, in order for long service to be considered a mitigating circumstance, such service must demonstrate a history of compliance with the Carrier's rules and policies. In this case, the Claimant received a Level S Record Suspension with a 12-month review period in April of 2014. The offense involved was untimely release of time and track. Then in August of 2017, the Claimant was found to have failed to be alert and attentive while driving, and was issued a Formal Reprimand with a 12-month review period.

Considered as a whole, the Organization's arguments regarding mitigation are not persuasive. We find the Carrier's selected penalty to be reasonable under the circumstances.

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 29th day of October 2021.