

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 64, (Case No. 64)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing May 26, 2010, when Claimant, Angel E. Alvarez (6475123), was issued a Level S 30-day Record Suspension with 1 year probation by letter dated August 13, 2010, concerning his release of the wrong track and time authority on the track leaving himself unprotected on May 26, 2010. The Carrier alleged violation of MOWOR 10.3 Track and Time.**
 - 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline, and reinstate with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 26, 2010, continuing forward and/or otherwise made whole."**
- (Carrier File No. 14-10-0168) (Organization File No. 10-13N1-1053.CLM)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On June 2, 2010, Claimant was directed to attend a formal Investigation on June 9, 2010, which was mutually postponed until July 22, 2010, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged Track and Time violation when on May 26,

2010 at 1729 hours on Main Track 2, between the Lomaz and Stronghurst stations, you allegedly released the wrong authority, Track and Time #22-64, allegedly leaving yourself unprotected on Main Track 2 activating an exceeds alarm on the HLCS."

On August 13, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a one year probationary period.

It is the Organization's position that the Carrier did not meet its burden of proof. It asserted that the record indicates that the Claimant who at the time of the incident has 29 plus years service, 24 of which had been as a Track Inspector, did nothing wrong or out of place concerning the allegations. It argued that the testimony of the Claimant verifies that on May 26th, and for several days prior the Claimant as well as other personnel working throughout the area covered by the charges had experienced trouble with their (HLCS) units as they were giving false readings as to the actual location of on-track vehicles indicating they were outside their limits for track protection when they were not, which according to the Organization is what transpired in this instance as well. It further argued the occurrences of false readings had been reported several times which was documented by the "trouble tickets" issued for that area.

The Organization directed the Board to carefully examine Exhibit #4 attached to the Investigation, which is a diagram of the location and the authorities that the Claimant had been granted. It stated that Claimant had been granted two overlapping track authorities. One (22-64) was granted on Main Track 2 between EBCS, Lomax, switch yes, and west crossover, Stronghurst, switch no. Another authority went from WBCS Niota to WBCS Lomax. The track between the EBCS Lomax and WBCS is the overlapping limits and this is the location the Claimant was in when authority (22-64) was released. According to it, because he was inside those overlapping limits that allowed the Claimant to still be under On Track Protection, but when the last authority limits were released, this put the Claimant back within the limits of the previous authority where the HLCS was issuing false trouble alarms which is why he was shown outside his track authority even though he was still protected. It also stated that the Claimant's truck had just recently been installed with a Smart Mobile Client which is a computer generated system whereby an employee can acquire On Track Protection without actually speaking with the Train Dispatcher. Claimant's training consisted of a two hour conference call with other personnel wherein they were instructed in its use. The Organization suggested that because of the insufficient training, it was kind of learn as you go, or on the job self-training and that when the Claimant acquired the third segment of track and was in the process of releasing a track authority he released the portion just acquired. Nonetheless, he was still within the overlapping limits and protected by the second track authority. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that on the date in dispute Claimant was working as a Track Inspector between Lomas and Stronghurst stations assigned to a hyrail vehicle inspecting tracks. It stated that when operating a hyrail on the track employees are required to get secured track warrants through their Dispatcher that allows them to occupy that portion of track they are on safely without the threat of any on-coming trains or any other equipment being on the track at the same time. In addition there is a global positioning device (HLCS) that the Carrier installed in its vehicles to both verify its position as well as provide an additional safety measure to the driver. On May 26th the Dispatcher was notified through the HLCS system that the Claimant was outside of the authority of his track warrant. It further argued that the Claimant admitted that he tried to release track warrant two, but instead released number three on page 31 of the transcript, therefore, he was guilty. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11.

Review of the record substantiates that the Carrier is correct that the Claimant inadvertently released his third track warrant, but that does not answer the question of whether or not he lost his protection. The reason being is that the Organization and Claimant specifically stated multiple times during the Hearing the Claimant did not lose his protected status because he was still within the overlapping limits and protection of the second track authority. The Claimant further stated that the HLCS system in his vehicle and another was not working properly and repeatedly sent false signals that vehicles were outside of their protected area when they were not, and this had been reported to the Dispatcher several times. The diagram that the Carrier introduced at the Investigation showing the three different track warrants does not dispute the Organization's position and the Claimant's rendition of the incident. On page 42 and 43 of the Transcript, the Hearing Officer made it clear that he did not understand if the Claimant's assertions were correct which led to the questioning of its one Carrier Witness as follows:

"Michael Heille: All right, um, I just needed to understand the process Mr. Alvarez explained. I wanted to bring you in to ask a few questions about it to see if you've ever worked with it. I don't have any other questions, but I do have one last question. Is there anybody that we could get that would be a resource that could get that would be a resource that could explain this over via speaker phone if we needed to? Is there somebody available?

Jason Dye: Um,

Angel Alvarez: Before you go on could I ask a question about that?

Michael Heille: Oh, yeah, yeah, I just wanted to ask him one last question. Could we have somebody testify via speaker phone? Would that be all right, Mr. Dye, or do you know somebody, that we could get via speaker phone?

Jason Dye: Um, the only guy I know his, his last name is Bennett, but I can't think of his first name or anything right now.

Michael Heille: Okay, I have no more questions...." (*Underlining Board's emphasis*)

No recess was taken to see if they could find Mr. Bennett and on page 48 of the Transcript the Claimant's representative asked Mr. Dye the following questions:

"Gary Marquart: Just one clarification. If you had two authorities and they overlapped each other. In other words, a segment of those two authorities were overlapping.

Jason Dye: Okay.

Gary Marquart: And you released one of the authorities, but you were within those overlapping limits. Would you still be protected if you were within the overlapping limits?

Jason Dye: Yeah, if you got you're track and time.

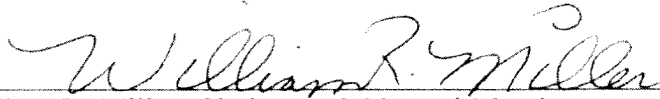
Gary Marquart: You would still be protected.

Jason Dye: Correct." (*Underlining Board's emphasis*)

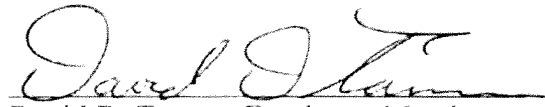
The record is clear that the Claimant's testimony was never refuted that he had overlapping protection and the HLCS system on his vehicle was sending a false signal. Countless Board have repeatedly ruled that un-refuted statements must be considered as being factually correct. Therefore, those fact coupled with Witness Dye's confirmation that if a person had overlapping authority his protection would not cease leads to the inescapable conclusion that the Carrier did not meet its burden of proof. The Board finds and holds that the discipline is rescinded and is to be removed from the Claimant's personnel record and his disciplinary status reverts to that held prior to the instant case. The additional requests set forth in part 2 of the claim do not apply as the Claimant lost no compensation nor had any benefits impaired.

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date: 10-12-11