

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44667
Docket No. MW-46401
22-3-NRAB-00003-200722**

The Third Division consisted of the regular members and in addition Referee Michael Capone 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:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. B. Hastings, by letter dated March 8, 2019, for violation of MWOR 6.50.5 Hi-Rail Limits Compliance System (HLCS) on January 22, 2019 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-19-D070-4/10-19-0172 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Hastings shall have his record cleared of the charges leveled against him and be reinstated in accordance with Rule 40.”**

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, Track Inspector Barry Hastings, has been employed by the Carrier since April 24, 2006. He was dismissed on March 8, 2019, for violating the Maintenance of Way Operating Rule 6.50.5, Hi-Rail Limits Compliance System (HLCS), on January 22, 2019, following an Investigation held on January 29, 2019. The Carrier alleged that the Claimant violated Rule 6.50.5 when he failed to place the HLCS thumbwheel in the proper position to indicate that his equipment was occupying the main track. It avers that the thumbwheel was improperly set to the non-authority (NA) position.

Before reaching the merits of the dispute, the Board addresses the Organization's procedural objection alleging that the hearing officer failed to ensure the Claimant was afforded a fair and impartial hearing. A review of the record does not support the Organization's allegations.

In discipline cases, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of its discretion. Upon review of all evidence adduced during the on-property investigation, the Board finds that the Carrier has met its burden of proof that the Claimant violated the applicable rules when he failed to properly set the HLCS thumbwheel. Roadmaster Augustine Sintas provides reliable testimony and documentary evidence that the HLCS thumbwheel was not turned on while the Claimant's equipment occupied the main track between 15:23 and 15:46 hours on January 22, 2019. Contrary to the Claimant's assertion that the HLCS had a history of malfunctions, the record confirms there were no documented failures when he was using the equipment. The trouble tickets related to the HLCS submitted by the Claimant after January 22 were found to be unsubstantiated. The Claimant testified that he used the HLCS without incident 11 times on January 22, 2019. However, his testimony does not survive the evidence that he did not properly activate the thumbwheel at the time his equipment occupied the main track.

The Organization's reliance on prior on-property awards finding fault with the HLCS is misplaced. A review of Third Division Award No. 43692 and Public Law Board No. 7048, Award No. 210 reveals distinguishable factors from those

contained in the record here. Both Awards cited corroborating testimony that the HLCS did not activate properly. We find no such evidence in the record here.

A review of the Claimant's disciplinary record confirms that the Carrier has applied a penalty consistent with its disciplinary policy. Nor was it arbitrary or capricious. The Claimant's poor disciplinary record since 2012 consists of seven operational violations and suspensions. In 2016, he committed a HLCS violation resulting in a 30-day suspension. In 2018, as a result of an Investigation Waiver, he accepted a 30-day suspension and "an offer of leniency on a 'last chance' basis". Such language connotes just that – a "last chance" for an employee to rehabilitate himself and demonstrate that he can perform his job safely and in accordance with the Carrier's rules. Here, the record indicates a failure to follow important rules and constitutes sufficient grounds for discipline. Given his recidivism, the Carrier's decision to impose the penalty of dismissal cannot be viewed as an abuse of discretion.

The Board here finds that the Carrier has met its burden of proof with substantial evidence and, therefore, its decision to dismiss the Claimant is upheld.

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 28th day of January 2022.