

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

Claim of Pasco, WA Utility Employee Ken Ray 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 March 20, 2014. (Organization File No. D977-187-14A; Carrier File No. 50-17-0010)

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 appeal of a termination from service here at issue arises from a Carrier determination that testimony and exhibits presented at a March 20, 2014 hearing show that the Claimant was guilty as charged of unsafe behavior in a failure to comply with requirements associated with going in between rolling equipment while working as a crew member (Utility Employee) in Pasco Yard (Pasco, WA) at 0444 hours on February 20, 2014. In its notice of termination of employment to the Claimant dated April 1, 2014, the Carrier held the Claimant to have violated General Code of Operating Rule (GCOR) 1.6, Conduct, and Transportation Safety Rules (TSR) 13.1.1, Going between Cars or Locomotives, and 13.2.4, Adjusting Mismatched Couplers.

It is the position of the Carrier that its discharge of the Claimant is supported by the testimony of Trainmaster Angelos and Trainmaster Harrison at the March 20, 2014 hearing involving their observations of the Claimant while watching him on a yard office video in the process of assisting a train and directing the train's Engineer to back up the train so that he could make a joint coupling. The Carrier submits it was testimony of the Trainmasters that they observed the coupling not to be successful; the Claimant telling the Engineer to stretch the train ahead and set some

air; the Claimant immediately asking for an in-between while the train was still moving; and, the Claimant going in between the unattached cut of cars as the train began rolling back towards the Claimant.

The Carrier directs particular attention to the following testimony of Trainmaster Harrison when questioned about his observation of the Claimant at the time and date at issue before Trainmaster Angelos directed all movement be stopped:

Yeah, there was a safety concern due to the, the way he asked for the in-between and, and what he actually did, different from what he needed to do rule-wise. Uh, the equipment was moving, as mentioned earlier, when he stepped in between. And as he worked on the unattached portion and then proceeded to head for the attached portion, the cars were actually still rolling back at him when he was walking towards that portion as well.

The Carrier further says that discipline assessed cannot be considered excessive in view of the Claimant have committed one of its "Eight Deadly Decisions" when he put himself in harms' way by improperly going in between rolling equipment. This Carrier reference to the Eight Deadly Decisions concerns constant warnings and training given its employees on eight different work decisions to be avoided for their personal safety. The second listed of the Eight Deadly Decisions is that entitled, "Going Between or Working on the End of Rail Equipment." Specific reference is here made to TSR Rule 13.1.1, which states in part, "before crew members go between or work on the end of rail equipment on any track, they must: Wait for movement to stop and slack to adjust."

It is the position of the Organization that the Carrier failed to properly conduct the investigative hearing in accordance with the Uniform Investigation Rule; failed in its obligation of burden of proof; and, discipline assessed is harsh, excessive and unwarranted under the facts brought forth at the hearing.

On the merits of the case, the Organization submits, as the Claimant said at the hearing, there was some difficulty in putting the train back together after setting out a bad order car; the on-duty Carman worked on a knuckle problem with the car; the Claimant began trying to connect the train with a back-up move; the Claimant experienced some difficulty because the knuckles closed improperly prior to making the coupling; the Claimant requested the Engineer pull the cut apart; and, the Claimant requested an in-between and got a "set and center" response from the train's Engineer. From this point, the Organization says "a dispute within the facts exists." Here, the Organization takes exception to testimony of the Trainmasters that the train was moving, asserting that the Claimant "steadfastly maintained that he believed the train was no longer moving when he placed himself between the train and the standing cut of cars to adjust the knuckles."

In this latter regard, the Board will note that at the hearing the Claimant said: "I was positive that the train was stopped, because it looked like it was stopped to me." The Claimant thereafter said, "I thought it was stopped." The Board also finds it noteworthy that the Claimant said: "I had the buggy lights [vehicle the Claimant was using to get around the yard] in my eyes . . . it looked like it was stopped." The Board also notes the Claimant to have said, in describing his going in-between to adjust the knuckles that, "I may have skipped over a step."

The Board has reviewed the several procedural objections advanced by the Organization and finds them to either be without merit or not of sufficient support of record to conclude that the Claimant had been denied benefit of a fair and impartial hearing.

Further, as concerns Organization argument that copy of the video that had been viewed at the hearing was not attached to the transcript of hearing, we do not find this to be a matter sufficient to overturn the discipline. Moreover, it appears that this issue was not raised during the handling of the claim on the property and to have only been first raised in argument to the Board.

There is no question that the Carrier has a right to require and expect its employees to perform all their duties in compliance with operating and safety rules incident to their assigned job assignments and to fully adhere to the dictates of the Eight Deadly Decisions on which they have been trained, counselled, and which has been the subject of job safety briefings. The Claimant's personnel record shows him to have attended Safety Training that included the watching of a video about the Eight Deadly Decisions on three past occasions, namely, February 17, 2011, March 9, 2012, and January 1, 2013.

An employee of the Carrier since August 26, 1996, the Carrier submits that this case involves the commitment of a second active serious violation by the Claimant within a three year review period as set forth in its discipline policy, Policy for Employee Performance Accountability (PEPA). The prior offense was said to have occurred on May 6, 2013 when the Claimant was observed "running while switching." In this respect, the Carrier submits that the Claimant signed a waiver in avoidance of a disciplinary hearing in acceptance of a Level S 30-Day Record Suspension and Three Year Review Period. The Carrier thus says the current incident having occurred on February 20, 2014, it clearly fell nine months within the review period, and, as stated in PEPA: "A second serious violation committed within the applicable review period may result in dismissal."

In the opinion of the Board, overall study of the record supports the conclusion that the Claimant had failed to wait for the movement at issue to come to a complete stop and the slack to adjust before proceeding to go between the equipment. It must be held that the Carrier therefore had just cause for the assessment of discipline.

However, the Board does not find the particular circumstances of record to justify imposition of the ultimate penalty of dismissal from service. We believe the time that the Claimant has been out of service should serve as sufficient discipline to have the Claimant recognize an obligation to perform assigned duties consistent with all operating and safety rules. The Board will, therefore, direct that discipline be modified to a Suspension from service with a Three (3) Year Review Period, without pay for time lost, and that the Claimant's return to service be with seniority and other benefits unimpaired, subject to successfully passing of all required 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: March 1, 2018