

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

Claim of Pacific (5th) Seniority District (Interbay, WA) Conductor A. D. Bryant for removal of Formal Reprimand and pay for all time lost as the result of the investigation held on October 2, 2013. (Organization File No. D324-039-141E; Carrier File No. 50-14-0002)

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 issue in dispute calls for a determination as to whether the Claimant was guilty as charged of having missed a call for service at 2330 hours on September 12, 2013 in violation of GCOR Rule 1.16, Subject to Call, and GCOR Rule 1.15, Duty-Reporting or Absence.

There is no question that at the time of the incident the subject of dispute that the Claimant was first out, rested, and available for a call to service as a Conductor in the Interbay to Vancouver unassigned through-freight pool.

It is the position of the Carrier that its automated Crew Support System properly attempted to contact the Claimant for service by telephone on the date at issue, but having received no answer from the Claimant to its calls that the Claimant was thus properly found by testimony and exhibits brought forth at the investigation to be guilty as charged of having missed a call for service as of 2330 hours on September 12, 2013.

At the hearing the Carrier presented into evidence two exhibits that it offered as support for its charge and findings of guilt. One exhibit, entitled, "Movement History Records," lists the Claimant as an EMC (Employee Missed Call) at 2330 hours on September 12, 2013. The second exhibit was identified as a screen shot from the TSS computer entitled, "Train Call Layoff Report Details," that lists the Claimant as having missed a call at 2330 hours on September 12, 2013.

It concerns the Board that nothing of record was presented to show any calls having been made to the Claimant through its automated calling system, as is usually presented as support documentation in cases such as that here at issue.

Notwithstanding the absence of Carrier calling data, the Claimant presented into evidence at the hearing copy of his personal cell phone billing record, albeit for the purpose of showing that only two calls had been made to him by the Carrier's automated system on September 12, 2013, one at 2328 hours and a second call at 2329 hours. The Claimant here stating that he was not afforded benefit of a 15 minute grace period to respond before being marked as having missed a call for service, as asserted is usually provided employees. That is, the Claimant offers the 15 minute grace period to have followed the first call at 2328 hours.

It was further testimony of the Claimant that when he found that he had been listed as having missed a call for service that he called Crew Support about not having been given benefit of the 15 minute calling period, and Crew Support not being in a position to resolve his protest, he asked to speak with the on-duty Trainmaster. In this respect, it is the unrefuted testimony of the Claimant that instead of his being penalized by being marked off for 24 hours as happens when an employee is marked off missing a call that the Trainmaster had Crew Support mark him up for service as of 2359 hours, or 29 minutes after being marked as having missed a call.

Although argument offered for the first time to the Board is generally rejected outright, we find it noteworthy as concerns the dispute that while the Carrier states nothing in Agreement rules provides for the 15 minute grace period referenced by the Claimant, it says that it does consistently grant such a time period to employees when being called for service. As for the Carrier argument, it avers there is no evidence that was not done in this case. In this respect, the Carrier says the call time for the through freight pool in question is set for 120 minutes, which would have calls starting to the Claimant at 2310 hours on the date at issue. However, the Carrier says, since the Claimant's phone bill shows that he was on the phone beginning at 2308 hours (two minutes before the call time started) for a total of 20 minutes, that calls to the Claimant during that time would not show up as a result of the Claimant's line being occupied during that time frame. Therefore, the Carrier says when the Claimant got off his phone at 2328 hours, there are the two calls from the Carrier that show up, or calls which were likely the last calls prior to the missed call being issued.

Although there may be some merit in the above belated argument of the Carrier, as the Board has indicated this is not something that was presented into evidence at the investigation or on-the-property handing so as to have permitted a timely response by the Claimant or the Organization. Moreover, as hereinbefore stated, the Carrier failed to have presented into the record evidence of calls having been made to the Claimant by it Crew Support System.

It being evident in overall study of the record that the Carrier has failed to meet a necessary burden of proof for its actions in disciplining the Claimant for an alleged missed call, the claim will be sustained.

Award:

Claim: Sustained.



Robert E. Peterson
Chair & Neutral Member



Melissa A. Beasley-Coke
Carrier Member



J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: 4/18/17