

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

Claim of Pacific Seniority District Conductor Christopher D. Carlsson for removal of censure of Standard Ten (10) Day Record Suspension and One (1) Year Review Period from his record and pay for all time lost as a result of an investigation held on July 17, 2015. (Organization File No. D426-314-15A; Carrier File No. 50-15-0094D)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the part by certified U. S. Postal Service mailing, return receipt requested, a notice of investigation 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 July 8, 2015 the Carrier sent by certified U. S. Postal Service mail, return receipt requested, a notice of investigation to the Claimant's address of record that reads in part as follows:

An investigation has been scheduled at 11:00 hours, Friday, July 17, 2015, at the Bob Downing conference room, 4510 E. Wisconsin Ave., Spokane, WA 99212, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to perform service as a full time employee in accordance with the BNSF Employee Attendance Guidelines, specifically your alleged absence from duty April, May, June 2015, as shown in the enclosed attendance report. The date BNSF received first knowledge of the alleged violation is July 8, 2015.

The Carrier letter also identified who the Claimant could contact with any questions regarding this investigation, postponement or waiver.

The investigation was held as scheduled, albeit in absentia; the Claimant not making an appearance or to have been in contact with the Carrier about a postponement or an inability to attend.

After placing opening remarks on the record at the investigation, the conducting officer directed a recess to determine whether the Claimant was in the building. Not

finding the Claimant in the building, the investigation resumed with a Carrier witness presenting into evidence documentation in support of the charge that the Claimant had exceeded his Attendance Guidelines threshold weekday absences by 2.0 weekdays during the three-month rolling period of April, May, and June 2015.

Following the investigation the Claimant was notified by Carrier letter of July 23, 2015 that it was determined that he was guilty as charged and was assessed a Standard Ten (10) Day Record Suspension and One (1) Year Review Period, the discipline here on appeal. The Carrier letter stated that in assessing discipline consideration was given to the Claimant's discipline record and the discipline assessed is in accordance with the Carrier's Policy for Employee Performance and Accountability (PEPA).

The Organization argues that the Claimant was denied due process in that he was tried in absentia. In this respect, the Organization says it questions whether proper notice was served on the Claimant. In referring to the U. S. Postal Service tracking document that the Carrier presented into evidence, the Organization alleges it shows that "although the notice was left at the Claimant's address, the notice of investigation was not delivered until July 20, 2015, three days following the conclusion of the hearing."

Examination of the tracking document reveals that an attempt at delivery was made at 11:41 a.m. on July 10, 2015, but, as it states, since there was no authorized recipient available that a "notice" was left advising the recipient that they may arrange delivery by going to the stated post office web site or may pick the item up at the post office indicated on the notice. This notice further stated if the item was unclaimed after fifteen (15) days then it will be returned to the sender. Since nothing of record shows the Carrier letter to have been returned to it as unclaimed, and no other tracking documentation was presented into evidence, the Organization statement that the notice of investigation was not delivered until July 20, 2017 suggests that the Claimant had waited until that date to pick it up at the post office.

Clearly, it is the responsibility of the Claimant to designate an authorized person to accept delivery of certified mail at his address of record when he is not going to be personally present to accept such a mailing, and to pick up mail at the post office in a timely manner when a postal notice of attempted delivery is left at his residence.

It has also been a long-standing precedent in this industry that when there is sufficient support of record that the employee had been duly notified of the investigation that a failure to appear is at that employee's own peril. As aptly set forth in Second Division Award No. 12690, IBEW v Conrail, Arbitrator John F. Hennecke:

This Board has consistently held that a Claimant may choose not to attend an investigation; however, he is bound by the record established thereat. Claimant's failure to attend constitutes a waiver of the procedural rights to which he is entitled under applicable discipline rules. Nonetheless Carrier still bears the burden of proving its charges.

It being evident that the Claimant was given timely and due notice of the charge of record that included the scheduled time, date and location at which the investigation was to be conducted, the Claimant, having elected not to appear at the investigation for reasons known only to himself to offer a defense for his absences from work, neither the Claimant nor the Organization on his behalf may be heard to contend that there was a denial of due process.

The Carrier having presented supportive documentation to show that the Claimant was in violation of the Attendance Guidelines Policy for the three-month time period at issue, and in view of the Claimant's past record, we find that discipline as assessed was fair and warranted in keeping with the Carrier's discipline policy, PEPA.

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 27, 2018