

PUBLIC LAW BOARD NO. 7564

Case No. 86/Award No. 86
Carrier File No. 10-18-0077
Organization File No. C-18-D070-4
Claimant: D. Robert Welsch

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION)

Statement of Claim:

By letter dated November 6, 2017, Foreman D. Robert Welsch was informed of his dismissal after the Carrier had concluded that he had not activated the HLCS device as noted in the Notice of Investigation set forth below. By letter dated December 28, 2017 the Organization, Jim L. Varner, Vice General Chairman, appealed the dismissal on the Claimant's behalf. In the final paragraph of his letter Vice General Chairman Varner asked that the dismissal be set aside because "it is excessive, unfounded and without merit" and that the discipline be removed from the Claimant's "records in accordance with Rule 40 of the current agreement."

Facts:

By letter dated September 27, 2017 Foreman D. Robert Welsch was informed that:

An investigation has been scheduled at 0900 hours, Tuesday, October 10, 2017, at the Roadmaster's Office, 2315 East Richards Street, Douglas, WY, 82633, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to activate HLCS Device in vehicle HRZ186 while occupying the track from 0939 until 1421 CST on September 25, 2017, under 7 track authority's (sic) at/or near MP 406 on the Butte Subdivision while assigned as a Foreman on Mobile Gang TMGX1151. The date BNSF received first knowledge of this alleged violation is September 26, 2017.

Carrier Position:

The Carrier asserts that the Claimant was provided a fair and impartial investigation that respected his due process rights. The required substantial evidence of a violation of MWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS) was obtained with the Claimant's admission that he failed in his responsibility to activate the HLCS device for over three (3) hours while traveling on Main Two. That he was the pilot on HRZ186 is not disputed. Documents in the record were not objected to at the time they were entered and are credible and valuable. The dismissal was in

accordance with the Policy for Employee Performance Accountability (PEPA) as this is the second Level S violation within the review period and involved a serious safety matter. That the Claimant had been on another assignment for four (4) months did not absolve him of responsibility on the day in question. Should the claim be sustained, the Board should order a set-aside for outside earnings, but should not include health benefits in the Order.

Organization Position:

The Organization insists that the investigation was not fair and impartial or respectful of the Claimant's due process rights. The Conducting Officer coached Assistant Foreman Amador and suggested the introduction of evidence. The Claimant, with twenty-four (24) years of service, was not "deliberately negligent, careless, or . . . unsafe." He testified honestly about his failure to activate the HLCS Device. Mitigating factors include the Claimant's work for the prior four months in a position that "did not require frequent use of an HLCS unit," the unthrown small, chrome toggle switch "was at least ten (10) inches away from each employee," and the "Claimant and his crew were protected by track authority" and were never in danger when the system was not activated. Moreover, even when the system was not activated "the Carrier was still able to track" HRZ186. The Organization has not received the audio recording of the investigation as it requested. The dismissal was punitive rather than corrective. The Board's Order in the Claimant's favor should not include a set-aside for outside earnings and should include compensation for additional medical expenses incurred as a result of the dismissal.

Findings:

The Board has carefully read the investigation transcript and finds that the Claimant received a fair and impartial investigation with undiminished due process. The Board further finds that the Claimant's admitted failure to activate the HLCS device was not deliberate, but that does not mean that the failure was not unsafe. The HLCS device, when activated, serves to protect Carrier and contracted employees from the disasters that can occur when vehicles used to maintain the rail network operate outside of the granted authority. Thus, the device is a critical element intended to minimize loss of property and lives in an inherently dangerous industry. While the Claimant's failure to ensure the activation of the HLCS device did not result in damage to property, injury or death, the "no harm, no foul" contention of the Organization is unpersuasive. If Boards ruled on serious safety violations based on outcomes rather than on the violations themselves, such rulings might well encourage less attention to procedures designed to preserve lives and property.

Neither the location of the toggle switch that activates the HLCS device nor the Claimant's assignment the previous four months that did not involve the use of an HLCS device serve to mitigate the failure to activate the device on September 25, 2017. As Foreman and Pilot and the only Carrier employee aboard HRZ186, the Claimant had the ultimate responsibility of ensuring that the vehicle occupied only authorized sections of track, even though the GPS allowed the Carrier to follow the vehicle's line of travel. The Claimant's admission, as well as documents in evidence, provide the required substantial evidence of a violation of MWOR 6.50.5. Because this was the second Level S violation within an active review period, the dismissal is in accordance with PEPA. The Board cannot, in good conscience, set aside the discipline.

Award:

Claim denied.

Order:

This Board, after consideration of the dispute identified above, hereby orders that no Award favorable to the Claimant be made.



Zachary Voegel, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn Neutral Referee

Austin, Texas
April 29, 2019