PUBLIC LAW BOARD NO. 4901

AWARD NO. 197

CASE NO. 197

PARTIES TO
THE DISPUTE: United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained

EMPLOYEES' STATEMENT OF CLAIM:

> "Request in behalf of Northern California Division Yardman M. R. Wylie for the removal of the Level 1 – Formal Reprimand and the alleged violation of Northern California Division Superintendent's Notices Nos. 184, in effect February 23, 2000 and No. 197, in effect May 1, 2000; and Rules 1.6, 1.3.3, and 1.13 the General Code of Operating Rules, effective April 2, 2000 from the Claimant's personal record and that the Claimant be paid for all time lost for being required to attend the Formal Investigation conducted on February 7, 2000."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant, with some 28 years of service, received a Level 1 Formal Reprimand for excessive absenteeism during the third quarter of 2000

He held a 5-day assignment. Under Carrier's availability guidelines, Claimant was allowed one day of absence from his assignment per month over a rolling 3-calendar month period. Accordingly, Claimant could have been absent on a total of three days during the months of October, November, and December 2000 and still have been in compliance with Carrier's guidelines. He actually missed nine days work on nine separate occasions over that time frame.

The Organization has challenged the discipline on its merits and for procedural reasons. It contends that, per Article 11 of the Agreement, employees are allowed to be absent for illness or injury for periods up to 15 days by verbally notifying the Carrier's designated representative. In addition, it notes that all of Claimant's absences were for genuine personal illness or family illness. Finally, the Organization maintains that Claimant properly reported his absence to the Carrier on each occasion and received permission to be absent. Procedurally, the Organization raised a timeliness objection per Article 24 of the Agreement.

Except where the law or a labor agreement provide otherwise, the rights of an employer to reasonably regulate employee attendance at work is well recognized. No such contract language or legal authority has been shown to exist here. Contrary to the Organization's view of it, a careful

reading of Article 11 shows that it does not permit 15 days of absence without disciplinary consequences. Rather, the article merely prescribes administrative procedures for dealing with absences of 15 days or less duration as well as those projected to exceed that limit. The article also covers procedures for laying off for other than illness or injury.

Given the lack of negotiated restrictions in the Agreement, it is well settled that the Carrier has the right to expect its employees to attend work with reasonable regularity. Accordingly, the Carrier need not retain in its service an employee who either will not or cannot provide the requisite level of attendance. Moreover, if there are factors personal to the employee that adversely impact on attendance, then it is the employee's responsibility to find solutions to those issues and eliminate that impact.

The key issue regarding excessive absenteeism is its frequency and not its legitimacy. It is axiomatic that even one fraudulently claimed absence may be proper grounds for serious disciplinary action by itself.

Of course, the doctrine of progressive discipline applies to attendance issues and requires that an employer undertake reasonable efforts to correct the problem. However, where the evidence shows absenteeism continuing to be excessive with no reasonable prospect that it will improve, because progressive corrective efforts have been unsuccessful, employment may be terminated. See Third Division Award 27801 and Public Law Board 3566, Award 17, Public Law Board 717, Award 374, Public Law Board 4121, Award 6, and Public Law Boards 6264 and 6265.

During his testimony, Claimant noted how his ex-wife would call him "out of the blue" and say she was leaving town. As a result, he would have to miss work to care for his children. This is an example of a problem that is wholly personal to Claimant. It is Claimant's responsibility to solve the problem to eliminate the adverse impact on his attendance. Frankly, the Carrier is not required to allow the ex-wife to determine what Claimant's work schedule will be.

It is also undisputed in the record that Claimant was aware of and understood the allowance of one day per month. His testimony that he did not believe it applied to genuine personal or family illness, however, simply lacks credibility. His absenteeism for August, September, and October was also in excess of the guidelines. All four of the absences were for personal or family illness. He was counseled on November 28, 2000. He was informed that those absences did count against him and placed him in excess of the allotted threshold. Claimant signed the counseling form and wrote on it that he would work to stay within the guidelines.

Given the foregoing discussion, we find that the record herein contains substantial evidence to support some disciplinary action by the Carrier. In light of the counseling Claimant received just one month earlier, we find the formal reprimand to be a reasonable next step. On the merits, therefore, the Claim must be denied.

But the Organization has also challenged the discipline on procedural grounds. It contends the Carrier failed to timely conduct the investigation in accordance with the 30-day time limit mandated by Article 24(a). The rolling 3-calendar month period that led to Claimant's discipline ended on December 31, 2000. The final absence occurred on December 27th. The investigation was not conducted until February 7, 2001. The Organization's objection was clearly raised at the hearing and was preserved thereafter. The objection was not addressed in any manner whatsoever by the hearing officer or any of the other Carrier officials that participated in the handling of the Claim.

In matters of this kind, the 30-day time limit began running when Claimant's supervisor first became aware of the attendance statistics for October, November, and December 2000. See Special Board of Adjustment 6432, Award 11. Given the 38-day lapse of time from the end of December until the day of the investigation, the Organization's timeliness objection was *prima facie* valid. Therefore, the burden of proof shifted to the Carrier to produce probative evidence showing that the attendance statistics did not become known to Claimant's supervisor until January 8, 2001 or later, dates that fell within 30 days of the investigation. However, the Carrier's evidence failed to establish the date of first knowledge at any time during the investigation or during the handling of the Claim on the property. We are compelled, therefore, to sustain the Organization's procedural objection.

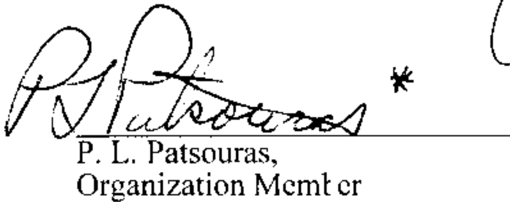
Article 24(f)(d)(6) contains a default mechanism. When the Carrier failed to prove its compliance with the 30-day time limit, the dispute was effectively closed out and settled in favor of the Organization and Claimant. See the prior awards of this Board Nos. 63, 127, and 161.

Accordingly, we must sustain the Claim.

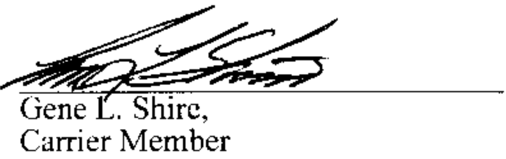
AWARD:

The Claim is sustained

Gerald E. Wallin, Chairman
and Neutral Member



P. L. Patsouras,
Organization Member



Gene L. Shire,
Carrier Member

DATE: 10/29/03

* Concur with sustaining the claim. Dissent to the findings of the merits. Written Dissent attached.

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ORGANIZATION MEMBER'S DISSENT RE: ARTICLE 11

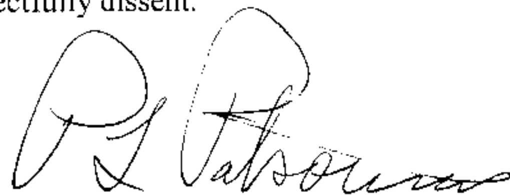
The Organization dissents to the finding of the Board regarding the merits of the claim; specifically the Board's conclusions relative to Article 11 of the Agreement. It is axiomatic that management policy does not supercede the conflicting terms of a Collective Bargaining Agreement.

In this particular case it is evident that the carrier's availability guidelines policy are in direct conflict with the plain and literal language of Article 11. Moreover the carrier's availability guidelines contain the following terms: "application of these guidelines also must yield to any conflicting labor agreement provision."

Article 11 outlines and provides the terms and conditions that an employee can lay off from the workplace as a result of illness or injury, or for other than illness or injury. The provisions of Article 11 were negotiated in "good faith," like any other agreement and the parties have a duty to enforce the agreement.

The majority of the Board finding that "a careful reading of Article 11 shows that it does not permit 15 days of absence without disciplinary consequences is nothing more than a red herring. If the Organization adopted such logic, Article 11 would be rendered meaningless. It begs the question how can one justify punishing an employee when the employee is in compliance with the terms and conditions of the agreement governing absences from the workplace.

In conclusion, Article 11 resolved the issue of valid absences from the workplace many years ago on this property. The carrier's "guidelines" are in direct conflict with Article 11 of the Agreement. Article 11 remains the status quo. We respectfully dissent.



P. L. Patsouras
Organization Member

Cleveland, OH
October 29, 2003