

**PUBLIC LAW BOARD NO. 7425**

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

**STATEMENT OF CLAIM:**

**Claim of Springfield, Missouri Engineer Ron A. Hill 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 January 16, 2015. (Organization File No. D303-317-15B; Carrier File No. 54-15-0054D)**

**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 October 8, 2014 the Carrier notified the Claimant by certified mail that he should arrange to attend an investigation on October 16, 2014 for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged failure to comply with instructions relating to his low performance and availability given to him by Brandon Ogden on July 9, 2013 and in a certified letter of July 10, 2013. This letter of notification for the investigation stated that the Carrier's first knowledge of the alleged violation was October 8, 2014 and relates to the month of September 2014.**

**Following several postponements of rescheduled dates, the investigation was held on January 16, 2015. The Claimant and his representative were present for the investigation to offer a defense against the charge of record.**

**By letter dated January 29, 2015 the Carrier notified the Claimant that he was dismissed from service effective that same date in a determination that the record shows that he had violated GCOR 1.13, Reporting and Complying with Instructions, GCOR 1.15, Duty-Reporting or Absence, and GCOR 1.6, Conduct.**

The letter also stated that in assessing discipline that consideration was given to the Claimant's discipline record and that the penalty assessed was in accordance with the Policy for Employee Performance and Accountability (PEPA).

The issue giving rise to this case is not unlike a number of other cases that have been the subject of dispute on the property concerning interpretation and application of what the Carrier calls its "Low Performance Review Process" (LPRP) that it placed into operation in 2010; a review process the Carrier says had been evolving for a number of years. The process involves the collection, processing, examination, and study of data, or what is called, "data mining," to determine whether an employee is "sharp shooting" or "gaming" assignments and availability by such methods as timing their layoffs, "chaining" layoffs, and resort to other various means in order to achieve the maximizing of their time off so as to remain employed and be entitled to contractual benefits. The purpose of LPRP, the Carrier says, is to identify employees who are making themselves unavailable for service a grossly inordinate amount of time in marked degree as compared with other employees working in the same type service. The sharp shooting or gaming of the system, the Carrier says, is to the detriment of its workforce needs to service its customers and places an undue burden on other employees who have to "pick up the slack" and unfairly effect the time off other employees have earned.

The case at issue in this dispute arises from the Carrier team of specialists assigned to LPRP having identified from a study of workforce data for June 2013 that the Claimant was not performing a comparable amount of service in comparison to his peers. The Claimant was therefore directed to report for a coaching and counselling meeting on July 9, 2013 with Springfield Division Superintendent of Operations Brandon Ogden regarding what was said to be his low work performance during June 2013. The Claimant was instructed by Superintendent Ogden of the need to improve his working performance in order to more favorably compare with his peer working group. Confirmation of the coaching and counselling instructions was set forth to the Claimant in a letter of July 10, 2013. The letter also notified the Claimant that his failure to comply with the instructions given him may result in a serious violation of PEPA.

Work data as compiled and presented to the Claimant at the July 9, 2013 coaching and counseling session showed that the average number of monthly hours worked at the Springfield, MO terminal, where the Claimant was then assigned, was 196.1 hours, whereas the actual number of hours worked by the Claimant was only 18 hours, or 9% of the potential hours in comparison to his peers.

For the month of September 2014, the Claimant was again identified by the LPRP specialists as an employee who was not performing service in a manner comparable to that of his peers on the Springfield Division. In this respect, the Carrier submits that in September 2014 the Claimant was assigned a position in the Springfield-

Lindenwood pool that provided opportunity of 30 days of work. Whereas the average number of hours worked by the Claimant's peers on the same board for the month of September 2014 was shown to be 117.9 hours, the Carrier says the Claimant timed layoffs to minimize his work opportunities to 15.2 hours, or 13% of the potential hours in comparison to his peer group average. Further, the Carrier says the Claimant was the worst performer in regard to the number or hours worked at his terminal and on the Springfield Division, and that he was 14<sup>th</sup> worst on the entire Carrier system.

The Carrier says that the Claimant was well aware that a future low performance violation would result in disciplinary action and as a result of the Claimant's continued and blatant indifference to duty, the discipline of dismissal from service as assessed was accordingly proper and warranted.

The Organization has offered extensive argument in expressing its views and questioning the right of the Carrier to initiate LPRP as well as the reasonableness and application of LPRP. In addition, the Organization challenges the manner in which the Carrier provides for the conduct of hearings involving LPRP, contending that there is nothing equitable about the Carrier having the Director of LPRP be the conducting officer and specialists who review the data serve as witnesses.

As the Carrier submits, the issues raised by the Organization have been reviewed and determined not to be unreasonable or improper in a number of arbitral decisions on the property. In this respect, the Board especially notes that PLB 6721, Award No. 121, Arbitrator Vaughn, provided an extensive review of Organization argument and in part stated: "The Carrier acts reasonably in establishing processes to measure employee availability and to counsel and discipline full-time employees who fail to be available on a reasonably full-time basis." This Award also stated: "The Board has searched the governing Agreement for indication that the Carrier's use of the Low Performance Review Process is violative of provisions of that Agreement, but finds none."

In regard to the case at issue, the Organization says there is no tool for the Claimant to determine where he stands against his peers in regard to his performance; the Claimant was dealing with personal issues, i.e., his father was very ill at the time and he and his live-in fiancée were going through a split; the Claimant tried to speak with one of his supervisors during the month of September but never got a call back; and, the Claimant reached out for help and started working with the Employee Assistance Program (EAP).

The Carrier disputes the Organization contentions. It says the Claimant had a baseline to work from when he was coached and counseled for his low performance in June 2013. Additionally, the Carrier says the Claimant had easy access in TSS to determine how many hours Engineers in his pool were working. Moreover, the

Carrier says none of this was really necessary though, offering that if the Claimant had just stayed marked up and taken his calls for work he would not have shown up on the low performance report.

As concerns contentions of the Claimant dealing with personal issues, the Carrier says there is no evidence that the Claimant ever reached out to a supervisor for help. Further, the Carrier says it understands that employees can face personal struggles, and that employees have options should they need to take time off, i.e., personal leave, medical leave, Family and Medical Leave Act, etc.

In regard to the Claimant seeking EAP help, the Carrier says that unfortunately the Claimant waited until after the fact to get assistance instead of being proactive.


In terms of discipline, the Carrier says dismissal is completely appropriate in taking into account that this was the Claimant's second Level S discipline within a 12-month period review period and in keeping with PEPA wherein it states that a second serious violation committed within the applicable review period may result in dismissal. Further, the Carrier submits that the Claimant's record also shows 20 prior disciplines, including a past dismissal from service on February 21, 2006 for failure to perform service as a full-time employee in accordance with Attendance Guidelines, with a subsequent return to service on a leniency basis on January 26, 2007 after the Claimant had been out of service for 11 months.

As the Carrier states, its business operates 24 hours a day, seven days a week, and the success of its business relies largely on the availability of its operating employees in order to ensure the timely movement of freight trains which, in turn, leads to timely service of the Carrier's customers. Thus, as the Carrier further says it is extremely important that employees make every effort to work or be available for call so as to ensure that it is providing full time service to its customers.

It being evident that no basis exists for the Board to disturb discipline of a dismissal from service as administered the Claimant by the Carrier, the claim will be denied.

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