

PUBLIC LAW BOARD NO. 7204

UNITED TRANSPORTATION UNION)
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vs.)
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BNSF RAILWAY COMPANY)

CASE NO. 2
AWARD NO. 2

STATEMENT OF CLAIM:

Claim in behalf of Vancouver, WA Conductor J.W. Alkire for immediate reinstatement, payment for all lost earnings and complete record clearance account dismissal on February 23, 2004 for alleged violation of GCOR Rule 1.15 (failure to protect assignment when laid off on call on January 20, 2004).

FINDINGS:

Public Law Board No. 7204, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The Claimant, J.W. Alkire, had been employed by the Carrier for approximately 12 years. On January 23, 2004, Claimant was charged to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged failure to protect assignment when he laid off on call for Z-PTLCHC9-20Z, at approximately 0023 hours, January 20, 2004 at Vancouver, Washington. Following the investigation, the Carrier found Claimant guilty of the violations alleged and, taking into consideration his personal record, dismissed him from Carrier's employment.

Carrier General Notice No. 363, Lay-Off Policy, provides:

Employees will not be allowed to lay off on call. Any lay-off request must be done in advance of being called for service. Employees who become ill while subject to call must promptly notify crew management and wait to lay off until called for service. In the event of an extreme emergency, employees must be prepared to provide all necessary documentation substantiating the inability to accept the call and explain why advance notification of lay-off was not possible.

Failure to accept a call for service will be considered unavailable time under the Availability Guidelines, a violation of which may result in disciplinary action.

Carrier's Policy for Employee Performance Accountability (PEPA) provides that five disciplinary incidents of any kind within a 12-month period will subject the employee to dismissal.

The facts of this case are not in dispute. On January 20, 2004, Terry L. Keene, Terminal Manager at Carrier's Vancouver, Washington facility, received a notice from the crew office that Claimant had missed a call. Mr. Keene testified at the investigation that Claimant had an automatic mark-up to the extra board, following a personal leave day, at 2359 on January 19, 2004, and received the call at approximately 12:23 a.m. He stated that Claimant asserted that he was ill, but did not lay off prior to receiving the call for service.

At the investigation, Claimant took no exception to Mr. Keene's testimony concerning what had occurred. He also acknowledged that he had laid off on call in violation of Carrier General Notice 363. He stated, however, that he had returned to the board from a personal leave day, and was ill and did not anticipate that he would be called within 15 minutes of his return to the board. He added that he was extremely intimidated about laying off sick, and had just been informed that his interpretation of the availability guidelines was incorrect, so he was making every effort to comply. He explained that if had known he would be called so soon, he would have laid off earlier.

Claimant's personal record indicates that in August 2003, he was disciplined twice for missed calls and once for violation of attendance guidelines, and in October 2003 he was again disciplined for missing a call. His record also shows previous discipline for such matters, including a dismissal for failure to protect call in February 2001, and a leniency reinstatement, with a three-year probationary period, in August 2001.

The Carrier points out that this case involves the second of two dismissal actions against Claimant, the first before this Board in Case No. 1. Simply put, the Carrier states, Claimant laid off without authorization, as the Carrier demonstrated and Claimant admitted. The Carrier asserts that Claimant offered a nonsensical explanation for his action, as he contended that he was too ill to work but nonetheless allowed himself to be marked up for service. The Carrier also notes that Claimant was second out on the extra board and, as he was well aware, could have been called at any time. The only rational explanation for what occurred, the Carrier contends, is that Claimant fabricated a story to cover his desire not to work when called. There is no question, the Carrier concludes, that Claimant is guilty of the charge.

As for the penalty of dismissal, the Carrier points out that the event at issue in this case occurred only 11 days after Claimant was issued an investigation notice for the attendance issues before this Board in Case No. 1. The Carrier states that Claimant, in

his 6½ year railroad career, has an extensive history of missing calls and failing to protect his assignment, and has been disciplined for such matters six times. The Carrier notes that its PEPA provides that the fifth rule violation in 12 months may subject an employee to dismissal, and this was Claimant's sixth disciplinary event in *five months*. The Carrier concludes that Claimant has demonstrated a tendency to conduct himself as he sees fit, without regard for the Carrier or his fellow employees. His unacceptable performance, the Carrier concludes, warrants the penalty assessed.

The Organization contends that although some tribunals may have held that the Carrier has certain rights to maintain a predictable workforce, the manner in which the Carrier has managed its current Lay Off on Call (LOC) policy is hardly a reasonable application of that principle. The Organization points out that the hearing testimony revealed that Claimant was sick and not scheduled to work until the employee ahead of him missed a call. Thus, the Organization states, Claimant was empowered, under the Carrier's "Safety Vision," to lay off, and he would have violated numerous Carrier rules had he reported for duty. The Organization concludes that the Carrier has shown a lack of understanding of Claimant's personal situation, and the claim should be sustained.

The Board has carefully reviewed the record in its entirety. First, we find that the investigation was conducted in a fair and impartial manner. On the merits, there is no question, and Claimant admitted, that he laid off on call, in violation of Carrier policy. Nothing in Claimant's testimony establishes any credible excuse for his having done so. Therefore, his guilt has been proven.


With respect to the penalty of dismissal, Claimant's record indicates four previous disciplinary actions for similar infractions, as well as the charge in Case No. 1, in the five months preceding this incident, while Claimant was still on probation following a leniency reinstatement. It is apparent that the Carrier applied progressive discipline in an effort to improve Claimant's performance, to no avail. Therefore, the Carrier's decision to dismiss him cannot be found arbitrary, capricious or unjust.


AWARD

Claim denied.


JACALYN J. ZIMMERMAN

Neutral Member


ROGER BOLDRA
Carrier Member


J.L. SCHOLLMAYER
Organization Member

Dated this 31st day of March, 2009.