

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 454 – Award No. 454 – Lopez
Carrier File No. 14-13-0335
Organization File No. 10-SF13N1-1373

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 4, 2013, when Claimant, Michael R. Lopez (6428130), was dismissed for his alleged failure to protect employees and equipment while acting as the Employee in Charge when he released the authority he was occupying while using Smart Mobile Client and he deactivated the HLCS while occupying the main track on June 4, 2013, at 7:16 p.m. on Main Two between Romeo and CP176 on the Chillicothe Subdivision. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 6.50.5 Hy-rail Limits Compliance System and MOWOR 10.3 Track and Time.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from Claimant's record this dismissal and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss, including overtime and vacation, commencing June 4, 2013, 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, M.R. Lopez, had been employed by the Carrier since 1995. On June 7, 2013, the Carrier notified Claimant to attend an investigation to ascertain the facts and

determine his responsibility, if any, in connection with his alleged failure to properly protect employees and equipment while acting as the Employee in Charge when he released the authority he was occupying while using Smart Mobile Client and allegedly deactivated the HLCS while occupying main track on June 4, 2013 between Romeo and CP176 on the Chillicothe Subdivision. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, in violation of Maintenance of Way Operating Rules MOWOR 6.50.5 Hy-Rail Limits Compliance System and 10.3 Track and Time, and dismissed him from employment.

The applicable MOWOR provide, 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.

10.3 Track and Time

The control operator may authorize men or equipment to occupy a track or tracks within specified limits for a certain time period. Authority must include track designation, track limits, and time limit. People or equipment may use the track in either direction within the specified limits, until the limits are reported clear.

Carrier Chicago Corwith Roadmaster Nicholas Norman testified at the investigation that he supervised Claimant, who worked as a track inspector on the main line. On the day of the incident, June 4, 2013, Claimant was working as the employee in charge, providing protection on the main line for a surfacing gang with two large on-track machines, a larger piece of machinery known as a VAC-train, with two operators, and a Brandt Road Railer, a large semi-truck.

Mr. Norman stated that at about 7:20 p.m., he received a call from the Chief Dispatcher, David Baldwin, who notified him that Claimant had released his track and time authority incorrectly, leaving himself and other employees and equipment unprotected. Mr. Norman added that Claimant had been using the Smart Mobile Client (SMC) to obtain and release authority. He explained that the SMC shows each track protection authority separately, and the employee can click and choose which to release.

The record includes an e-mail from the dispatcher to Mr. Norman, indicating that Claimant had released an authority and, when contacted by the dispatcher, told him that he had released the wrong time and track. The dispatcher issued another authority to

protect them. The dispatcher stated that the "short version" of the situation was that Claimant had released the authority from under himself. The record also includes the transcript of a conversation between Claimant and the dispatcher, in which Claimant informs the dispatcher he was supposed to release a different authority, and wondered what had happened because he was receiving alerts on his computer.

Claimant's vehicle was also equipped with a Hy-Rail Limits Compliance System (HLCS), a GPS-based technology, which has a visual display unit and lights and buzzers that will activate if the vehicle travels outside its authority. A thumbwheel indicator shows whether the vehicle is occupying track, has been switched to inactive, or is turned off altogether. As part of his investigation, Mr. Norman requested the Hy-Rail Limits Compliance System (HLCS) information from the vehicles which were on the track at the time of the incident. Mr. Norman entered into evidence a printout of the HLCS data, and explained that the data from Claimant's vehicle showed that the system had been turned off at approximately 1916 hours, 50 seconds.

Following the incident, Mr. Norman traveled to the depot and interviewed Claimant, who told him he had been in a hurry to release one piece of authority because the surfacing gang was getting close, and he released the wrong authority. Mr. Norman added that Claimant told him he knew he had made a mistake when he received a call from the Brandt vehicle telling him they had an exceeds alarm. Mr. Norman stated that Claimant told him he then requested additional authority and called the dispatcher to tell him what had happened, although he did not think to call Mr. Norman.

Claimant acknowledged at the investigation that he made a mistake and had released the wrong authority. He also admitted that he had deactivated his HLCS unit while occupying the main track. He stated that he had disengaged the HLCS so that he could concentrate on communicating with the dispatcher to obtain additional authority.

The Carrier's Policy for Employee Performance Accountability (PEPA), provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules. The PEPA provides that a second serious incident within a 36-month review period will subject the employee to dismissal. Claimant's personal record shows a Level S 30-day record suspension with a 36-month probation period, issued May 17, 2012, for failure to utilize HLCS equipment as required and formal reprimands in 2011 and 2013.

The Carrier first asserts that Claimant received a fair and impartial investigation and the Organization provided nothing to show he suffered any prejudice. On the merits, the Carrier asserts that the testimony of both Roadmaster Norman and Claimant demonstrates that Claimant released his authority, using his vehicle's SMC, and deactivated the HLCS in his truck. The Carrier explains that the SMC and HLCS are two different systems which perform different functions. The SMC is a system for obtaining and releasing track authority without the need for the employee to contact the dispatcher,

although the employee can always do so if verbal communication is necessary. The HLCS is designed as a safety overlay to protect employees, as it utilizes global positioning systems to verify the location of an HLCS-equipped vehicle relative to its authority. The HLCS is designed to give visual and audible warnings to an authority-holder if he travels near or outside his authority limits.

The record, the Carrier stresses, clearly shows Claimant's violation relative to the use of these systems. At the relevant time, Claimant had more than one authority, and he released the wrong one, which he learned when an on-track vehicle within that authority contacted him to inform him of an HLCS exceeds alarm. Claimant admitted that he released the wrong authority, and also that he disengaged the HLCS in his vehicle, disproving that Organization's contention that the HLCS was active and in use the entire time. These admissions, the Carrier states, clearly satisfy its burden of proving Claimant's guilt by substantial evidence.

With respect to the penalty assessed, the Carrier urges that dismissal was warranted given the seriousness of Claimant's violation and his personal record. The Carrier notes that this was Claimant's second Level S violation within a 36-month review period and, under its PEPA, subjects him to dismissal. For all of these reasons, the Carrier urges that the claim be denied.

The Organization concedes that Claimant inadvertently released his authority to occupy track at the relevant time. However, the Organization states, the Carrier ignores the fact that upon realizing his mistake, Claimant immediately moved to secure protection for himself and the other work groups who had been utilizing the authority.

The Organization denies the Carrier's contention that Claimant deactivated the HLCS. Rather, when the loud alarm sounded, Claimant moved the thumbwheel to "N/A," to silence the alarm so he could concentrate. As soon as he obtained new authority, the Organization contends, he set the thumbwheel to "M2," reflecting his position on the track. The Organization adds that the dispatcher was fully aware that Claimant and the workgroups were on the track and they were never in harm's way. The Organization also disputes the Carrier's contention that Claimant attempted to hide the incident from his supervisor; rather, his priority was simply to obtain the needed protection. The Organization also asserts that Mr. Norman could not interpret the evidence he entered into the record, and that the SMC is still under development so that situations like the one at issue cannot occur.

The Organization concludes that the Carrier has failed to prove its charges against Claimant, and, even if it had, the discipline assessed is extreme, unwarranted and unjustified. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. The rule at issue is a serious one, intended to safeguard the safety of employees working on tracks by ensuring that they do not occupy track without authority. While Claimant's releasing the wrong authority may have been inadvertent, that will usually be the case. The point is that he

did release the wrong authority, as he admitted, and this admission is sufficient to satisfy the Carrier's burden of proof. Contrary to the Organization's contention, Claimant also admitted that he turned off his HLCS, and this admission also satisfies the Carrier's burden of proof concerning that allegation.

The rules Claimant violated are serious ones, literally intended to protect the lives of employees working on the track. Further, as the Carrier points out, this was Claimant's second serious violation within a review period, the other also involving a failure to properly utilize the HLCS. Claimant's record, under the PEPA, subjects him to dismissal. Given that record and the potential danger his violations here entailed, we cannot say that the Carrier's decision to impose that penalty represents an unfair or arbitrary exercise of its discretion to determine penalties.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member


JOY MENENDEZ
Carrier Member


DAVID SCOVILLE
Organization Member

Dated this 31st day of October, 2014.