

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

Claim of Memphis West, Tennessee Conductor Darian Coleman 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 July 28 and August 26, 2015. (Organization File No. D1420-459-15B; Carrier File No. 55-16-0001)

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.

On June 25, 2015 the Claimant was the Conductor on a train operating from his away-from-home terminal of Little Rock, Arkansas over the Hoxie Sub-Division of the Union Pacific Railroad (UP) through a Carrier/UP trackage agreement. A Form B track restriction was in effect for operation of the Claimant's train from Mile Post (MP) 262.75 and 261.5 to protect a UP Maintenance of Way (MofW) crew that was performing overhead work on a bridge. The Claimant's train passed the Form B restriction and a red flag without permission from the Foreman in charge by 1310 feet, with locomotive downloads showing that the lead engine went by the flag at 23 mph.

Following three postponements of scheduled dates, an investigative hearing into the incident commenced on July 28, 2015, recessed, and was completed on August 26, 2015.

By letter of September 8, 2015 the Carrier notified the Claimant that it had determined through testimony and exhibits brought forth during the hearing that he was guilty as charged and that he was therefore dismissed from service effective

that same date for violation of GCOR 1.3, Rules, GCOR 5.4.7, Display of Red Flag or Red Light, GCOR 1.14, Employee Jurisdiction, GCOR 1.1.2, Alert and Attentive, and GCOR 1.47, Duties of Crew Members. The letter further stated that in assessing discipline consideration was given to the Claimant's discipline record and the discipline assessed was in accordance with the Carrier's Policy for Employee Performance and Accountability (PEPA).

At the hearing the Claimant admitted responsibility for his train's failure to have stopped short of the Form B restriction. It is noted, however, that this admission asks that consideration be given to what the Claimant asserted to be mitigating circumstances; the Claimant saying in a closing statement at the hearing:

I would just like for it to be on the record that, you know, due to my, my many years of service and dedication to my job, I try to do it efficiently as my, as, as well as possible. And, uh, at no fraction of a moment I was trying to deny that we got past the red flag. I called my supervisor in the event and let him know of the situation. I don't blame Mr. Whitlinger [the train's Engineer] or no one of that fact. I was trying to do my job, as I stated earlier during this investigation. Due to unforeseen circumstances of radio clutter, we unfortunately got past a red flag. We're not downplaying that at no, at no expense. No one was in danger. We stopped the train in good fashion, good train handling, without causing any derailments or injury or personal to anyone. And that, that all of that hopefully is being considered, uh, at the end of the day. Um, I do feel like we were both alert. Some of the rule violations I, I felt like weren't pertinent to this because he and I both put a lot of years in and I don't feel like that should have been implemented that we were not alert and we were, you know, not being, doing our duties as a crew member, but we did do a rule violation of getting past a red flag. I do agree. But, uh, with that being said, I just, um, hope without prejudice that this, uh, investigation is taken into consideration with our many years of service and, uh (inaudible) for this company. That's all I have.

As concerns the mitigating circumstances offered by the Claimant and advanced in extensive Organization argument on the property and to this Board, we find the Carrier to have clearly shown why such contentions are lacking in merit.

We concur with the Carrier that in passing the Form B and red flag restriction that the MofW crew was placed in danger, if not the Claimant and his Engineer. That no personal injury or mishap occurred is, of course, fortunate. Further, that the MofW crew was working on an overhead bridge does not overcome the possibility a worker having had to go onto the track to retrieve something dropped from the bridge or equipment having been left on the track.

In regard to the Claimant's contention of not being able to get in touch with the Foreman in charge of the Form B work area due to "radio clutter." As the Carrier says, radio traffic has no bearing on the Claimant's responsibility to have stopped at the Form B designated MP. Clearly, if the Claimant was unable to communicate with the Foreman to receive permission to enter the Form B restricted track then he had a responsibility to bring the train to a stop and await the opportunity to be in communication with the Foreman.

As concerns the Claimant saying that he and the Engineer "stopped the train in .good fashion, good train handling, without causing any derailments." We also concur with the Carrier that train handling after the emergency stop is immaterial as the discipline assessed was for the Claimant's train passing the Form B and red flag without authority.

Although the Claimant maintains that he was "alert," it is difficult to accept such a contention when it is evident that he failed to comply with the stated Form B restrictions in entering the track limits without permission by 1310 feet before stopping.


Lastly, as concerns the Claimant offering that his many years of service and dedication to his job calls for leniency, the Carrier submits that the Claimant was a previous beneficiary of leniency in having been reinstated to service on such a basis in Award No. 18 of PLB No. 7361, Arbitrator Simon, dated August 21, 2012. The Claimant's record also shows this to be the Claimant's 14th discipline of record, with the Claimant likewise being subject to having committed a second Level S violation within an outstanding 36 month review period.

The Board will note, as stated above, that it has also gave studied consideration to other extensive argument advanced by the Organization and has found them to not be of sufficient substance to conclude that the Claimant had been denied benefit of a fair and impartial hearing or that other mitigating circumstances support a contention that discipline as assessed was harsh or unwarranted.

Award: Claim Denied.



Melissa A. Beasley-Coke
Carrier Member



Robert E. Peterson
Chair & Neutral Member



J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: March 1, 2018