

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

NMB Case No. 18
Claim of R. D. Doyno
Dismissal: Absenteeism,
Abuse of FMLA, Conflict
Interest, Failure to
Provide Requested
Information

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Southern California Division Yardman R. D. Doyno for reinstatement to service on the BNSF Railway Company with seniority and all other rights unimpaired with pay for all time lost including payment of Health and Welfare Benefits beginning November 25, 2003 and continuing until returned to service and no deductions for outside earnings and the removal of his alleged violations of Rules 1.6, 1.18 of the General Code of Operating Rules, fourth edition, effective April 2, 2000, as supplemented or amended and possibly using Family Medical Leave Act (FMLA) as a reason to lay off working as a Longshoreman.

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 March 10, 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 first employed by the Carrier beginning in March of 1996. Insofar as the record indicates, his service was satisfactory until the events which led to his dismissal. At times relevant to this dispute, Claimant was assigned to a yard job, working days, Monday through Friday.

In October of 2002, Claimant's Wife underwent surgery. The surgery was not completely successful; and she experienced continued pain which limited her ability to care for herself. In November of 2002, Claimant applied for and was granted Family Medical Leave to care for her. He was off from his scheduled assignment a sufficient amount of time that he used up his unpaid FMLA leave by June of 2003.

Claimant continued to be absent after the expiration of his FMLA leave to the point where he was scheduled for investigations in consequence of his excessive absenteeism. Claimant advised Management that his absences were in consequence of his Wife's continued medical problems; and the Carrier canceled the investigations, apparently treating his absences as excused.

Managers claimed that they orally requested documentation for Claimant's Wife's condition, but never insisted on the documentation as a condition of canceling the investigations and never reduced the requests to writing or threatened Claimant with discipline if he failed to comply with the requests. When Claimant's excessive absenteeism continued into the fall of 2003, the Carrier notified him of his unsatisfactory attendance and referred him for alternative handling.

In the summer of 2003, Management had "heard rumors" that Claimant was working as a Longshoreman while marked off. Management interviewed Claimant on November 17, 2003 concerning his possible outside employment. Claimant admitted working as a Longshoreman, and acknowledged that he was trying to work enough for BNSF to retain his benefits while establishing seniority as a Longshoreman, but denied at that time that he had worked as a Longshoreman during times he was on FMLA leave. Claimant was suspended from service, pending investigation, in November of 2003.

The record establishes that Claimant missed 140 days of work for BNSF in 2003 through the time he was removed from service. Sixty days of Claimant's absences were intermittent FMLA, 14 were vacation and 5 were Union business. He also took sick leave. The remainder of the absences were treated as excused until Management started applying the Attendance Guidelines to his attendance.

The Carrier convened an investigation on January 6, 2004 to determine whether Claimant violated General Code of Operating Rules 1.1, (April 2, 2000 Edition) Rules 1.8, which provides that "[e]mployees must not engage in another business or occupation that would create a conflict of interest with their employment on the railroad or would interfere with their availability for service or the proper performance of their duties" and Section 1.6 of which, in part, makes "any act" of misconduct or willful disregard affecting the interest of the Company to be cause for dismissal, as well as possibly using Family Medical Leave Act (FMLA) to cover his absences while working as a Longshoreman.

At the hearing the evidence described herein was adduced. In the hearing, Carrier witnesses admitted that they lacked written

documentation that Claimant had worked as a Longshoreman on days he was scheduled to work for BNSF. Claimant denied that the Carrier had ever asked him for documentation of his Wife's illness, but pointed out that his certification for FMLA leave was conditioned on his submission, and Carrier review and approval, of documentation of her medical condition as making him eligible for such leave. Claimant admitted that there were some times in which he worked as a Longshoreman on days he was off on FML but asserted that he only worked in that capacity after he had tended to his Wife's medical needs, which he testified consisted primarily of providing her personal assistance when her pain limited her ability to care for herself.

Claimant was found guilty of the charges brought against him. He was dismissed from service by a letter dated and sent to him on February 4, 2004, 29 days after the investigation, which he received on February 6, 2004, 31 days after the investigation.

The instant claim for Claimant's reinstatement and payment for all time lost was presented in due course and 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 abused FMLA, was insubordinate when he failed to provide documentation of his wife's medical condition as requested, and he engaged in unauthorized employment in conflict with his obligations to BNSF.

The Carrier points out that, after Claimant exhausted his FMLA leave and continued to be excessively absent, he escaped discipline for absenteeism by asserting that he continued to need time off to provide constant care for his wife but failed to provide documentation for her medical condition, despite Management's repeated requests to do so.

The Carrier also argues that Claimant violated his duty of loyalty when he absented himself from his regular assignment to work as a Longshoreman, working for employers who worked with competing railroads in addition to BNSF.

The Carrier argues that Claimant abused his FMLA leave by taking such leave when his Wife did not require constant care and when he used time he was on FMLA to engage in outside employment as a Longshoreman.

The Carrier argues that the evidence proves that Claimant was insubordinate and dishonest. It urges that his dismissal be upheld and that the claim be denied.

The Organization argues that the Carrier failed to prove the charges against Claimant and argues further that it failed to provide the Claimant with notice of his dismissal within the contractually-required 30 days.

The Organization argues that the Carrier failed to undertake an investigation within the required 30 days from the date of the occurrence to be investigated. It cites Article 24 (a). The Organization asserts that the Carrier was aware of Claimant's outside employment on or before November 17th, but did not convene the investigation until January 6th.

The Organization also complains that by supporting its charges, Claimant was deprived of his right to face his accusers.

As to the merits of the charges, the Organization maintains that the Carrier failed to prove that Claimant engaged in unauthorized outside employment, since it submitted no evidence that he worked elsewhere when he was supposed to be working for the railroad. It asserts that there was no documentation to establish that Claimant was working as a Longshoreman on any day when he laid off FMLA.

As to Claimant's alleged dishonesty, the Organization argues that Claimant admitted when asked that he had been working as a Longshoreman and conceded that he was trying to keep his benefits with BNSF while establishing a seniority date as a Longshoreman.

As to the charge of abusing FMLA leave, it maintains that the Carrier produced no proof of such abuse. It protests use of Claimant's crew movement history and attendance as beyond the scope of the notice.

The Organization also challenges the Carrier's charge that Claimant failed to produce documentation of his Wife's illness upon request. It points out that the Carrier produced no proof that it requested such documentation, despite a practice of maintaining written documentation.

Finally, the Organization protests Claimant's suspension pending investigation. It asserts that Article 24 (a) limits such suspensions to "aggravated cases, such as a serious collision", which it maintains Claimant's situation is not.

The Organization argues that the claim must be sustained, Claimant's dismissal overturned and that he be reinstated to service with seniority unimpaired and made whole for wages and benefits lost.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to adduce substantial credible evidence on the record as a whole of Claimant's guilt and to establish that the penalty of dismissal was the appropriate response. For the reasons which follow, the Board is persuaded that the Carrier violated its contractual obligations with respect to the timely processing of the charges, which requires that the claim be sustained in accordance with its terms.

As to the Organization's complaint that Claimant did not receive notice of his dismissal within the contractually-required 30 days, the Board is not persuaded. The industry generally follows the "mailbox rule", pursuant to which notices are deemed to have been given on the date they are transmitted. No contrary language or intent with respect to the governing Agreement is contained in the record. The evidence is that the notice of dismissal was mailed to Claimant on the 29th day, within the required 30 days. The Board concludes that the Carrier did not violate the required notice period and that the discipline is not procedurally defective.

The Agreement obligates the Carrier to bring charges within 30 days of when it becomes aware of the charges. [Article 24 (a)]. Failures to comply with time limits are deemed to settle the claim on the terms set forth therein [See Article 24 (d)(6)].

The evidence establishes that the Carrier was aware of Claimant's alleged failures to provide documentation and alleged insubordination on an ongoing basis beginning not later than July or August of 2003, after it allegedly requested that documentation, but did not initiate an investigation until January. The Board notes that the alleged failures to provide documentation are unsupported by proof that his alleged failures to comply rose to the level of insubordination. The Board also notes Claimant's denial that the Carrier ever asked him for documentation.

The evidence also persuades the Board that Carrier had definite knowledge as of November 17th, in the form of Claimant's admission, of his work as a Longshoreman, but held no investigation until January 6, 2004.

It is not clear when, if ever, the Carrier had knowledge of Claimant's alleged FMLA abuse prior to convening an investigation; but to the extent that its notice is based on learning that

Claimant had been engaging in outside employment, that occurred not later than November 17th, and the Carrier's investigation of FMLA abuse suffers from the same infirmities as its other charges.

The Board concludes that the investigation was, therefore, untimely under Article 24 (a) and that, under Article 24 (d) (6), the dispute should be settled on the terms of the claim, that is, with Claimant's reinstatement and restoration of wages and benefits lost.

The Board is also persuaded that the Carrier improperly suspended Claimant pending investigation. Suspension in advance of charges and hearing is proper only in "aggravated cases", which this is not. Indeed, the claimed dishonesty which might otherwise trigger suspension is not proven.

Given the procedural violations which occurred and the manner in which the Parties have by agreement determined to resolve such violations, it is unnecessary to rely on the merits of the charges against Claimant. As indicated, there is insufficient proof to establish that Claimant was insubordinate and insufficient evidence to prove that Claimant's work as a Longshoreman was, itself, impermissible.

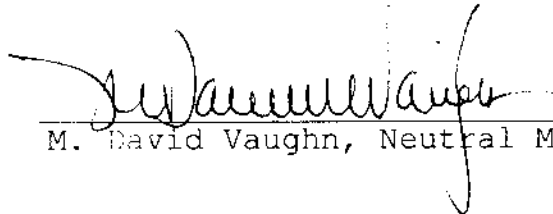
The railroad is entitled to prohibit employees from engaging in outside employment which interferes with their ability to perform their railroad duties; but there is insufficient proof that Claimant's occasional work as a Longshoreman was the cause, or a cause, of his absences.

The Board believes that an employee who takes FMLA leave is granted permission to be absent from work to tend to covered medical obligations and not to use such leave to engage in outside employment. If Claimant became sufficiently free of his medical obligations to work, or to seek work, as a Longshoreman, he had an obligation to ascertain if the railroad had work for him. There is no indication that he made any attempt to do so. However, the procedural violations obviate the need to assess the consequences of his failures.

Claimant's large number of absences and his interim earnings are relevant to the remedy, as the Board concludes that the Carrier is entitled to reduce back pay by a projection of his pattern absences and by his outside earnings during the period he was dismissed. The Award so reflects.

AWARD: The claim is sustained. The Carrier failed timely to conduct its investigation with respect to the conduct at issue and improperly suspended Claimant pending the investigation. As required by Article 24 (a) of the governing Agreement, the claim is deemed settled in accordance with its terms. Claimant's dismissal shall be rescinded and he shall be reinstated to service, with seniority unimpaired, and made whole for wages and benefits lost for the period he was absent, reduced by a percentage representing the number of workdays he was absent compared to the number of work days scheduled during the last 12 months prior to his suspension and further reduced by his interim earnings, including earnings from working as a Longshoreman during the period he was absent. Claimant shall, as a condition of receipt of back pay and benefits, supply tax and earnings information sufficient to allow the Carrier to calculate outside earnings. The Carrier shall implement the Award within 30 calendar days of its execution.

Executed this 13th day of July, 2006.



M. David Vaughn, Neutral Member



Gene L. Shire, Carrier Member



R. L. Marceau, Employee Member