

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 433 – Award No. 433 – Claimant: Lopez
Carrier File No. 14-12-0231
Organization File No. 10-13N1-1243.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing May 17, 2012, when Claimant, Michael R. Lopez (6428130), was disciplined with a Level S 30-day Record Suspension with a 3 year review period for his alleged failure to utilize HLCS equipment as required while operating Carrier vehicle while assigned as Track Inspector on March 16, 2012. The Carrier alleged violation of MOWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS).
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated, if applicable, of seniority, with all rights unimpaired; the reinstatement of lost vacation time; and for the payment of all wage and expense loss, commencing May 17, 2012, continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Michael R. Lopez, has been employed by the Carrier since 1995. On March 26, 2012, the Carrier notified Claimant that an investigation had been scheduled "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in

connection with (his) alleged failure to utilize HLCS equipment as required while operating vehicle number 22986 on the Chillicothe Subdivision, Chicago Division on 3/16/2012 at approximately 0945 hours while assigned as Track Inspector on Gang TINS1783." The investigation was conducted on April 17, 2012. In a letter dated May 17, 2012, the Carrier found that Claimant had committed the misconduct alleged, in violation of Maintenance of Way Operating rule 6.50.5 Hy-Rail Limits Compliance System (HLCS), and assessed him a Level S 30-day Record Suspension with a three-year review period.

Rule 40 of the parties' Agreement provides, in relevant part:

INVESTIGATIONS AND APPEALS

D. A decision shall be rendered within thirty (30) days following the investigation, and written notice thereof will be given the employee, with copy to local organization's representative. . .

E. The employee and duly authorized representative shall be furnished a copy of the transcript of investigation, including all statements, reports, and information made a matter of record.

The applicable Carrier Maintenance of Way Operating Rule provides, in relevant part:

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.

* * *

During the briefing the EIC must include:

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- Notification of all non-operational HLCS equipped on-track equipment (by HLCS identification number) which will foul or occupy the track using the authority

Required Visual Display Unit (VDU) Test

The equipment operator must test the LED displays and audible tones of the VDU as soon as practical during each work assignment requiring the HLCS to be activated . . .

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If the VDU fails the functional test of LED displays and audible tones or any other problems are experienced with HLCS (e.g. tracking issues, radio problems, system is non-operational, etc.), contact the TSOC . . . to report the system as defective and open a trouble ticket during the work assignment the problem is identified.

Kelly Pendergraft, Carrier Roadmaster for Cicero, Illinois, testified at the hearing that his supervisor, Division Engineer Craig Morehouse, forwarded him an e-mail from the remote audit desk, stating that at approximately 9:45 on March 16, 2012 Claimant had occupied main track pursuant to track and time authority in an HLCS-equipped on track vehicle without utilizing the HLCS. Mr. Pendergraft acknowledged that the territory upon which Claimant was operating was not under his jurisdiction, and Claimant did not report to him. Mr. Morehouse asked Mr. Pendergraft to investigate, which, Mr. Pendergraft testified, is a common practice.

Mr. Pendergraft explained that Carrier Rules require that hy-rail vehicles use the HLCS on subdivisions where it is in effect, which was the case on the Chillicothe Subdivision where Claimant was traveling. He stated that he traveled to Claimant's location and interviewed him, and Claimant told him that on the day at issue he had turned off his HLCS when he was approaching a location where the HLCS had a problem and would show the vehicle out of limits.

Mr. Pendergraft added that if the HLCS is malfunctioning, the employee is required to contact TSOC, the telecom help desk, report the system as defective and open a trouble ticket during the time of the work assignment when the problem is identified. He added that it is not acceptable for an employee to simply turn the system off, as Claimant stated he had, if there is a problem. Mr. Pendergraft testified that Claimant admitted he had not mentioned the problem to his supervisor or called in a trouble ticket.

Mr. Pendergraft took a written statement from Claimant, which was read into the hearing record. The statement recounts that on March 16, 2012 Claimant started at CP46 with authority 31-1 and associated HLCS 22986 with the dispatcher but forgot to turn on the toggle switch after CP California because the HLCS often showed an exceed at that point.

Claimant testified that at the time of the incident he had been on the assignment for approximately three to four weeks. He explained that the HLCS on this vehicle is not fully activated until the toggle switch is turned on, while the systems in the other vehicles

he had operated were activated by a steering wheel lock. He added that the toggle switch controls the tracking on the HLCS. Claimant stated that he placed this vehicle in the shop for unrelated reasons approximately two weeks after he started operating it, and during that time the vehicles he operated were not equipped with HLCS.

Claimant acknowledged that at the time of the incident he knew how to operate the HLCS properly. He admitted that he was familiar with all the test procedures and knew what to do if the system failed to operate properly.

Claimant explained that he had been informed by other track inspectors that the tracking on this HLCS often shows an exceeds at CP California, although he had never personally experienced that problem. He acknowledged that as far as he knew the HLCS was working properly, but it was his practice to just shut off the toggle switch at CP California because he believed there was a problem. He admitted that he had not opened a trouble ticket but, he stated, he assumed the other inspectors had already called it in. He maintained that he had notified his supervisor Mr. Norman on one occasion but did not call the help desk.

Claimant admitted that in order for this HLCS to operate properly the toggle switch must be turned on. On the day of the incident, he further admitted, he never turned it on. He explained that it was his practice to turn it on after he passed CP California if traveling west, and the other way around if traveling east. Claimant stated that it was his understanding that turning off the toggle switch was an acceptable way to work around the problem and avoid the possibility of a false exceeds alarm. Claimant stated that he learned the system was operating properly by leaving it on.

Claimant's personal record shows a formal reprimand issued April 28, 2011 for failure to properly protect, repair and remove track from service, which was directly related to the derailment of three cars.

With respect to the Organization's procedural arguments, the Carrier notes that Rule 40 provides that a decision will be rendered within 30 days of the investigation and asserts that it complied with the rule by mailing it on the 30th day, along with a copy of the official transcript. Further, the Carrier states that there is no merit to the Organization's contention that the Hearing Officer committed a procedural error by stopping the Organization representative during his closing record. Rather, the Carrier asserts, the Hearing Officer simply asked a question to clarify the issue of discipline. This was simply conversation, and nothing occurred which deprived Claimant of his right to a fair and impartial investigation.

On the merits, the Carrier notes that on March 12, 2012, Claimant, who was working as a Track Supervisor, was assigned a hy-rail vehicle to perform his track inspections. The Carrier states that employees operating hy-rail on track are required to obtain secure track warrants through the dispatcher, allowing them to occupy track safely and without the threat of on-coming trains or other equipment occupying track at the same time. The Carrier adds that it has also installed the HLCS global position system

device in vehicles to verify the vehicle's position and provide additional safety for its driver.

The Carrier asserts that Claimant admitted in testimony and his written statement that he did not have the HLCS in his vehicle turned on at the relevant time. Although Claimant maintained that other employees had informed him that the device would incorrectly go off at a certain location, he acknowledged that the only way he knew that the situation had been corrected was to turn the HLCS on. Therefore, the Carrier argues, Claimant essentially admitted the HLCS should have been turned on because it could have been working and, moreover, it was never shown that the HLCS was not working.

The Carrier contends that Claimant was not fully protected while his HLCS was not activated, creating an unacceptable safety risk. While it is fortunate that no one was injured, the Carrier states, the potential was there and the Carrier's determination that Claimant committed a serious rule violation is appropriate. The Carrier concludes that it has proven Claimant's guilt by substantial evidence, and the penalty assessed was appropriate given the seriousness of the violation. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. First, the Organization states that the Carrier failed to deliver the discipline notice and official transcript within 30 days of the investigation, thereby violating Rule 40 of the parties' agreement. The Organization notes that the investigation was conducted on April 17, 2012, and the discipline notice, although dated May 17, 2012, was not received by the Organization until May 21, 2012. The Carrier's failure, the Organization maintains, impaired its ability to appeal the discipline within the required time limits, and requires that the discipline be voided and Claimant made whole. Further, the Organization stresses, the Hearing Officer cut off the Organization representative's closing statement and attempted to dismiss his argument as a waste of the Hearing Officer's time.

On the merits, the Organization points out that Claimant was charged with failure to flip the toggle switch which would have activated his HLCS when he set his vehicle on the tracks. The record, the Organization states, shows that Claimant was new to the territory and alternated between using vehicles equipped with HLCS and those which were not. The Organization adds that the HLCS on the vehicle at issue was different from those he had operated previously, as activation required an additional step. Further, during a 3½ week work period, the day of the incident was the only one during which Claimant utilized an HLCS-equipped vehicle, although he inspected the same section of track every day of that assignment.

The Organization asserts that Carrier Officer Pendergraft, who investigated this incident, was not familiar with the HLCS itself or with the environmental problems with the HLCS in the area where Claimant was working. The Organization adds that there are numerous unasked and unanswered questions in the hearing record concerning past reporting/responses to/from the TSOC and sanctioned and non-sanctioned past practice

“work arounds” by previous Track Inspectors. The Organization maintains that if additional witness testimony would have supported the Carrier’s charges, the Carrier would have produced those witnesses.

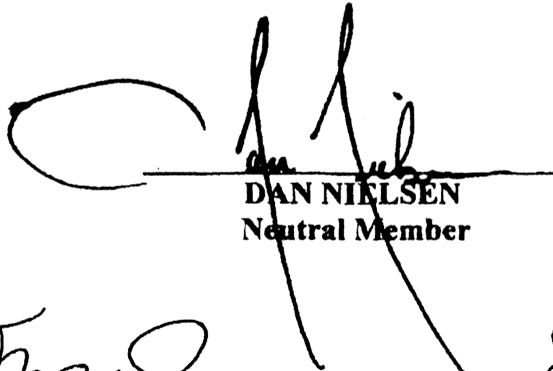
The Organization concludes that the Carrier has failed to meet its burden of proof, and, even if it had, the discipline assessed was excessive in proportion to the asserted offense. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. In particular, the Organization has not demonstrated that Rule 40, which requires only that the Carrier render a disciplinary decision within 30 days and provide notice thereof to the employee and the Organization, has been interpreted to mandate that the decision be physically received within 30 days. Requirements like the one at issue are generally satisfied so long as the document is prepared and sent within 30 days, which is what occurred here, and the Organization has not provided support for its contrary decision. In addition, our review of the record demonstrates that the Organization representative gave an extensive closing argument. While the Hearing Officer must take care not to interfere in the presentation of the Organization’s case, on this specific record there is nothing to demonstrate that the Hearing Officer’s attempt to move matters to a conclusion deprived Claimant of his right to a fair investigation.

On the merits, this case presents a very straightforward situation. Claimant admitted that he was fully familiar with the operation of the HLCS on his vehicle, despite the Organization’s contrary arguments. He also admitted that on the day at issue he failed to turn it on, to avoid a supposed situation where he could encounter a false exceeds alarm, even though he had not experienced that problem and when he turned the HLCS on it worked properly. He also admitted that he failed to notify the appropriate Carrier authorities of the purported problem with his HLCS, offering the explanation that he assumed other employees had done so. All of Claimant’s actions are clear violations of Carrier Rules concerning equipment designed to ensure the safety of Carrier employees while operating on track. None of his explanations are particularly sensible. Contrary to the Organization’s argument that we should find the evidence wanting because there might be other evidence that isn’t in the record, we find the record as it stands sufficient and persuasive. Claimant’s guilt has been proven by substantial evidence. With respect to the penalty, Claimant committed a serious violation, deactivating a safety overlay. The discipline was assessed in accordance with the Carrier’s PEPA and we cannot say that it represents an unfair, arbitrary or discriminatory exercise of the Carrier’s discretion.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this *15th* day of *October*, 2013.