

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

Claim of Memphis, TN Conductor K. R. Harden 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 4, 2015. (Organization File No. D1420-470-15A; Carrier File No. 55-16-0055D)

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 February 22, 2015, at about 0035 hours, the Memphis, TN Trainmaster noticed that the Claimant, who held a regular yard assignment as Conductor with an on-duty time of 2355 hours, was not present for his assignment. An attempt by the Trainmaster to contact the Claimant by telephone was without success, the Trainmaster leaving a voicemail, saying, "wondering what was going on" and to call him back. After waiting five minutes, the Trainmaster said he contacted the crew desk to mark the Claimant as a "no show" for failing to protect his assignment and for crew management to call an extra employee to fill the Claimant's vacancy. The Claimant telephoned the Trainmaster at approximately 0110 hours, apologized, and stated that he had overslept.

A hearing into the failure of the Claimant to report for his assignment at the time and date at issue was held as scheduled on March 4, 2015, with the Claimant being present and assisted in a defense against the no show charge of record.

Following the hearing, by letter of March 19, 2015 the Carrier notified the Claimant that it had determined through testimony and exhibits brought forth at the hearing that he was guilty as charged and that he was dismissed from service in accordance

with the Policy for Employee Performance Accountability (PEPA). The Carrier letter stated that in assessing discipline consideration had been given to the Claimant's past record.

The Organization has advanced several procedural arguments in urging that the Claimant was denied a fair and impartial hearing. It contends: 1) the Carrier introduced documentary evidence that was not exchanged with the Organization; 2) the Claimant was assessed discipline for a rule violation not alleged by the notice of investigation; and, 3) the first attempt of delivery of the notice of discipline was outside of the time limits of the governing agreement.

In regard to the Organization's first alleged procedural defect, it concerns the introduction at the hearing of documents that had not been provided the Claimant's representative 48 hours in advance of the hearing as is set forth in Article II (a)(5) of what is referred to as the "Uniform Investigation Rule." This provision states:

(5) Forty-eight (48) hours in advance of the hearing the Carrier and the individual identified as the accused employee's representative will exchange all records, documents, locomotive recorder tapes, etc., as well as any other items to be used as exhibits at the investigation to allow both parties to prepare for the hearing.

Although the Board concurs with Carrier contentions that the above rule does not require it to track down an accused employee to determine the identity of a representative who will be representing them at the hearing, the rule does require the exchange of the data listed when an accused employee has elected to have a representative and the representative is made known to the Carrier in advance of the hearing. We would therefore caution the Carrier that it need comply with this contract provision and not rely on argument that documents being presented are those commonly known to a representative and a grievant, i.e., the notice of charge, PEPA, GCOR rules, etc. It may be that a letter to the representative noting that the commonly known documents are to be presented at the hearing and if the representative desires copy to notify the Carrier, and only include with this initial letter documents that are to be presented that are not of a common nature. In any event, we do not find the failure to have provided the documents in this case in advance of the hearing to be of such egregious violation to conclude that discipline be set aside on that basis.

As concerns the second alleged procedural defect, although a notice of discipline as first issued referred to GCOR Rule 1.6, Conduct, having been violated, a rule not entered as an exhibit or brought forth in testimony at the hearing, this matter was corrected by a letter of the same date stating that such rule violation was removed and the Claimant was held in violation of GCOR 1.15, Duty – Reporting or Absence. In the circumstances, the Board finds no merit in this Organization procedural

contention; the Claimant was not, as the Organization contends, disciplined for a violation of GCOR Rule 1.6.

Lastly, as concerns the third of the Organization's procedural arguments, documentary evidence shows that the hearing was held on March 14, 2015 and that the Claimant signed for delivery receipt of the notice of discipline on March 19, 2015, a date within the 15-day time limit constraints of the Uniform Investigation Rule. Thus, it is evident that the record does not support this Organization contention that the discipline notice was delivered outside the time limits of the governing agreement.

On the merits of the dispute, the Organization does not dispute the facts of record concerning the Claimant having failed to report for duty at his regularly assigned time due to having overslept, but notes that the Claimant offered to report as soon as he was able to do so. In this respect, the Board notes the following testimony of the Claimant at the hearing:

Basically, I overslept. The provisions that I have that uh, allow me to uh, to get here on time basically, my wife, she's like my second backup as far as my alarm clock. She was out of town. She left out of town that following Saturday, or the day before, so um, I just didn't hear my alarm, and I didn't hear the phone call from the Trainmaster, and when I woke up, I, I honestly thought I was waking up in time to go to go to work, and found out that I wasn't there. So immediately, when I woke up, I called the Trainmaster, and, and uh, told him that I overslept, and he indicated to me that they had already had called somebody, and uh, I apologized for, for oversleeping.

The Organization also urges that consideration be given to the Claimant's 17 years length of service and that imposition of the ultimate penalty of dismissal from service for the incident the subject of this dispute is harsh and unreasonable.

The Claimant, in a closing statement at the hearing said:

My closing statement is, just, I've been here 17 years. I've never missed a call or had a no show. Uh, this is just a matter of circumstances that just happened. When I realized, I called in, um, prepared to come to work, but I was told that I was replaced at that time. So I, I, the only thing is just, it's never happened before, and I apologize for, for not showing up.


In this latter regard, the Carrier submits that the Claimant had incurred two serious rule violations in a then active 36-month review period and that the current incident was the Claimant's third Level S violation under PEPA; the Carrier


offering that the Claimant had been granted leniency twice before when he could have been dismissed in September and November 2014. It is also noted that the Claimant's record shows a total of 23 past disciplines, including 16 Attendance Guidelines Policy disciplines for exceeding threshold absences during three-month rolling periods of time and four disciplines for a failure to protect a call for service.


The record supporting a finding that the Claimant was guilty of a failure to report for his regularly assigned yard assignment, and the Claimant having an extremely poor discipline record, the Board finds no basis to disturb the decision of the Carrier to dismiss 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 27, 2018