

PUBLIC LAW BOARD NO. 7564

Case No. 93/Award No. 93
Carrier File No. 10-18-0115
Organization File No. C-18-D040-16
Claimant: Leonard Chesnut

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

Statement of Claim:

By letter dated February 12, 2018 Foreman Leonard Chesnut was assessed a Level S 30 Day Record Suspension and a One Year Review Period for his alleged “failure to activate the HLCS unit on HRZ176 on November 6, 2017 on the Napier Subdivision, while assigned as the Foreman/Flagman, as discovered by remote unit.” Specifically, the Claimant was found to have violated MWOR 6.50.5 Hy-Rail Limits Compliance System (HLCS). The March 1, 2018 claim from the Organization, Randy Anderson, Vice General Chairman, stated that the discipline was “inappropriate, excessive and should be overturned immediately” with the Claimant’s “personal record cleared of the discipline and any mention of this investigation.”

Facts:

By letter dated November 15, 2017 the Claimant was informed that:

An investigation has been scheduled at 0900 hours, Tuesday, November 21, 2017, at the BNSF Railway Company Roadmaster’s Office, 500 East Lake Blvd, St Joseph, MO 64504, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to activate the HLCS unit on HRZ176 on November 6, 2017 on the Napier Subdivision, while assigned as Foreman/flagman, as discovered by remote audit. The date BNSF received first knowledge of this alleged violation is November 10, 2017.

Carrier Position:

The Carrier insists that the Claimant received a fair and impartial investigation and that it was appropriate to make the statements of the two Herzog employees a part of the record even though they were not present as witnesses. Substantial electronic and testimonial evidence was produced, making it reasonable to conclude that the Claimant violated MWOR 6.50.5. While HRZ176 never exceeded the limits of the track warrants that the Claimant had obtained, failure to

activate the HLCS constituted a serious safety violation. The resulting discipline was consistent with the Policy on Employee Performance Accountability (PEPA) and should not be disturbed by the Board. Leniency is within the Carrier's discretion, not the Board's.

Organization Position:

The Organization asserts that the investigation was not fair and impartial and that the acceptance of the two employee statements into the record violated the Claimant's due process rights because the authors of those statements could not be cross examined. MWOR 6.50.5 does not say that the Employee-in-Charge must personally activate the HLCS unit. The unit was activated by the Driver at the Claimant's direction. The Claimant followed relevant rules and was not careless. Roadmaster Brady, admittedly not an electronics expert, could not attest to the accuracy of the electronic evidence and had no first-hand knowledge of the incident considered herein. Moreover, there are mitigating factors, including the fact that the D-car never exceeded the limits of the three track warrants. The discipline, which was punitive rather than corrective, followed an inquiry that was not objective.

Findings:

The Claimant received a fair and impartial investigation as the two disputed statements, which clearly constituted hearsay evidence because the authors were not available for cross examination, are essentially irrelevant. Mr. Reil's statement that he had no knowledge of what happened contributes nothing to an understanding of the incident. Mr. Heath's statement seemingly says that he noticed that the thumbwheel was not on and that the Claimant turned it on so that it indicated that the vehicle was on the mainline. The investigation transcript, at page 84, contains the Claimant's testimony that after about 40 minutes on the mainline, the Driver pointed out that the thumbwheel was not on and so he turned it on. The written statement provides no more information than the Claimant himself provided and has not impacted the Board's decision.

The Organization has suggested that the electronic data may be inaccurate and that there could have been technical problems with the HLCS. There is nothing in the record to support either of these suppositions. The electronic data are sufficient to convince a reasonable person that the HLCS was neither tested nor operational while HRZ176, the D-car, was on the mainline. And, more than sufficient evidence establishes that the thumbwheel indicated the vehicle's presence on the mainline for only part of the entire tenure of the three track warrants.

The question that must be answered is whether or not the above-noted failures are attributable to the Claimant. In the final analysis, the Claimant acknowledged that he was the EIC as the only Carrier employee in the Hy-Rail along with the Herzog contractors. As EIC the Claimant was responsible for assuring that the HLCS device was activated and that the thumbwheel at all times relevant showed the location of the Hy-Rail. The Claimant's location in the vehicle, with his vision blocked, does not excuse the failing to ensure proper operation of the HLCS and the thumbwheel when questions to the Driver seemingly would have sufficed. Nor does the fact that the Hy-Rail never exceeded the limits of the track warrants excuse the failure. The Board will not allow a "no harm, no foul" contention to prevail when a critical safety rule has been violated because the Board believes that such an approach to discipline could create a more

lax climate that could lead to loss of property and lives in an inherently dangerous industry. With all due respect to the Claimant, the electronic evidence is seen as substantial.


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