

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

Claim of Birmingham, Alabama Engineer Richard S. Hice 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 February 9, 2015. (Organization File No. D847-232-15B; Carrier File No. 55-15-0033D)

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 present for and provided opportunity to participate in the Organization's presentation of its case to the Board.

On Saturday, January 24, 2015, the Claimant stood for service and was called by the computer crew service calling system to work as an Engineer for a yard job on duty at 0630 hours in the Birmingham Terminal. Despite three attempts to reach him at his primary phone number from 0504 hours to 0520 hours, the Claimant did not answer his phone, albeit voicemail picked up the calls. The Claimant was thus listed as having Laid Off-Missed Call and thereafter notified by letter of January 26, 2015 that an investigation into this matter was scheduled for February 2, 2015.

The date for the investigation was mutually postponed and held as rescheduled on February 9, 2015. The Claimant and his representative were both in attendance at the investigation to offer a defense against the charge of record.

By letter of February 23, 2015 the Carrier notified the Claimant that it found the record of investigation to support a finding that in missing the call for service he was in violation of GCOR 1.6, Subject to Call, and that in view of this violation and

consideration of his discipline record he was dismissed from service effective that same date, February 23, 2015.

Aforementioned GCOR 1.6 states:

Employees subject to call must indicate where they can be reached and must not be absent from their calling place without notifying those required to call them.

The Organization has advanced procedural argument in requesting that discipline be set aside and the Claimant returned to service. It says the Claimant was not afforded "a fair and impartial hearing" as required by the Uniform Investigation Rule; the Claimant was "pre-judged and pushed into an investigation, hence no formal hearing;" and, discipline assessed was "harsh, excessive and unwarranted."

As concerns local Organization argument that the conducting officer had agreed that the Claimant "was not afforded a hearing," it is evident that this concurrence was only as concerned the Uniform Investigation Rule stating that an employee will be directed to attend a "hearing." The conducting officer was only agreeing to the extent that the notice used the term, "investigation," whereas both "hearing" and "investigation" have long been recognized as synonymous or interchangeable, and that he was present to conduct an investigation as stated in the notice.

The Board likewise finds baseless the Organization contention that it was a violation of the Uniform Investigation Rule for the Carrier not to have provided the Claimant's representative all records, documents or evidence 48 hours prior to the investigation. As the Carrier submits, even though the Claimant is a member of SMART-TD and chose a representative of that organization to represent him in this matter, the Claimant was working as an Engineer at the time of the violation and properly adjudicated under the applicable Brotherhood of Locomotive Engineers Trainmen Agreement, which agreement does not include a pre-investigation exchange of documents.

The Board also finds nothing of record to show a pre-judgment guilt of the Claimant to the charge of record, as contended by the Organization.

At the investigation when asked to state for the record what he knew about the subject of charge, the response of the Claimant was as follows:

It was the uh, alleged missed call and uh, I was expecting the call, but as I woke up the next morning, looked at my phone, and realized that, I saw where the railroad had called me, but failed to hear my phone ring, if it did ring. But it w- w- the records were showing on my phone. And I believe what happened was, I attended church that

evening and put it on vibrate and uh, forgot and failed to take it off vibrate and back on audio. That's one, one thing that may have happened.

While it is commendable that the Claimant would offer that he placed his cell phone on vibrate while attending church services, it would seem that in knowing the cell phone is the only phone of record on which he is called for service, and that he admittedly was expecting a call for service, that upon leaving church the Claimant would check the phone for any messages; take it off vibration; and, return the sound to a normal ring tone. We say this in especially noting that the Claimant was disciplined on four prior occasions for missing calls for service.

In an extensive closing statement at the investigation the Claimant offered that in the last four years he has had to deal with a number of upsetting family problems and challenges, including the deaths of two younger brothers, going through a divorce, and seeking help through the Employee Assistance Program so as to get back focused to work and perform his duties in a safe manner and finish out his railroad career where he can provide for his three children.

The Carrier says that although it understands that employees at times have personal challenges to work through, that does not mean those employees can abuse one of the most fundamental requirements of the employee/employer relationship – showing up to work. Moreover, as concerns the Claimant, the Carrier says he has a terrible record of missing calls, laying off on call, violating Attendance Guidelines, and a number of operating and safety rule violations, totaling 18 past disciplines of record. Further, the Carrier submits the current incident is the Claimant's 5th violation within a 12-month period; the Policy for Employee Performance Accountability prescribing as concerns a cause for dismissal from service: "Five violations of any kind in a 12-month period (which may include a combination of non-serious, serious, and attendance violations)."

In support of its position that the personal problems of the Claimant in no way mitigate the continued behavior displayed by the Claimant, the Carrier cites the following excerpts from Public Law Boards (PLB):

PLB 6006, Award 80

Merely telling a manager that you have family problems does not automatically excuse subsequent absences. An employer is not social services. They cannot consider each and every family problem that may surface.

PLB 7527, Award 64

The Carrier has a right to expect regular and reliable attendance from employees, even when personal problems seem more important.


The Board will also note as appears applicable to the case here at issue, the following excerpt from Award No. 82 of PLB 2720:


Given the record in this case, Carrier's determination that Claimant's employment no longer is an asset to Carrier, but, instead, is a liability, cannot be said to be an arbitrary, capricious or unjust action, or an abuse of managerial discretion. Claimant himself is solely responsible in this matter; and he must now bear the consequences of his own actions. Carrier has been more than tolerant of Claimant, but Claimant has not responded in an acceptable manner. Carrier has now reached the limit of its toleration.


The Carrier having shown sufficient cause for its dismissal of the Claimant from service, the claim will be denied.

Award:

Claim Denied.


Robert E. Peterson
Chair & Neutral Member


Melissa A. Beasley-Coke
Carrier Member


J. Michael LaPresta
Organization Member

Fort Worth, TX
Dated: March 1, 2018