PUBLIC LAW BOARD NO. 4901

AWARD NO. 228

CASE NO. 228

PARTIES TO
THE DISPUTE: United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings.

STATEMENT OF CLAIM:

"Request on behalf of Southwest Division Conductor M. A. Hense for the removal of the alleged violations of Rules 1.1, 1.1.1, 1.2.7, 1.4, 1.5, 1.6, and 1.9 of the General Code of Operating Rules, Fourth Edition, effective April 2, 2000, Rules S 26.1 and S-27.14 of BNSF TY&E Safety Supplement No. 1, in effect April 1, 1998, as supplemented and amended and Southwest Division General Notice 27, Appendix C, Paragraph 3, dated January 15, 2002, from the Claimant's record and the Claimant be reinstated to service with the BNSF Railway Company with seniority and all other rights unimpaired and with pay for all time lost including Health and Welfare benefits from June 13, 2002 until returned to service."

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 was dismissed after Carrier learned he accepted a plea bargain and pled guilty to an un-designated Class 6 felony under Arizona law. At the time of his dismissal, Claimant had more than twenty-nine years of service with the Carrier. His work record revealed no relevant disciplinary action. Moreover, his supervisor described him as a good worker with whom he had not had any problems.

According to Claimant's testimony and the closing statements of him and his Organization representative, he suffered serious financial setbacks and other personal adversities in 2001. He was approached by apparent drug dealers offering to sell him marijuana for resale. The dealers were part of a police sting operation. While off duty, Claimant went to the dealers' hotel and held a bag of marijuana briefly. He had no money with him so did not buy any of the marijuana and left the hotel. He was arrested in the hallway. Because there was more than four pounds of the substance in the hotel room, Claimant was charged with Class 2 felony possession with intent to sell. As noted, the charge was bargained down to the lesser charge of facilitation of sale.

Our review of the record fails to reveal any procedural irregularities of significance.

Although the Carrier's dismissal letter was allegedly never received by Claimant, we do not find a violation of the Agreement. Article 13 does not require actual receipt. Tracking documents show that the letter was timely issued and delivered to the proper address for Claimant.

The Organization also advanced a disparate discipline contention in its submission. It included documents and arbitration awards to show that other employees have not lost their employment for similar conduct. This contention must be rejected for two reasons: First, disparate discipline normally requires probative evidence to establish three elements. There must be the same or substantially similar conduct. It must occur under the same or substantially similar circumstances. Finally, there must be the same or substantially similar mitigating or aggravating circumstances, as the case may be. The material offered by the Organization does not provide sufficient information to establish these three elements. Second, the submissions do not reflect that the material was exchanged on the property while the evidentiary record was still permissibly under development. Accordingly, it must be regarded as new information and argument raised for the first time before us. As such, we may not properly consider it.

Drug usage is a menace that plagues the railroad industry as well as other employment sectors in the United States. Consequently, drug dealing has no saving graces whatsoever. Although the record does not show that Claimant actually participated in such selling, it is clear he knew the purpose of the hotel meeting and went there to explore the income producing potential of the arrangement. The Carrier was not unreasonable in treating his conduct seriously when it rose to a felony level. Carrier rules warn that conduct leading to a felony conviction may result in dismissal.

In this case, Claimant was found guilty of all nine of the rule violations in the notice of charges. No attempt was made by the Carrier in its dismissal letter to distinguish between the seriousness of the nine violations. Thus, we must assume that the dismissal penalty was premised upon the fact that all nine were violated. Careful review of the evidence fails to reveal any substantial evidence in support of five of the alleged violations. Rules 1.1 and 1.1.1 pertain to following safety rules while on the job. It is clear from the transcript that Claimant was off-duty when he was caught in the sting. Rule 1.5 deals with the use, possession, or being under the influence of controlled substances while on duty or on Carrier property. The transcript of the investigation makes it abundantly clear that Claimant did not violate this rule. Even the hearing officer did not pursue this rule violation. It is puzzling to the Board, therefore, how Claimant could have been found in violation of it. There is simply no evidence whatsoever to support this finding. Rule 1.9 relates to conduct bringing criticism upon the Carrier. Once again, there is no evidence to support the finding. Neither the name of the Carrier nor any employment relationship between Claimant and the Carrier was made public. Finally, Rule S-26.1 prohibits conflicts of interest. Neither the evidence nor the Carrier's disciplinary letter explains how the record supports a finding that this rule was violated.

Given the immediately foregoing discussion, we are confronted with the reality that Claimant's dismissal was apparently, for want of any persuasive explanation to the contrary, predicated upon all nine rule violations and not any lesser number. There was a failure of proof on five of the nine. Several of the unproven violations, by themselves, would warrant serious discipline on their own. Thus we must treat the evidence as not providing the requisite support for the Carrier's

disciplinary action.

Having made the foregoing determination, however, we must nevertheless recognize the Claimant's proven misconduct calls for serious and substantial discipline. Accordingly, we must modify the discipline and substitute a suspension without pay for the time Claimant has been out of service. Carrier, therefore, is directed to offer Claimant reinstatement to his previous employment status with seniority and other rights of that status unimpaired but without back pay or other economic benefits for the period of his suspension. This reinstatement directive is conditioned upon Claimant satisfying all customary requirements for employees seeking to return to work as well as an EAP evaluation, if Carrier so chooses, to determine Claimant's fitness to return to duty. Carrier is not required to offer reinstatement until Claimant receives a favorable EAP recommendation, which may not be unreasonably delayed.

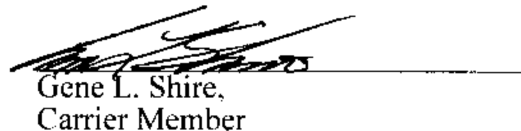
The Board retains jurisdiction over any remedy issues the parties are not able to resolve.

AWARD:

The Claim is sustained in accordance with the Findings.

Gerald E. Wallin, Chairman
and Neutral Member

R. L. Marceau,
Organization Member



Gene L. Shire,
Carrier Member

DATE: 4-6-04

PUBLIC LAW BOARD NO. 4901

AWARD NO. 224

CASE NO. 224

PARTIES TO
THE DISPUTE: United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings.

STATEMENT OF CLAIM:

> "Request in behalf of Northern California Division Yardman M. R. Wylie for the removal of the Record suspension of twenty (20) days for the alleged violation of Northern California Division Superintendent's Notice No. 29 item 18, in effect August 29, 2001, and Northern California General Notice No. 5, in effect January 19, 2002; and Rules 1.6, 1.3.3, and 1.13 of the General Code of Operating Rules, effective April 2, 2000 from the petitioner's personal record and that the petitioner be paid for all time lost for being required to attend the Formal Investigation conducted on March 7, 2002."

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 was disciplined for exceeding the absenteeism limits contained in the Carrier's attendance guidelines. At the time of his discipline, Claimant had some twenty-nine years of service. His previous work record contained two prior instances of discipline for excessive absenteeism within one year under the Carrier's attendance guidelines. These prior instances were the subject of Awards 197 and 219 of this Board.

The actual application of the Carrier's attendance guidelines was discussed in detail in Public Law Board No. 6345, Award No. 38. This Board has also addressed the operation of the guidelines in our Awards 197, 212, 213, and 217. The operation of the policy is thus incorporated by reference and need not be repeated here. Suffice to say that the Carrier was found to be within its rights to promulgate the policy in question and to administer the policy accordingly.

The Organization advanced several procedural objections to the Carrier's actions. Our review of the record does not show them to have merit. However, the primary objection warrants comment. It is based on Agreement Section 24(a), which requires that investigations be held within thirty days from the date of occurrence of the incident to be investigated. Because the Carrier's attendance guidelines are based on a rolling three-month review period, the "occurrence" date must, of necessity, await the end of each three-month period. The period in question encompasses the

months of November and December of 2001 and January of 2002. Thus, on this record, the trigger date for the Article 24(a) time limit could have been no earlier than January 31st. The reply of the Carrier's highest designated officer effectively established that the Carrier would not know of the absenteeism statistics contained in the review period until they are compiled and presented to supervision between the 8th and 10th of the month following the end of the review period. Accordingly, the Carrier was obligated to hold the investigation not later than March 8-10, 2002. The investigation was held on March 7th. It was, therefore, properly scheduled in compliance with the Agreement. We do not find any of the other procedural matters raised by the Organization to be well taken.

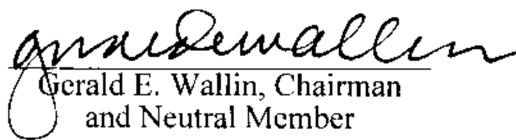
On the merits, Claimant's absenteeism statistics are not in dispute; he was absent from work without a proper excuse on eight days during the three-month period from November 2001 through January 2002. Even after excluding absence due to work related injury, this amount of absenteeism is in excess of that permitted by Carrier's policy for the three month period as well as each of the months in question. Personal illness of a routine nature is not exempt from the operation of the policy.

Given the numbers associated with Claimant's absenteeism, the Carrier had a proper basis for taking disciplinary action pursuant to its policy. The discipline in question, however, is the third step prescribed by the policy. In Award No. 197 of this Board, we were required overturn Claimant's first-step discipline, which was a reprimand, not because of the merits of the case, but because of a technical procedural irregularity in the evidentiary record. Thus, Claimant must be treated now as a second-time offender. Accordingly, his twenty day record suspension must be reduced to a ten day record suspension in accordance with the second step of the Carrier's policy.

It is our further understanding that Claimant's record suspension did not result in any actual economic loss. If this is incorrect, then Claimant must be made whole for all losses resulting from the longer record suspension.

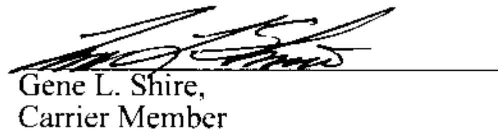
AWARD:

The Claim is sustained in accordance with the Findings.



Gerald E. Wallin, Chairman
and Neutral Member

R. L. Marceau,
Organization Member



Gene L. Shire,
Carrier Member

DATE: 4-6-04