

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

NMB Case No. 34

Claim of Dean Gilbert

20 Day Record Suspension:
Absenteeism

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Southern California Foreman D. A. Gilbert for removal of the 20 day record suspension from his record.

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 August 17, 2006, at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

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.

At times relevant to the claim, Claimant was assigned to a job as a Foreman at the Carrier's Los Angeles Yard, working five days on and two days off. He had been hired by the Carrier in 1996 as a Trainman.

During the three month period of June, July and August, 2004, Claimant laid off 13 weekdays and six weekends. Pursuant to the Carrier's Availability Policy ("Policy"), these accumulated lay offs exceeded by 10 days his authorized lay off threshold during the period of three months. Following the end of that three-month period, the Carrier received and reviewed Claimant's attendance records and concluded that he was in violation of the Policy.

The Carrier convened an investigation to review his absences. Claimant did not attend the investigation, despite notice having been sent to him. The Organization also failed to appear, apparently because it was not asked by Claimant to represent him.

Based on the record of the hearing, the Carrier found Claimant guilty of the charges and, as the violation was Claimant's third under the Policy, assessed him a 20 day record suspension. The

Carrier had progressively counseled and disciplined Claimant in connection with these prior incidents.

The Organization protested Claimant's suspension. The claim was progressed on the property in the usual manner, but without resolution; and it was submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that it is entitled to have its employees work regularly, to enact policies to promote their attendance and to discipline employees who fail to meet the Carrier's reasonable attendance requirements. It asserts that the validity of the Policy has been upheld when challenged.

BNSF argues that it proved, by substantial credible evidence, that Claimant was absent from work in excess of the number of absences allowed by the Attendance Policy for the rolling three month period of June, July and August of 2004. It asserts that he was, therefore, properly assessed a 20 day record suspension for his third violation of the Policy. The Carrier contends that Claimant had been instructed in the rules regarding the rolling three month period for evaluating employee attendance and the penalties that would attach if he continued to violate the Policy. It maintains that Claimant understood the requirements of the Policy and was properly disciplined for his violations.

The Carrier argues that it did not violate Claimant's right to due process and a fair hearing by conducting the hearing in his absence. It points out that there is neither evidence or assertion that Claimant was not able to attend the hearing because he was sick or injured. BNSF maintains that it met its obligation with respect to the hearing by sending Claimant notice of the investigation to his address of record by certified mail. It maintains that it is not responsible if Claimant chose not to pick up his mail or to ignore its contents.

With respect to the Organization's argument that the Carrier failed to conduct an investigation within 30 days of its first knowledge of the violation, as required by Rule 24 (a) of the governing Agreement, the Carrier argues that it conducted the investigation within the prescribed time limits. It maintains that the statistics regarding the three month period could not be compiled until the end of August and that it needed to be gathered and verified before any serious action could be taken, which did not occur until September 8th, 2004. The Carrier points out that the investigation was scheduled for September 28, 2004, which was clearly within the prescribed time limits, as acknowledged in previous Awards applying the Policy.

The Carrier denies that it violated Article 24 (b) by not allowing the Organization to represent Claimant at the hearing. It points out that the language of that Section provides only that the Organization "may" be assisted by an Organization representative. BNSF denies any obligation to have the Organization's representative present, as Claimant had the choice whether to attend and whether to utilize the assistance of the Organization.

Finally, maintains the Carrier, it did not violate Article 24 (d) of the governing Agreement by not having "all witnesses" (which would certainly include Claimant) present at the hearing. It points out that, insofar as the record indicates, Claimant voluntarily chose not to attend the hearing.

The Carrier submitted prior arbitration awards in support of its position.

The Carrier maintains that Claimant's dismissal was warranted based on the violation cited. It urges that the claim be denied and Claimant's dismissal upheld.

The Organization argues that the Carrier violated Claimant's rights to due process and a fair hearing by conducting the hearing in Claimant's absence and without having made any additional effort to contact either Claimant or his representative. It points out that there is no proof that Claimant ever received the letter. Moreover, protests the Organization, no copy of the letter was ever sent it as Claimant's representative.

The Organization also argues that the Carrier failed to conduct an investigation within the prescribed time limits. It argues that the Carrier was aware of the violation at least as early as August 22, 2004, the last day he laid off. On that basis, it argues that September 22, 2004 was the last day on which an investigation could properly have been conducted. The Organization maintains that the investigation was held 34 days following the trigger date, rendering the investigation untimely.

The Organization argues, further, that the Carrier violated Article 24 of the governing Agreement by failing to obtain the most relevant yardman: Claimant.

The Organization submitted prior arbitration awards in support of its position.

The Organization urges that the claim be sustained.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to prove, by substantial evidence in the record as a whole, that Claimant exceeded the allowable lay off threshold for the rolling three-month period of June, July and August of 2004. The Board finds that the Carrier met its burden to prove the charges against Claimant and that the penalty of a 20 day record suspension was not arbitrary or excessive. It was also the Carrier's obligation to provide Claimant with due process and a fair hearing and to prove, when challenged, that it satisfied that obligation. I am also persuaded that the Carrier met that obligation.

The record clearly establishes that Claimant exceeded the number of lay offs allowed for the rolling three month period June, July and August of 2004. Those facts are not disputed by the Organization. The reasonableness of the Policy is not disputed by the Organization in this proceeding. The Board is persuaded that the Carrier proved Claimant's violations as charged.

The evidence is that the Carrier sent notice of the investigation to Claimant at his address of record. It is not clear whether Claimant actually received the notice, but if he did not, it was because Claimant either did not keep his address updated or did not pick up his mail. Either way, the Board concludes that the Carrier met its obligations by sending the notice by certified mail to Claimant's address of record.

The evidence also persuades the Board that the Carrier did not violate the governing Agreement by failing to send the Organization a separate notice of the investigation. While sound labor relations might suggest that notice be sent to the Organization, there is no contractual provision which requires it to be done.

The record also persuades the Board that the investigation was timely. The violation of Claimant's attendance obligations in the rolling three month period could not be established until September of 2004, after the rolling three month period ended. There is substantial evidence that a determination of an employee's actual attendance could not be made without some examination of the attendance records for the period, which would take at least a short period of time. The evidence persuades the Board that the information necessary to determine Claimant's violation of the Policy was not available to Management until September 8, 2004. The hearing was held 20 days thereafter, timely within the meaning of the applicable Rule, concludes the Board.

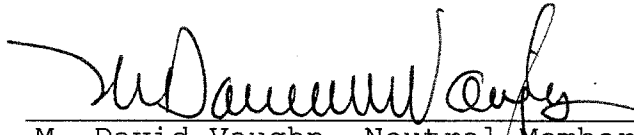
As to the Organization's final argument that the Carrier failed to meet its obligations to conduct a fair hearing by not having all the relevant employees - namely Claimant - attend the

hearing. The Board is not persuaded that Article 24 creates an obligation on the part of the Carrier to separately have Claimant (or any other necessary participant) attend the hearing. To the contrary, the Board confirms that the Carrier discharged its obligations with respect to having Claimant attend the hearing by sending notice to him at his address of record. The Organization points to no other witnesses who would have had knowledge of the case.

The Policy recognizes that an employee's availability to perform his/her duties is crucial to the employment relationship. The Carrier has a right to expect employees to be available for work on a regular basis. Claimant's attendance did not meet that test, and he was properly disciplined. The Award so reflects.

AWARD: The Carrier proved Claimant's violation by substantial credible evidence on the record as a whole and proved that the penalty of a 20 day record suspension was not arbitrary or excessive. The claim is denied.

Dated this 20TH day of February, 2007.



M. David Vaughn, Neutral Member



Gene L. Shire
Carrier Member



R. L. Marceau
Organization Member