

PUBLIC LAW BOARD NO. 7425

**PARTIES) SMART - TRANSPORTATION DIVISION
TO)
DISPUTE) BNSF RAILWAY COMPANY**

STATEMENT OF CLAIM:

Claim of Engineer Johnny A. Wilson for removal of censure from his personal record of a Level S 30 Day Record Suspension and pay for all time lost as a result of an investigation held on April 22, 2016. (Organization File No. D303-258-16B; Carrier File No. 55-16-0065D)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The Claimant was assessed the discipline here on appeal, a Level S 30 Day Record Suspension, in a Carrier determination that testimony and exhibits presented at an investigation at which the Claimant was present and duly represented by a member of the Organization show that for the month of February 2016 while assigned as an Engineer at Springfield, Missouri, the Claimant only worked eight starts for a total of 61.4 work hours, which was 59% of his 103.9 hours of work potential for the month.

The Carrier maintains that this Claimant work performance was despite his having previously been counseled and formally instructed by letter in August 2011 to maintain his work performance in such a way that he conforms each month to the performance levels expected of a full-time employee compared to his peers and which does not reveal misconduct and/or indifference to duty. At that time the Claimant was said to have worked seven starts for a total of 51.4 hours for the month of August 2011; 39% of a total of 131.1 hours of work potential for the month.

The Board recognizes the right of the Carrier to implement, as here, a Low Performance Review Process (LPRP) that involves the collection, processing, examination, and study of data, called, "data mining," to determine whether an employee is "sharp shooting" or "gaming" assignments and availability so as to remain employed and be entitled to contractual benefits while, at the same time, making themselves unavailable for service a grossly inordinate amount of time in a marked degree with other employees in the same relevant group and system-wide.


However, we think it incumbent upon the Carrier to exercise a certain amount of discretion as concerns the basis for a charge being related to counseling that took place a considerable amount of time in the past. In the instant case, the counseling was in August 2011 and it is used as a basis for an alleged offense in February 2016. The Claimant apparently had completed 53 months at a recognized full-time basis, or close thereto at which no exception was taken to his level of work performance. As stated in on property PLB Nos. 6264 and 6265 (Arbitrator Richard Kasher) in an LPRP dispute, it was held that a 36 month period was excessive and that there should be "a cleansing period."


It also concerns the Board in study of the transcript in this case that when a Carrier witness was asked how the Claimant was to track the number of hours worked by his peers that this witness merely offered that the Claimant "would just have to monitor that throughout the month where he stands relative to his peer group." Questioned further about there being no such tool provided for an employee to do so, this witness then said: "He would just have to stay available." Certainly, this witness should have been prepared to have provided a more informed response to this matter.


In the particular circumstances of record it will be the decision of the Board that the claim be sustained.

Award:

Claim Sustained.


Robert E. Peterson
Chair & Neutral Member


James K. Hurlburt
Carrier Member


Nathan R. MacDonald
Organization Member

Fort Worth, TX
Dated: Dec. 7, 2016