

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 173

Claim of S. P. Witt

Dismissal - Failure to
Comply with Attendance
Guidelines

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of Trainman S. P. Witt requesting reinstatement to service, restoration of seniority and fringe benefits and pay for time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on October 10, 2014, in Washington, D.C. Claimant was present at the hearing.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings.

Claimant has worked for the Carrier since November 8, 2004. Claimant is subject to the Carrier's Attendance Guidelines, which require employees to be regular in attendance and set maximum allowable weekday and weekend thresholds for layoffs. For the three-month rolling period October, November and December 2012, Claimant, while working mixed service in Stockton, California, had an established layoff threshold of zero weekend days. However, during that time frame, Claimant used unexcused absences on two weekend days. Claimant testified that he contacted his supervisor, Sean Kilcullen, on December 26, 2012, about his need for accommodation and that he previously spoke to Mr. Kilcullen in September 2012. Mr. Kilcullen acknowledged that he spoke to Claimant on December 26 but testified that the alleged September conversation did not take place.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of GCOR Rules 1.13 (Reporting and Complying with Instructions) and 1.3.3 (Circulars, Instructions, and Notices) and dismissed him from service.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property up to and including the highest designated official, but without

resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violation of the Rule and the appropriateness of the penalty. It asserts that the facts and testimony presented at the investigation make it clear that Claimant failed to comply with the Attendance Guidelines and, therefore, violated its rules.

BNSF maintains that the evidence is clear that Claimant violated TYE Attendance Guidelines for the three-month rolling period of October, November and December 2012. It contends that Claimant's unexcused absences on two weekend days placed him 2.0 weekend days in excess of his layoff threshold. It points out that Claimant could have avoided violating the charged rules by maintaining full-time employment and staying within the confines of the Attendance Guidelines. It asserts, however, that Claimant, by observing 11 weekend rest days over the three-month period and then laying off an additional two unexcused days, failed to provide full-time employment.

As to the Organization's arguments - that the Attendance Guidelines are wooden and rigid and that it failed to consider Claimant's mitigating circumstances, that is, evidence of clinical depression and his several efforts to fix his attendance problem - the Carrier argues that they are without merit. It maintains that Claimant was previously shown leniency and that, although Claimant knew he was going to violate the Attendance Guidelines, failed to contact his supervisor to try to get excused days off until the last minute. BNSF contends, in addition, that he did not reach out to Labor Relations, ultimately requesting time off to visit the doctor, until just prior to the investigation. It points out that, although Claimant may have alleged that he qualified for additional time off under the ADA and that he was able to hold a job that accommodated his doctor's appointments, he admitted that was not an option because he did not want to make less money. Finally, it asserts that, even if it excused all days in which Claimant visited the doctor, the lay-off sick that occurred on December 23 and into December 24 (Christmas Eve) had nothing to do with a doctor's appointment. It points out that there is no evidence as to why those days should be excused and, therefore, Claimant would still be in violation of the Attendance Guidelines.

The Carrier maintains that the Organization's other arguments - that Claimant attempted to file for FMLA and contacted EAP prior to reaching out to Mr. Kilcullen and that his decision to bid to a job at the end of December cost him his career - are similarly without merit. As to the former, it contends that Claimant had not

logged enough hours (1,250) in the prior year to qualify for FMLA and EAP told him to work through his supervisor in order to secure time off work but that he apparently did not do so until the last minute. As to the latter, BNSF asserts that, although Claimant's mixed service changed the monthly threshold applicable to him, it also provided weekend rest days and it is not known what days he may have missed had he stayed in unassigned service in December without those weekend days off. It maintains that the hypothetical situation does not change the clearly established facts. It also points to the leniency provided to Claimant when he previously stood for dismissal, which was not sufficient to change his attendance.

Finally, with respect to the penalty, BNSF argues that the discipline imposed is appropriate and the record fails to support any of the Organization's claims to the contrary. It contends that any argument for mitigating circumstances is not credible, Claimant having attempted to rectify the situation at the last moment, having options to bid on different jobs, failing to work enough hours to qualify for FMLA and having previously been shown leniency. It points out that Claimant had four active Attendance Guidelines violations on his record at the time of this violation and that dismissal was warranted.

The Carrier urges that the claim be denied as without merit.

The Organization argues that the Carrier failed to meet its burden to prove Claimant's guilt by substantial evidence. It contends that the Attendance Guidelines and those who administer them are wooden and rigid. The Organization asserts that, although it has previously argued that many cases it has brought have been full of holes, the instant situation is truly one of them. It maintains that Claimant was placed between the proverbial rock and a hard place, having gone to Management for guidance in September 2012 but receiving none, having gone to EAP but being told to apply for FMLA and having applied for FMLA but not qualifying.

The Organization further argues that, at the investigation, it was noted that, if Claimant had not used his seniority to move to a better job, he would not have been disciplined. It contends that, once he moved, he did not lay off for 26 days but that, by making that simple seniority move to stabilize his working hours and help with his medical condition, it cost him his career. The Organization asserts that Claimant was not trying to game the system by using his seniority but was simply trying to get some stability to his hours.

Finally, as to the penalty, the Organization argues that Claimant has been a hard working and dependable employee for more

than eight years and that dismissal is not warranted. It maintains that dismissal should be reserved for the worst offenses, not for an individual who had a medical issue about which the Carrier was well informed.

The Organization urges that the Claim be sustained, that Claimant's termination be rescinded and that he be made whole for all lost time and benefits.

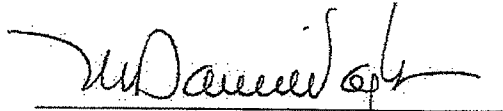
DISCUSSION AND ANALYSIS: The Attendance Guidelines govern Claimant's work. They limit the number of absences an employee may take during any rolling three-month time frame. Claimant was subject to those requirements. The Guidelines do not themselves, differentiate as to the reasons for chargeable absences. The premise for the Guidelines is that the Carrier is entitled to employees who are available for service on a reasonably full-time basis, being excused only on the basis of contractually recognized leave or for statutorily protected reasons. The requirements of the Guidelines are well established; and Claimant was familiar with and bound by them.

The Board has carefully considered, but is not persuaded by, the Organization's challenges to the discipline imposed. Claimant knew that he was in violation of the Guidelines but did not do anything to remedy his situation until the last moment. Furthermore, due to his own record with respect to the number of hours he had worked, he did not qualify for FMLA leave. Claimant had, and used, numerous weekend days off during the relevant period.

The Board is persuaded that Claimant's violation of the Attendance Guidelines, by using additional unexcused weekend days, was of his own doing. Claimant's record includes multiple attendance violations in rolling three month periods. Claimant's attendance problems remained uncorrected. The Board notes that Claimant previously stood for dismissal and that the Carrier showed leniency toward him. Given the nature and circumstances of Claimant's violations, the Board concludes that termination was within the range of reasonableness. The Award so reflects.

AWARD: The Carrier met its burdens to prove Claimant guilty of the charges and to prove his suspension to have been an appropriate penalty. The claim is denied.

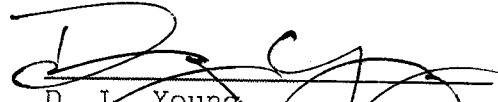
Dated this 5th day of November, 2014



M. David Vaughn,
Neutral Member



Jason Ringstad,
Carrier Member



D. L. Young,
Employee Member