

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 203, (Case No. 203)**

**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 R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing February 19, 2016, when Claimant, Jacob Washbourne (0239871), was dismissed for failure to establish protection for men and equipment prior to fouling track at or near MP 362.2 on Cherokee Subdivision and dishonesty for his statement given to his supervisor regarding the incident. The Carrier alleged violation of Maintenance of Way Operating Rules 6.3 – Track Occupancy and 1.6 – Conduct.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant’s record this dismissal and he be reinstated, if applicable, with seniority, health insurance benefits, vacation, all rights unimpaired and pay for all wage loss including overtime commencing February 19, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-16-0127) (Organization File No. 1251-SL13N1-1612)**

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.

The facts indicate that on January 14, 2016, Claimant was assigned to the position of Track Supervisor. On the aforementioned date, Manager Operating Practices, Mr. Eric Powell while performing remote audits of track authorities using traffic management system tools found an exception for the Claimant that he reported to Roadmaster Bruce for additional research. He provided a copy of the Claimant's Track Authority and HLCS data related to the exception with the email he sent to Roadmaster Bruce. That data showed that the Claimant obtained track authority between West Todd SW-N and WSS White Oak, SW-N on the main track at 6:19 a.m. It also showed that at 6:45 a.m. the Claimant's HLCS unit alarmed indicating he might have exceeded his authority by occupying the siding at East Aires. Based upon the aforementioned information the Claimant was directed to attend a formal Investigation on January 27, 2016, which was mutually changed to January 25, 2016, 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 failure to establish protection for men and equipment prior to fouling track at or near MP 362.2 Cherokee Subdivision on January 14, 2016 and alleged dishonesty regarding your statement on January 15, 2016 to Roadmaster Katie Bruce about the incident.

This investigation will determine possible violation of MWOR 6.3 Track Occupancy and MWOR 1.6 Conduct."

On February 19, 2016, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the position of the Organization that the Claimant was denied a "fair and impartial" Investigation because the Carrier failed to produce Mr. Eric Powell, Remote Audit Desk Officer, for the Hearing so that he could be questioned by the Organization as he was the author of documentary evidence used against the Claimant, thus denying the Claimant the opportunity to face his accuser. The Organization further argued that the Hearing Officer was not an impartial trier of facts because it was evident that he had full prior knowledge of all exhibits and continually led and directed the Carrier witness. Additionally, it asserted that the Hearing Officer crossed the line of impartiality when he offered testimony as a witness and then acted as the judge. Simply stated the Organization concluded that the Hearing Officer had inappropriately held multiple roles of prosecutor, witness and judge. The Organization also suggested that the Carrier improperly removed the Claimant from service prior to the Investigation without pay thus having disciplined him prior to the Investigation. The Organization argued that because of the

aforementioned procedural errors the discipline should be removed without reviewing the merits.

Turning to the merits, it asserted the Carrier failed to meet its burden of proof that the Claimant exceeded his track and time limits. The Organization argued that Carrier introduced information from a GPS/HLCS system that had not been tested by qualified persons with BNSF Telecom to assure its accuracy which was installed in a vehicle that had a defective battery that was not tested by a qualified mechanic to assure the electrical system was working properly, thus, according to the Organization the reliability of that information and its conclusions cannot be trusted. It further argued that the record shows that the Claimant was forthright when he told his superior that when his vehicle came to an abrupt stop a clipboard and cup fell from the Center Console of the vehicle hitting the thumbwheel on the HLCS unit flipping it from Main Line to Siding causing the inaccurate reading that suggested that the Claimant had exceeded his track limits. The Organization pointed out that a subsequent field test/reenactment of the incident substantiated the Claimant's recollection of the incident that a clipboard and cup falling hit the thumbwheel from Main Line to Siding was possible. It concluded there was no basis for discipline and requested that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that there were no procedural errors on the part of the Hearing Officer during the holding of the Claimant's formal Investigation. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that data showed that the Claimant had exceeded his track authority by occupying the siding at East Aires. The Carrier stated that it did a reenactment of the Claimant's version of the incident to test whether a clipboard and cup could hit the thumbwheel HLCS unit and change it from Main Line to Siding. The Carrier acknowledged that the test showed that it was possible for clipboard/cup hitting the thumbwheel HLCS unit and change it from Main Line to Siding, however, it pointed out that it took 37 separate intentional attempts before a clip board flipped the thumbwheel. It argued that if the thumbwheel was changed in the manner the Claimant stated then why didn't the Claimant flip the switch back to Main Line when the alarm first went off? Instead it stated the evidence proves that the Claimant's vehicle continued to travel an additional 660 feet following the initial alarm that the limits of his authority had been exceeded.

The Carrier further argued that if the vehicle came to a sudden stop at the switch as the Claimant argued, then it could not have continued to move another 660 feet alarming two more times before the Claimant turned the unit off and returned to his authorized limits, therefore, it reasoned that the Claimant was dishonest when questioned by Roadmaster Bruce on January 15,

2016, concerning exceeding the limits of his authority on January 14th as well as failed to have proper authority to occupy track. Lastly, it argued that after having proven its allegations against the Claimant it appropriately disciplined the Claimant. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. The Organization first argued that it was denied the opportunity to question Mr. Eric Powell, the author of evidence that was used against the Claimant denying the Claimant the opportunity to face his accuser. The Board is not persuaded by that argument because examination of the record indicates Mr. Powell was not the "accuser", but instead audited Carrier records and radio recordings then reported his findings to the appropriate field Officers for their handling after which Carrier Officers, in this instance Roadmaster Bruce had the duty to research the allegation that the Claimant might have exceeded his authority on January 14, 2015.

The Organization further argued that the Claimant was pre-judged to be guilty of the charges which was evident by the fact that he was removed from service two days without pay prior to the Investigation. That argument is not persuasive because Carrier Officer Bruce testified on pages 60 and 61 of the transcript, without rebuttal, that Claimant was not removed from service, but was held out for safety reasons because he had multiple Investigations to attend and he was paid as if he was working.

The Organization next asserted that the Hearing Officer was not impartial because it was evident he had prior knowledge of exhibits to be introduced by the Carrier Witness and led that witness in their testimony and then acted as a Witness. Contrary to the Organization's assertions it is not improper for a Hearing Officer to have some basic knowledge about the incident covered by the Notice of Investigation. Review of the transcript reveals that the Hearing Officer asked questions that were relevant to the Notice of Charges and asked follow-up questions to obtain clarification. The next assertion that the Hearing Officer acted as a Witness has been found by this Board to be a serious procedural violation especially when the Hearing Officer subsequently renders discipline (See Awards 30, 55 and 58) wherein he judges his own credibility. The Organization argued that the Hearing Officer testified on pages 49 and 50 of the transcript. Review of the transcript shows that the Organization Representative and Hearing Officer discussed telemetry drifting and both offered their respective expertise on the subject. That discussion did not rise to the level of the Hearing Officer acting as a witness against the Claimant.

The Organization also argued that it was improper for the Hearing Officer to render the discipline. In this industry it is not unusual for Hearing Officers to render discipline and in fact in many cases where the Hearing Officer did not issue the discipline the Organization has often argued that the Hearing Officer should have rendered the discipline because he was at the Investigation and could best measure the credibility of witnesses as opposed to a person that was not at the Hearing. This Board has determined in the past that the best measurement is to review the handling of each Investigation individually to determine its fairness and the Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was afforded his "due process" Agreement rights. The Board also reviewed the Organization's argument that retaliation might have been a hidden reason charges were placed against the Claimant. The Board found no merit to that argument. The case will be resolved on its merits.

The question at issue is whether or not on January 14, 2016, the Claimant exceeded his track limits at or near MP 362.2 Cherokee Subdivision and was subsequently dishonest on January 15, 2016, about the incident in his statement to Roadmaster Bruce. The Carrier argued that the data showed that the Claimant obtained track authority between West Todd SW-N and WSS White Oak, SW-N on the Main Track at 6:19 a.m. and it further showed that at approximately 6:45 a.m., the Claimant's HLCS unit alarmed indicating he had exceeded his track authority by occupying the siding at East Aires. The Claimant asserted that he did not exceed his track authority and there was a false reading of the HLCS unit that was caused because the Claimant came to an abrupt stop, causing his cup and/or clipboard to fall from the center console and hit the thumbwheel on the HLCS unit flipping it from Main Line to Siding.

The parties agree that on January 14, 2016, Claimant was traversing through the turnout towards the siding and either he stopped at the edge of his Track Authority or he exceeded those limits. In an effort to determine what transpired on January 14th the Claimant and Roadmaster Bruce conducted a field trial of the HLCS unit on the vehicle the Claimant was driving on January 18, 2016. That test confirmed that the GPS data was accurate and did correctly indicate when the vehicle was on a siding or the main line. That test further confirmed that it was possible for an object such as a cup or clipboard to fall from the center console and hit the thumbwheel on the HLCS unit and cause it to change from Main Line to Siding.

It should be noted that during the aforementioned test it took 37 separate intentional attempts before a clip board flipped the thumbwheel from Main Line to Siding thus the Carrier argued that it was unlikely that it happened whereas the Organization argued that it could have just as easily happened on the first attempt as the Claimant explained it happened on January 14, 2016.

The Carrier next argued that if the clipboard did hit the thumbwheel, why didn't the Claimant simply flip the switch back to Main when the alarm went off? The Claimant was questioned on that issue on pages 54 of the transcript and he explained that he did not initially see the alarm and that he had stepped out of the truck before the East Aires Switch while still within his designated track authority when the Dispatcher called him and advised that the alarm had gone off in the Claimant's truck. Claimant testified that he explained to the Dispatcher the alarm was the result of a thumbwheel error.

At first blush Claimant's explanation for not hearing the alarm does not sound unreasonable, but review of the transcript (See Page 23) reveals that the HLCS unit has a red light that comes on and an alarm that beeps if a vehicle exceeds its limits. That alarm engages very quickly so as to alert the occupant of a vehicle of potential danger. If the HLCS unit had been flipped as described by the Claimant it is difficult to understand why Claimant did not notice the red light or hear the beeping of the alarm as it apparent from the testimony that the alarm begins to alert the driver of the vehicle within moments of either a thumbwheel error or if a vehicle exceeds its limits. Roadmaster Bruce testified without rebuttal that the first alarm was at "06:45:14", the second alarm was at "0645:28" and the third was at "0645:36". Based upon the time frequencies of those alerts it seems improbable that the clipboard and/or cup could have hit the HLCS unit and flip the switch from Main Line to Siding and the Claimant could have exited his vehicle before the alarm was engaged, despite the fact that the Claimant testified on page 54 of the transcript that he had already exited the truck before the alarm went off.

Regarding the alarm alerts of January 14th in the Claimant's vehicle Roadmaster Bruce confirmed the aforementioned "times" on page 20 of the transcript when she was questioned as follows:

"Brad Holloway: So you, you investigated this, and it says the first alarm was at what time?"

Katie Bruce: The initial alarm was at, uh, 0645.

Brad Holloway: And that's, and where was he at that time, or where was the truck?

Katie Bruce: At that time, he was showing into the siding, uh, on the siding to the west or the eastbound control signal at East Aires.

Brad Holloway: Okay. And then so was the truck moving or stationary?

Katie Bruce: The vehicle was moving.

Brad Holloway: All right. The, the second alarm was at what time?

Katie Bruce: The second, uh, exceed was at 06:45:28. The first one was at 06:45:14.

Brad Holloway: And was the truck still moving?

Katie Bruce: Yes.

Brad Holloway: Okay. And then the third alarm?

Katie Bruce: The third alarm, uh, occurred at 06:45:36. And this was the furthest west exceed alarm that occurred on the HLCS.

Brad Holloway: And how many feet into the siding was that?

Katie Bruce: Approximately 660 feet.”

Roadmaster Bruce continued to testify on page 21 that after Claimant’s vehicle was put in reverse to exit the siding the audible alarm and red light stopped.

The Organization argued that the HLCS GPS data could not differentiate between Main Line and Siding. However, that was contrary to the results of the test performed by the Claimant and Roadmaster Bruce January 18, 2016, which confirmed that the GPS data was accurate and did correctly indicate when the vehicle was on a siding instead of on main line. On page 58 of the transcript the Claimant testified he took no exception on January 14th to the HLCS unit that would warrant a “trouble ticket” being turned in nor did he ever offer any testimony during the Investigation that field test and results of the January 18th were in error. It is clear that the Carrier met its burden of proof that the Claimant was guilty as charge as exceeded his Track Authority on January 14, 2016, and his statement on January 15, 2016, as to what transpired on January 14th to Roadmaster Bruce is not consistent with the facts and is best described as being self-serving.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately three years of service with a clear disciplinary record. The exceeding of Track Authority was a Serious Level S violation due to the potential risk to the safety of employees and/or the public and in this instance the Claimant compounded that violation when he was not forthright to Roadmaster Bruce. The Carrier’s Policy for Employee Performance Accountability (PEPA) identifies dishonesty as the type of violation that is a stand-alone dismissible offense. The Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to PEPA, nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman and Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 1/5/18