

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 40

**Claim of R.R. Reverdy
Dismissal: Absenteeism**

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of Northern California Conductor R. R. Reverdy for reinstatement to service on the BNSF Railway Company with seniority and all other rights unimpaired and without deduction for outside earnings.

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.

Claimant was employed by the Carrier as a Conductor; his service with the Carrier began in 1980. During the three month period of February, March, and April 2005, Claimant laid off 15 weekdays and six weekends. Pursuant to the Carrier's Availability Policy ("Policy"), these accumulated lay offs exceeded his authorized lay off threshold of 13 weekdays and five weekends. At the investigation called to investigate his absence, Claimant stated that he understood the Policy and apologized for violating the rules concerning availability. The record indicates that Claimant violated his threshold lay off during the periods April through June 2003, June through August 2003, January through March 2004, and May through July 2004. The Carrier progressively counseled and disciplined Claimant in connection with these prior incidents.

The Carrier notified Claimant on May 23, 2005 to attend an investigation to ascertain the facts surrounding his alleged laying off in excess of 25% of his available weekdays and weekends during the period February, March, and April 2005. Following the Organization's requested postponement from June 2, 2006, the hearing was held on June 9, 2006. Based on the record of the

hearing, the Carrier found Claimant guilty of the charges and dismissed him from service.

The instant claim for Claimant's reinstatement was presented in due course, 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 proved, by substantial credible evidence, that Claimant failed to perform his duties in excess of 25% of his available weekdays and weekends during the three month period February, March, and April 2005, and therefore, violated its attendance requirements and was properly dismissed from the Carrier's service. The Carrier contends that Claimant knew of, or should have known, the rules regarding the rolling three month period for evaluating employee attendance. It maintains that Claimant's alleged failure to understand the Policy does not excuse his violation. The Carrier points out that Claimant concedes his violation and that he had been disciplined previously for the same violation. It argues that these prior violations gave him experience and made him aware of how the Policy operated.

The Carrier rejects the Organization's anticipated argument that some of Claimant's lay off days were due to sickness for which he received permission to be off. The Carrier points out that violation of the Policy is based on "availability" not on sickness and that sickness is not exempt from the percentage availability requirement of the Policy. BNSF argues that Claimant's frequent sickness led to his failing to live up to his obligations of employment. The Carrier contends that Claimant does not have a clean disciplinary record and that he simply does not want to work regularly.

The Carrier asserts that it has been lenient in dealing with Claimant's attendance. It points out that it granted Claimant a 30-day leave of absence, followed by a further week off, and followed by four days off sick, all without discipline.

BNSF anticipatorilly rejects the Organization's argument that the Policy contradicts various agreements with the Organization. It asserts that one of those agreements long pre-dates the Policy and deals with non-illness/non-injury lay offs. The Carrier contends that the other agreement does not exempt sick days from being considered as unavailable days.

With respect to the Organization's anticipated argument that the Carrier failed to conduct an investigation within 30 days of

its first knowledge of the violation, the Carrier argues that the Organization failed to raise this issue until the first appeal after the assessment of discipline. It maintains that the Organization is barred from introducing the argument at that time. Further, the Carrier argues that it *did* conduct an investigation within the prescribed time limits. It contends that the statistics regarding the three month period could not be compiled until the end of April 2005 and that it needed to be gathered and verified before any serious action could be taken. The Carrier points out that the investigation was scheduled for June 2, 2006, but was postponed at the request of the Organization. Thus, it maintains, by inference, that June 2nd was within the prescribed time limits.

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 Claimant's dismissal is excessive. It points out that Claimant has 26 years of service and that he has been free of injury and/or accidents. The Organization points out that for the first 24 years of his career, Claimant was a reliable worker and worked many additional trips.

The Organization contends that Claimant has not been a disciplinary problem and that his attendance problems began only recently. It argues that his attendance problems are due to stress and that, rather than bring his problems to work, he laid off sick. The Organization points out that Claimant did not use his days off for personal business, but to deal with stress. It notes that Claimant took a 30-day leave of absence for the purpose of participating in the Employee Assistance Program ("EAP"). The Organization asserts that Claimant's stress did not reappear immediately following completion of EAP, but that after approximately 30 days, the stress did begin to accumulate and increased over time. Further, the Organization concedes that Claimant admitted his violation of the Policy but points to his sincere expression of remorse and his apology. The Organization argues that Claimant's receiving permission to be off sick and that such laying off sick with permission does not constitute a violation of other agreements between the Parties.

The Organization also contends that the Carrier failed to conduct an investigation within the prescribed time limits. It argues that the Carrier never established a time line establishing when it became knowledgeable of the violation. The Organization asserts that the Carrier became aware of the violation on April 30, 2005, the last day of the relevant three month period. It argues that May 30, 2005 is the last day on which an investigation could

properly have been conducted. The Organization maintains that June 2nd is two days beyond the end of the 30-day period for commencing an investigation.

The Organization urges that the claim be sustained.

DISCUSSION AND ANALYSIS: The central issue in this case is whether the Carrier proved, by substantial evidence in the record as a whole, that Claimant exceeded the allowable lay off threshold for the period February, March, and April 2005. The Board finds that the Carrier met its burden but that for the reasons that follow, dismissal was excessive.

The record establishes that Claimant exceeded the number of lay offs allowed for the rolling three month period February, March, and April 2005. Those facts are not in dispute and, indeed, Claimant admitted and apologized for his violation. Notwithstanding the Organization's argument that the Policy is complex, Claimant acknowledged that he understood it. In addition, Claimant's prior experiences with counseling and/or discipline for similar violations establish that he understood the substance and requirements of the Policy.

With respect to the timing of the investigation, the record shows that the conduct of the investigation was timely. The violation could not be established until the end of April 2005, when 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. If that period were only a small number of days, then even under the Organization's argument, the investigation as originally scheduled on June 2, 2005, was not untimely.

As to the Organization's claims of inconsistency between the Policy and various agreements between the Parties, the claim herein does not appear to challenge the validity of the Policy as being inconsistent with the provisions of any agreement between the Parties. In addition, insofar as the record herein reveals, there is substantial evidence that the Policy is not inconsistent with the agreements of the Parties.

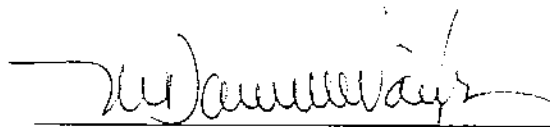
The Policy recognizes that an employee's availability to perform his/her duties is crucial to the employment relationship. The Carrier has a right to expect employees to be available for work on a regular basis. Claimant's attendance did not meet that test. As to the argument that Claimant's lay offs were due to sickness, the Board finds that there is substantial evidence in the

record that lay offs due to sickness are not distinguished from other lay offs in the Policy and such days count against the percentage totals for the rolling three month period. There is no allegation in the record that Claimant's lay offs are protected pursuant to the Family and Medical Leave Act, or any other similar circumstances.

The record makes clear, however, that Claimant's sickness was a recent, if ongoing, problem and that he had sought to address it through the EAP, with some temporary success. Moreover, Claimant's ready admission of violation and remorse plus his record of long service leads the Board to find that appropriate resolution of this matter is to reinstate him to service, but without back pay, and to refer him for further EAP assessment and appropriate treatment. The Award so reflects.

AWARD: The Carrier proved Claimant's violation by substantial credible evidence on the record as a whole, but the penalty of dismissal is excessive in light of the circumstances of the case. Claimant shall be reinstated, but without back pay or benefits for the period of his absence, and shall be referred to EAP.

Dated this 29th day of September, 2006.



M. David Vaughn, Neutral Member



Gene L. Shire
Carrier Member



R. L. Marceau
Organization Member