

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

Claim of Pacific Fifth Seniority District (Pasco, WA) Switchman J. A. Wright for reinstatement to service with seniority rights unimpaired, removal of censure from his personal record and pay for all time lost including but not limited to the following: payment of vacation allowance, health and welfare costs, reimbursement of all expenses related to the pursuit of alternative employment, reimbursement for any damages incurred as the result of discharge from service including proceeds on any property, real estate or financial instruments sold to replace lost compensation, as a result of an investigation held on May 14, 2015. (Organization File No. D977-217-15A; Carrier File No. 50-15-0082D)

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.

Appeal of the Claimant's dismissal from service arises in protest of a Carrier determination that testimony and exhibits brought forth at an investigation conducted on May 14, 2015 show that he was guilty of dishonesty and indifference to duty by entering and misrepresenting Computer Based Training (CBT) layoffs of January 20, 2015 and April 14, 2015 with limited activity or no system access history to support the layoff, including improper pay claims on January 21, 2015 while assigned as a Switchman in Pasco, WA.

The Carrier contends that the claim should be denied in a failure by the Claimant and the Organization on his behalf to have put forth any probative support for the contention that the Claimant or other employees are entitled to one CBT layoff per month, much less support for the Claimant's CBT layoffs, including the filing and receipt of pay for the January 20, 2015 layoff when in fact nothing of record shows that the Claimant had accessed the computer based web site on January 20, 2015.

The Carrier says the actions of the Claimant were dishonest, a major offense that warrants dismissal.

The Carrier says the actions of the Claimant came to its attention when on April 14, 2015 the Claimant approached Trainmaster Rod Bailey to request a CBT layoff, the Claimant having reportedly explained to Trainmaster Bailey that he had put in for a CBT layoff the prior night; it had not then been approved; and, the Claimant asserting that train and engine service employees were allowed one CBT layoff per month. In this respect, Trainmaster Bailey testified that he told the Claimant that he did not think it worked that way; there was a General Notice [System General Notice #3, dated December 19, 2014] that explained the CBT; he asked the Claimant if he had any previous layoffs for CBT; the Claimant said he did not recall; he approved the April 14, 2015 CBT layoff but told the Claimant he would check into the matter; and, after some research found that the Claimant had a previous CBT layoff on January 20, 2015.

Evidentiary documents involving the Claimant's CBT layoffs were presented into evidence by Trainmaster Bailey. As concerned the Claimant's CBT layoff for January 20, 2015, the Carrier submits the computer records show no activity by the Claimant to have logged into the web based training system, with the Claimant having claimed pay for the layoff of January 20, 2015.

As concerns the Claimant's CBT lay off for April 14, 2015, the Carrier submits that testimony and exhibits show that it was a rest day for the Claimant's regular assignment and although the computer web based CBT shows the Claimant to have logged in, it was for but a limited amount of time, ninety-five (95) minutes, and that no claim for compensation had been filed for such date.

The Organization urges that the Board should reverse the Carrier's discipline decision and sustain the claim in an assertion of mitigating circumstances. It says the Claimant offered good and sufficient reason for his actions and that he had not in any way intended to enrich himself in the manner he sought to complete CBT certification. The Organization points to testimony of the Claimant whereby he offered that he marked off CBT on January 20, 2015 with the intent to access the computer system, but significant family problems arose that required his immediate attention and prevented him from accessing a computer terminal. In this respect, the Claimant said the following when asked by his representative "what happened on July, or January 20th:

[Terminal Superintendent] Matt Bailey called me on my day off, and I told him at that time, I could not remember, and so I went back and looked through my records, and I do remember having a problem, my wife remembers me having a problem logging in that morning. So, I went to my step mother and my mother and my sister, to find out

medical records, because we were having problems with all four of my family members right now, and my step mother –

The hearing officer interrupted the Claimant's testimony to clarify the date that the Claimant said he had a call from Terminal Superintendent Matt Bailey, the Claimant then stating the following:

Um, like I said, I, I could not remember. Um, on the, I have to think back, I think it was April; it'd have to be April 20th, because that was my day off. Um, Matt Bailey called me, just like Brian Fischer said, to talk about, talk about the 20th, and I had told him that I could not remember what happened on the 20th. I do remember that I could not log into the computer. That's all I could remember. I went back and talked to my mother in law, my step mom, and my sister to find out medical record dates for my four family members, and my step mother had went back in her log and found out that was the day that my father had one of his Alzheimer episodes, which was one of the worst ones that he's had so far, and so, uh, at 12:00, I was dressed and ready to come to the terminal, to try to log in here, when I got the call from her.

In subsequent questioning by his representative the Claimant said that he had come in on his days off and had completed his CBT training prior to his due date of April 23, 2015 to complete such training. According to the record, contact with the Technical Training Office verified that the Claimant's due date was in fact April 23, 2015.

As concerns the CBT layoff for April 14, 2015, the Claimant acknowledged that he had laid off for CBT training for that date, but did not put in for pay for that day because he "had already been paid for my one CBT day for the year."

This Claimant statement about having one CBT lay off for the year notwithstanding that it was testimony of Terminal Manager Fischer that during an interview with the Claimant the latter had said:

Jeff explained that he believed you had one CBT layoff a month that was available to you, and we asked him where he had heard that. Jeff said, in the Crew Room, that's just what guys are talking about here in Pasco, that you're able to do that.

There is no question in study of the record that neither the Claimant nor the Organization on his behalf have shown that it has been a recognized practice for employees who are required to engage in CBT certification are entitled to claimed pay for CBT once every month or that System General Notice #3 may be properly

read in a manner to support the once a month CBT layoff contention. It is also evident that the record supports a finding that the Claimant engaged in an act of dishonesty in laying off CBT when he did not in fact access the computer web based CBT system and in falsely claiming a day's pay for his layoff of January 20, 2015.


As concerns petitioner's contention of mitigating circumstances, we do not find valid the Claimant's excuse. Even assuming, *arguendo*, the Claimant had experienced the family problems that were not supported by any documentation, it seems to the Board that after failing to access the computer web based CBT the Claimant knew or should have known that it was an act of dishonesty to then claim pay for such day. Moreover, once the claim for pay was improperly filed the Claimant could have taken timely and proper action to notify the Carrier of such happenstance and not have waited for it to be uncovered by Carrier research.


Turning to the matter of discipline, the record shows that at the time of the incident the subject of this dispute that the Claimant had five (5) years of service with one prior discipline. In waiver of a hearing the Claimant had accepted discipline of a Standard Reprimand and twelve (12) month review period in connection with a charge of misconduct in a failure on January 3, 2014 to control the speed of a train as required by a signal indication and improper documentation of signal awareness.

Although the Board is aware that dishonesty is generally looked upon as deserving of stringent discipline, including dismissal from service, in this particular case we believe the penalty should be short of a termination from service. We find that the time the Claimant has been out of service, about two and one-half years, should be sufficient to have the Claimant recognize that he has a responsibility to faithfully follow and comply with all rules and policies. The Board will accordingly direct that discipline be modified as above stated, with the Claimant to be reinstated to service with seniority and other benefits unimpaired, without pay for time lost. This return to service shall be subject to the imposition of a twelve (12) month review period commencing with the date of the Claimant's return to active service upon his successfully passing usual and customary return to service examinations.

AWARD: Claim disposed of as set forth in the above Findings.


Robert E. Peterson
Chair & Neutral Member


Melissa A. Beasley-Coke
Carrier Member


J. Michael LaPresta
Organization Member

Fort Worth, TX
Dated: 9/25/17