

PUBLIC LAW BOARD NO. 6721

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE

RAILWAY COMPANY

NMB Case No. 44

Claim of D. R. Hartwick

Dismissal: Reporting Late

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Southern California Trainman D. R. Hartwick for reinstatement to service with pay for time lost, with all rights, seniority and all Health and Welfare Benefits restored unimpaired and removal of the alleged violation of Rule 1.15 of the General Code of Operating Rules, Fifth Edition, from his personal 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 craft.

Claimant was employed by the Carrier as a Conductor; his service with the Carrier began in July of 2002. Between March 24 of 2005 and his dismissal in November of 2005, Claimant incurred seven rules violations, all related to missing work. On March 24th he missed a call due to his unavailability and was reprimanded. On June 29th, he missed a call due to his unavailability and accepted a waiver, receiving a 10 day record suspension. On June 30th, he was found in violation of BNSF attendance guidelines for the Month of June and received a formal reprimand. On July 13th, Claimant missed a call due to his unavailability and he accepted a waiver and received a 20 day record suspension. On July 24th, he laid off on call without authorization, accepted a waiver and received a 30 day record suspension. On September 30th, Claimant laid off on call without authorization, and received another 30 day record suspension and three years of probation for failure to protect his assignment and engaging in other employment.

The Carrier has in place the Policy for Employer Performance Accountability ("PEPA"), the validity of which has been upheld in

previous awards. See, e.g., Award 1 of PLB 6532 (Vaughn). One provision of PEPA is that five violations of any kind in a 12-month period may result in an employee's dismissal.

On October 13th, Claimant was scheduled to report at 0605 to work as Conductor on Train Z-LACNYC9-11. He was timely and properly called, but reported at approximately 0655. The departure of his train was delayed approximately 30 minutes and resulted in delays of other high-priority trains. Claimant asserted that he had been delayed by car trouble and had been unable to contact the Carrier to advise of the problem because of a constant busy signal on the telephone.

Claimant was notified of an investigation to determine his responsibility for possible violation of GCOR Rule 1.15, which obligates employees to report for duty at the designated time and place and warns that an employee's continued failure to protect their employment will be cause for dismissal. For reasons unexplained in the record, neither Claimant nor his representative appeared at the hearing, at which the above evidence was adduced. Claimant's receipt of the notice is not disputed. When Claimant and his representative did not appear, the hearing officer recessed the investigation to try to locate them, but it is not disputed that the Carrier did not attempt to contact either by telephone. There is no evidence that either attempted to contact the Carrier in connection with their failure to appear.

Following the hearing, the Carrier found Claimant guilty of the charge and dismissed him, based on the nature of the offense and the fact that the offense was Claimant's seventh violation within the previous seven months.

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 evidence, that Claimant is guilty of the charge and that dismissal was an appropriate penalty.

The Carrier argues that the evidence establishes that Claimant was properly scheduled and notified, but did not appear until 50 minutes late, causing delay to his and other trains. It asserts that CGOR Rule 1.15 clearly requires employees to report as scheduled and that the evidence clearly establishes Claimant's

violation of the Rule and attendant delays.

The Carrier argues that the violation was Claimant's seventh in a mere seven months and asserts that Claimant's record warrants a conclusion that his reliability is unacceptable, that he has not improved over time and that he is simply unable or unwilling to meet his obligations to the Carrier.

As to the Organization's complaint that Carrier conducted the investigation in absentia and without calling necessary witnesses, the Carrier argues that it provided Claimant with proper and timely notice and that its obligation ended there, there being no provision of the Agreement requiring it to either follow up to ascertain why Claimant was not there or to forego proceeding in his absence. It points out that the Carrier recessed the hearing to try to locate Claimant and that the proceeding took 45 minutes, during which neither claimant nor the Organization appeared.

The Carrier urges that the claim be denied and Claimant's dismissal be upheld. It also requests that if discipline is modified, that any lost wages paid to Claimant be offset by any outside earnings.

The Organization argues that the Carrier failed to prove that dismissal was the appropriate penalty for his tardiness and failed to take into account his legitimate reason for his tardiness (car trouble) or his unsuccessful efforts to contact the Carrier to so advise them.

The Organization also argues that the Carrier violated Article 13 (a) of the governing Agreement by conducting the hearing in Claimant's absence and without attempting to contact him and by failing to have present all witnesses with knowledge of the incident at issue.

The Organization maintains that penalty of dismissal is arbitrary and excessive. The Organization urges that the claim be sustained, the dismissal rescinded and that Claimant be returned to service with all seniority rights unimpaired, with fringe benefits intact, and with pay for all time lost without deduction for outside earnings.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to prove, by substantial evidence in the record, that Claimant was guilty of the charge against him and that the penalty of dismissal was an appropriate penalty. As the Organization has challenged the

fairness of the investigation, the Carrier was obligated to prove that the procedure utilized did not violate Claimant's right to due process and a fair hearing. For the reasons that follow, the Board concludes that the Carrier proved Claimant's violation, proved that dismissal was an appropriate penalty and proved that Claimant was not deprived of the due process and fair hearing to which the law and Governing Agreement entitled him.

The evidence persuades the Board that Claimant failed to report for his assignment on October 13, 2005 until approximately 50 minutes after his scheduled time, which resulted in the delay of his train and other trains and that Claimant had been properly and timely notified of his assignment. The Board concludes that Claimant's conduct was in violation of GCOR Rule 1.15.

Claimant was obligated to take steps necessary to report for his assignment on time, including maintaining reliable transportation and having in place a backup plan. Claimant never produced any documentation for his alleged car trouble. He was also obligated to notify the Carrier of any delay in his reporting, but he failed to do so. Claimant's explanation that he tried to call but was unable to get through is not supported by cell phone receipts, nor is his failure to utilize alternate telephone numbers to reach the Carrier. The Board is not convinced by Claimant's explanation for why his failure to report timely should be excused or mitigated.

The Organization argues that the Carrier violated Claimant's rights to due process and fair hearing by conducting the investigation in the absence of Claimant and his representative and by failing to have all relevant witnesses present. The Board is not convinced. The evidence is that the Carrier sent Claimant timely and proper notice. There is no assertion that Claimant did not receive the notice. The Board concludes that the Carrier met its notice obligation. Article 13 (a) requires that hearings be held promptly and provides that when a material witness is unable to attend because of sickness, vacation or injury, the investigation may be deferred. Nothing explicitly requires that a claimant attend an investigation or that a claimant be represented. A claimant is ordinarily a material witness in an investigation, and an investigation "may" be deferred because a material witness is unable to attend because of sickness, vacation or injury. However, there is no evidence that Claimant was sick, on vacation or injured or that the circumstances otherwise warranted deferral of the hearing. Indeed, given Claimant's history of not showing up when required, the Carrier was hardly obligated to assume his intent to

appear. There is no provision of the Governing Agreement which required the Carrier to call Claimant or his representative to determine whether they intended to appear. There is no evidence that either Claimant or the Organization ever asked for adjournment of the hearing or even that they asked that it be reconvened.

As for the Organization's assertion that the Carrier failed to have all material witnesses present at the hearing, the Board is also unconvinced. The Carrier had the obligation, in the absence of Claimant and/or his representative, to present a prima facie case. The Board concludes that the Carrier met its obligation. Had Claimant and/or his representative been present, the Carrier would have been obligated to present those witnesses for cross-examination, but the absence of either relieved the Carrier of its obligation. The Board concludes that the Carrier did not violate Claimant's right to due process and fair hearing in the manner in which it conducted the investigation.

Claimant's failure to report in a timely manner was serious, as the Carrier operates its trains on tight schedules; and the failure of employees to report when scheduled interferes with the schedules. Tardiness is, of course, correctable; and if this were Claimant's first instance of tardiness, a penalty intended to correct the violation and deter future tardiness would ordinarily be appropriate. However, PEPA specifically provides that employees who incur five or more violations in a 12 month period are subject to dismissal.

Claimant meets that test, with offenses to spare and a shorter time period than required. Moreover, Claimant's violations are all of a type: he is scheduled to work and does not show. His dismissal resulted from his seventh similar violation in seven months. The record persuades the Board that Claimant has been unresponsive to corrective discipline and that he is either unable or unwilling to meet his obligations to report as scheduled and work his assignments. The Carrier is clearly entitled to employees who can meet those obligations; Claimant does not. The Award so reflects.

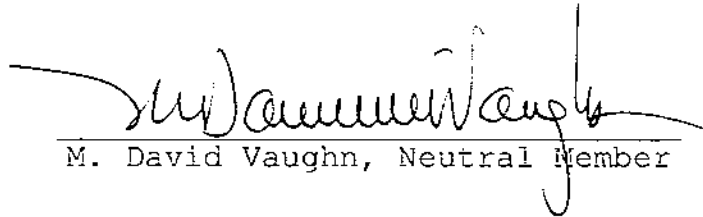
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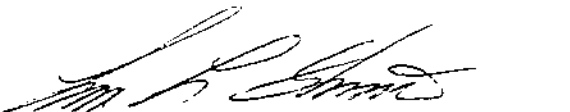
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AWARD: The Carrier proved that Claimant violated Rule 1.15, established that it provided Claimant with due process and a fair hearing and proved that dismissal was an appropriate penalty. The claim is denied.

Dated this 18th day of September, 2001


M. David Vaughn, Neutral Member


Gene L. Shire
Carrier Member


R. L. Marceau
Organization Member