

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 218, (Case No. 218)**

**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 October 13, 2016, when Claimant, Shawn Tong (0057430), was dismissed for occupying Main Track without proper Authority and failure to activate Hy-Rail Limits Compliance System (HLCS) prior to occupying track. The Carrier alleged violation of Maintenance of Way Operating Rules 6.3.1 – Main Track Authorization and 6.50.5 – Hy-Rail Limits Compliance System (HLCS).**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate Claimant, remove from the Claimant’s record this discipline with all rights unimpaired and pay for all wage loss including overtime commencing September 27, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-16-0472) (Organization File No. 2404-SL13N1-16146)**

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 August 25, 2016, the Claimant was working as Foreman. Claimant's crew was assigned to replace a section of rail. Claimant's Roadmaster, Mr. Allen Klingenberg testified on page 2 of the transcript that he did not have an opportunity to debrief with the Claimant, so he checked the Carrier's CTC to make sure the Claimant and his crew got their track and time for the day and he didn't see where they had proper authority to handle the defect. The Roadmaster then went out to the location to perform audit and according to him he believed that the crew was not within their limits for the day and because of that allegation the Claimant was directed to attend a formal Investigation on September 9, 2016, which was mutually postponed until September 27, 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 occupying Main Track without proper authority and failure to activate Hy-Rail Limits Compliance System (HLCS) prior to occupying track at East Cassoday, at approximately 1042 hours on August 25, 2016.

This investigation will determine possible violation of MWOR 6.3.1 Main Track Authorization and MWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS).

On October 13, 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 Claimant was prejudged which was shown by the fact that when the Claimant requested a Waiver it was denied by the Carrier. It further argued that the Investigation process was patently unfair and the Hearing Officer was too knowledgeable of Claimant's alleged violations and led witnesses to have been impartial. Organization asked that because of the aforementioned procedural errors the discipline should be removed without reviewing the merits.

Turning to the merits, it asserted the Carrier did not meet its burden of proof that the Claimant occupied the Main Track without proper authority and failed to activate the HLCS. The Organization argued that testimony and various exhibits showed that the Claimant used a Carrier approved form of protection which was use of a Lookout and that method of protection was verified as being proper in accordance with Transcript Exhibits 11A, 11B and 11C. Furthermore, 1) the Claimant had the prescribed form completed and in his possession, 2) had access to a working radio, 3) had designated a place of safety, 4) had more than enough sight distance prescribed by the form, 5) was not involved in the work and only performed the task of looking out. It asserted that when using this method of protection the use of HLCS was not required and was not activated and used. In addition it argued if a different method had been used the

responsibility to activate the HLCS did not apply to the Claimant that was the assigned Foreman, but instead to the Truck Driver. 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 it was not required to offer a Waiver. It explained an employee signing a Waiver is admitting guilt, and under the circumstances of this offense that would have been a Third Level S subjecting Claimant to dismissal which obviously neither the Claimant or Organization would have been agreeable to. It further argued that because the Hearing Officer was aware of the charges against the Claimant as well as Rules was not evidence he was either unfair or partial or that the Claimant was adversely affected. The Carrier asserted that the Hearing Officer simply prepared for the Investigation, familiarizing himself with the charges and the Rules cited so that he could ask pertinent questions. Regarding the Organization's argument that Investigations are unfair the Carrier stated that Investigations have been handled in the same manner for decades and arbitration has never ruled such handling was improper. It requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier asserted the testimony and evidence shows that Claimant violated multiple Rules when he occupied Main Track without proper authority and failed to activate HLCS prior to occupying track at East Cassoday on August 25, 2016, which the Claimant admitted to in a written statement taken shortly after the incident and during his testimony at the Investigation.

The Carrier argued there is no merit to the Organization's argument that because the Claimant used a Lookout, himself, for protection he was not obligated to comply with the Rules set forth in the Notice of Investigation. It argued the Claimant and other employees were removing a section of rail and replacing it and while doing that work they had to be protected with their HLCS turned on which did not happen in this instance. It further argued there is no merit to the Organization's assertion that only the Truck Driver was responsible to ensure the HLCS was turned on. According to it, both employees were in the truck and both were responsible for ensuring their safety and ensuring the HLCS was turned on. Claimant, as the Foreman, was the Employee in Charge (EIC) and had the utmost responsibility to ensure their safety. It closed by stating that after having proven its charges it appropriately disciplined the Claimant and it asked 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 the Carrier prejudged the Claimant as being guilty which was shown by the fact it denied the Claimant's request for a Waiver. Carrier's decision not to grant a Waiver did not show prejudgment and if

granted would have made the Claimant subject to dismissal without the Claimant being able to offer a defense. The Organization's argument that the Hearing Officer had too much pre-Hearing knowledge of the incident to be impartial and improperly led witnesses is not persuasive as the record simply shows that the Hearing Officer was prepared. The last argument offered by the Organization that the Investigation process is not fair, lacks substance because the Investigation process was developed by the parties and is covered by Agreement Rules. If either party is unhappy with that process which has been in existence for decades the negotiating table is the place to make changes. 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 case will be resolved on its merits.

The Claimant's primary defense was that he and his crew were properly protected by the use of a Lookout in accordance with Rule 6.3.3 Visual Detection of Trains. Organization argued that the Rules the Claimant allegedly broke did not apply whereas the Carrier argued that the Lookout defense was not pertinent to the subject case because this was not minor work and it affected train or engine movement. The Organization relied upon Exhibits 11A, 11B and 11C to show that the Claimant and his crew were properly protected when it used a Lookout. Review of Exhibit 11A identifies it as a form called Statement of On-Track Safety (which Claimant had filled out on the date of the incident). Exhibits 11B and 11C explains the responsibilities and the Conditions for Use for Lone Workers, Lookouts and Work Groups. There is a common theme that applies to each of the aforementioned employees as to when the use of a Lookout is proper and it is the following: The use of a Lookout is proper when doing minor work that does not affect the movement of trains or engines.

On pages 68 and 69 of the transcript the Claimant was questioned as follows:

"Andrew Molgren: Would changing a rail out, would that consist of minor work or routine inspection?"

Shawn Tong: No. (Underlining Board's emphasis)

The Claimant confirmed that the work he and his crew did on August 25th was not minor work as it affected the movement of trains and/or engines. Claimant further confirmed on page 59 that his work group was working outside of his proper authority while fouling the track. It was also clarified that the boom is a part of the truck, and thus, per Rule 6.50.5 HLCS should have been activated and it was not. As the Foreman and Employee in Charge (EIC) Claimant had a shared responsibility with the Truck Driver regarding the HLCS. It is clear that the Carrier met its burden of proof that the Claimant was guilty as charged.

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The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately five years of service. The subject incident was of a serious nature and was the Claimant's third Serious Level S discipline event within his 36 month review period. The two prior Serious Level S infractions were for occupying track without authority and fouling main line track without authority. The Carrier's decision to dismiss the Claimant in this instance was permissible in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). 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