

**PUBLIC LAW BOARD NO. 7564**

Case No. 52/Award No. 52  
Carrier File No. 10-14-0190  
Organization File No. C-14-D040-11  
Claimant: Carl Montgomery

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BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES DIVISION )  
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**Statement of Claim:**

1. The Carrier violated the Agreement on February 27, 2014 when it assessed Claimant, Carl Montgomery, a Level S 30-day Record Suspension, with a 1-year review period, for alleged violation of MWOR 6.50.5 Hy-Rail Limit Compliance System, for failure to associate and activate HLCS with Time and Track Authority 35-19 near MP 374.4 on the Marceline Subdivision between EBCS Bosworth and WBCS Bosworth with the boom section of the truck in the foul of Main One Track while assigned as a Foreman at approximately 1439 CST on January 8<sup>th</sup>, 2014, as observed by the BNSF System Engineering Operations Test Team.

As a consequence of the violation referred to in Part (1), Claimant's record should "... be overturned, he be compensated for any time lost and that this discipline be removed from and no mention of this be placed on his personnel record."

**Facts:**

By letter dated January 10, 2014 the Claimant was informed of an investigation to be held on January 21, 2014 "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to associate and activate HLCS with Time and Track Authority 35-19 near MP 374.4 on the Marceline Subdivision between EBCS Bosworth and WBCS Bosworth with the boom section of the truck in the foul of Main One Track while assigned as a Foreman at approximately 1439 CST on January 8<sup>th</sup>, 2014, as observed by the BNSF System Engineering Operations Test Team." By mutual agreement, on January 15, 2014 the investigation was postponed until February 10, 2014.

**Carrier Position:**

The Conducting Officer provided a fair and impartial investigation, with no procedural lapses that prejudiced the Claimant. That the Claimant was not paid for time spent at the investigation did not mean that he was prepunished. The Agreement does not mandate discovery; therefore the Carrier was not required to provide the names of witnesses and copies of exhibits prior to the investigation. The Notice of Investigation met Rule 40 requirements for information conveyed. The Carrier was not required to have the Conducting Officer also issue the discipline. Thus Division Engineer Allen, who issued the discipline was able to make a fair and impartial judgement.

There is substantial evidence that MWOR 6.50.5 Hy-Rail Limit Compliance System was violated because the Claimant admitted that he was unaware of the rule and that he did not use HCLS. Discipline was in accordance with the Policy for Employee Performance Accountability (PEPA), which has remained unchanged for years. The original 36-month review period was reduced to 12 months after reconsideration. The Board's function is to interpret the rule and not to substitute its judgment for that of the Carrier unless there has been an abuse of discretion. The Board must not provide leniency because that is the province of the Carrier. However, if the Claim is sustained, only the remedies contained in Rule 40G should be provided.

#### **Organization Position:**

The Claimant was not afforded a fair and impartial investigation because the Conducting Officer did not issue discipline, the Claimant was pre-punished by not being paid to attend the investigation, the Conducting Officer did not rule on the Organization's objections and the Conducting Officer entered evidence, predetermined the outcome and was only interested in proving the charges. Furthermore, the Claimant's representative received no answer to his e-mail to Division Engineer Allen asking for a list of witnesses and all information to be used in the upcoming investigation. This, too, violated the "fair and impartial" language of Rule 40.

Because his truck was not on the track, the Claimant was not aware that HLCS should have been activated and associated with Time and Track. However, this was not evidence of a marked disregard for rules; thus discipline was not warranted. The audit team could not be contacted during the investigation, indicating that the alleged failure was not that serious. Furthermore, the audit team could have used the Approaching Others technique with the Claimant and corrected the problem rather than simply initiating the disciplinary process. Moreover, the Claimant had never received sufficient training about the use of the HLCS unit.

#### **Findings:**

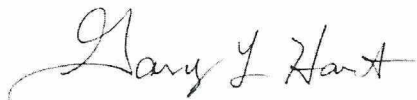
The Organization's procedural contentions, none of which are new with this case, are once again to no avail. There is on-property precedent stating that the duties of the Conducting Officer and the disciplinarian do not have to reside in the same individual. While the Board has repeatedly written that the better practice is to assign both responsibilities to the same individual, particularly when a case may turn on a credibility determination, which this case does not, there is no mandate in the Agreement that it must be done that way. The Carrier's policy of not paying the Claimant for time spent at the investigation does not indicate pre-punishment. Nor does the

Agreement contain a discovery position that would give the Organization pre-hearing access to a witness list and proposed exhibits. In essence, the Conducting Officer ruled on the Organization's objections, although not explicitly. The objections were not sustained, but simply noted, which allowed them to remain in the transcript and for all practical purposes was the same as overruling the objections. The Board has carefully considered the transcript and exhibits and finds that the Claimant received a fair and impartial investigation.

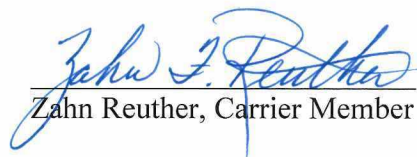
Little more needs to be written. MWOR 6.50.5 Hy-Rail Limit Compliance System explains the purpose of the HLCS and states that "On subdivisions where HCLS is in effect, all HLCS equipped on-track equipment that fouls or occupies the track when using Track and Time, Track Warrant or Track permit authority must have the HCLS system activated and associated with the authority." The Claimant acknowledged that the boom on his vehicle was fouling the track. If he was unsure of the meaning and application of the rule, which he should have known, he was obligated to get clarification, all the more so because safety was involved. Substantial evidence of the violation exists with the Claimant's admission that the HLCS had not been activated and associated with the authority. The unavailability of the audit team at the time of the investigation did not lessen the seriousness of the violation. And, while the audit team might have used the Approaching Others technique to correct the problem, the Board is responsible for considering the Claimant's appeal, but not for second-guessing the Carrier on the choice of management techniques.

**Award:** Claim denied.

**Order:** The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be entered.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas  
November 30, 2015