

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

NMB Case No. 154

Claim of D. C. Boyce
Dismissal - Low Hours

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Trainman D. C. Boyce requesting reinstatement, restoration of seniority and fringe benefits and payment for any 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 April 12, 2013, in Washington, D.C. Claimant was not 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.

On July 20, 2010, Claimant, who has worked for the Carrier since May 16, 2005, and was working in Los Angeles, California, was Coached and Counseled by his Terminal Superintendent regarding his Low Performance during the month of June 2010, and was instructed that his working performance needed to improve. By a letter dated August 4, 2010, Claimant was told that he worked 77.3 hours in June 2010, had not met expectations of full-time employment and had maximized his unavailable time by maximizing time off and minimizing work opportunities. He was also informed that his failure to comply with the letter's instructions would be considered a Level S violation under PEPA and a violation of GCOR Rules.

On December 13, 2010, Claimant signed a waiver accepting responsibility for failing to comply with instructions relating to his low performance and availability for the month of October 2010, in which he worked 86.0 hours with a work potential of 185.2 hours. His low performance and availability were considered a Level S violation.

In July 2012, Claimant was again identified by the Transportation Process Specialist team as an employee who was not performing a comparable amount of service in comparison to his

peers. In June 2012, Claimant, who spent the month assigned to multiple positions in Los Angeles, worked 72.9 hours, as compared to comparable employees at Los Angeles who averaged 157.0 hours. This ranked Claimant as the 7th lowest working employee out of Los Angeles's 296 employees, 18th lowest out of 1,355 employees in the California Division and 184th lowest out of more than 17,500 employees system-wide.

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), 1.15 (Duty - Reporting or Absence) and 1.6 (Conduct) and dismissed him from all 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 violations of the Rules and the appropriateness of the penalty. It asserts that the evidence presented at the investigation make it clear that Claimant violated its Rules. It maintains that Claimant failed to comply with instructions and demonstrated indifference to duty in the form of failure to perform as a full-time employee.

BNSF maintains, citing numerous prior Awards, that Claimant's actions reflect an employee "gaming" the system to avoid working as a full-time employee. It contends that Claimant would mark up, ride his working Board until he was close to being called and then would lay off. The Carrier maintains that Claimant was coached and counseled to improve his availability but that, nonetheless, he continued to make himself unavailable for service. It points out that Claimant, by timing his lay offs to occur when he was close to the top of the working board, managed only to work from June 8 through June 20 and that, although he was always between first and third out on the working board, he only worked nine starts. It points to the evidence that Claimant's co-workers, who were junior in seniority, were able to work 17 to 20 starts.

The Carrier contends that the Organization's arguments that the Carrier refused to grant Alternative Handling ("AH") to Claimant and that he could not use FMLA are without merit. It contends that there is no evidence that Claimant ever requested AH and that, since Claimant had violated a personal conduct rule, i.e., GCOR Rule 1.6, he was not eligible for AH. In any case, BNSF maintains that the purpose of AH is to provide extra training and

counseling instead of punitive discipline but that Claimant had already been Coached and Counseled regarding his low performance and received a Level S 30-day record suspension. It points out that Claimant clearly timed his lay offs so as to maximize his time away from work and that he is performing near the bottom of employees at his work location. Finally, BNSF contends that, even if Claimant had requested - and been denied - AH, the Organization was obligated to follow the steps set forth in the Agreement before arguing that it violated the AH Agreement. It asserts that the General Committee did not request a conference and, therefore, waived any argument concerning the denial of AH.

As to FMLA, the Carrier maintains that the Organization's statement that Claimant could not use FMLA is correct because Claimant was not eligible for FMLA in 2011, having not worked a sufficient number of hours to qualify for it. It points out, in addition, that Claimant did not even apply for FMLA in 2012 and would not have qualified for it.

Finally, as 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 asserts that Claimant was coached and counseled and acknowledged a prior Level S violation. The Carrier maintains that Claimant failed to improve his behavior, instead performing at a lower rate in comparison to his peers. It asserts that Claimant was indifferent to his duties and that his behavior constitutes a serious rules violation. It notes, in addition, that Claimant has two Attendance Guidelines violations during the same period, as well as another four Attendance Guidelines violations for which it demonstrated leniency and did not assess discipline.

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

The Organization argues that the discipline is defective on its merits and must be rescinded because the concept of "Low Hours" (the same process the Carrier terms "Low Performance") is invalid. It contends that the "Low Hours" procedure is merely a way for the Carrier to end run several negotiated agreements because it refuses to man the boards properly and refuses to manage the manpower that it has. The Organization asserts that the concept has no guidelines, no rhyme or reason and no way for an employee to ever work out of it. It maintains that an employee has no way to understand the policy or correct his alleged misbehavior. The Organization further protests that the Carrier refused to grant AH to Claimant. It contends that "Low Hours" is not excluded from AH and that the instant issue should have been handled by AH.

As to the merits, the Organization contends that Claimant has a known medical problem for which he is seeking treatment. It asserts that Claimant sought advice from the Carrier but, because he did not qualify for FMLA and did not need ten days at a time off for medical leave, was not provided with any viable option. The Organization maintains that Claimant needed time to have his medication regulated properly and to work out a diet and exercise program. It contends that Claimant has continued to seek medical advice and has his ailment under control and will not be a low hours issue for the Carrier in the future.

The Organization urges that the Claim be sustained, that Claimant be reinstated, that his seniority and fringe benefits be restored and that he be paid for any time lost

DISCUSSION AND ANALYSIS: The Board is persuaded that employees who occupy full-time jobs are reasonably expected to be available on a full-time basis, excused from that obligation only in the exercise of contractual authorization, such as vacation, or the exercise of statutory rights, such as FMLA. Employees who fail that obligation not only encumber a full-time position which they are not supporting, but shift the burden of excess absences onto other employees. The Carrier acts reasonably in establishing processes to measure employee availability and to counsel and discipline full-time employees who fail to be available on a reasonably full-time basis.

The Board has carefully considered, but is not persuaded by, the Organization's contention that the LPRP was improperly established, is not numerically based and, therefore, is arbitrary. Undoubtedly, employees may be singled out in comparison to their peers, as the Organization suggests, even if their attendance is at a level which might be acceptable. However, Claimant's demonstrated lack of availability for duty cannot be excused on the basis that his performance was at an acceptable level under the guidelines.

The fact that an employee is below average in attendance is not, itself, a basis for discipline. There is likely a line that would limit the Carrier's ability to discipline employees for Low Performance, as when average employee attendance might increase and the difference between those averages and the bottom of the list decrease. However, it is not necessary to define the lowest level of acceptable attendance; by any standard, Claimant's availability to perform his full-time job was far less than full time and far less than acceptable: the evidence is that he was the lowest performer of all employees in his Station, his Division, and System-wide. He did not improve after coaching and counseling.


Claimant's hours establish his indifference to duty and cannot be excused

The Board finds that Claimant was not entitled to AH and did not qualify for FMLA. However, the Board is persuaded that Claimant has a legitimate medical issue and that, during the time that he has been out of service, he has succeeded in bringing his ailment under control. The Organization's contention that Claimant's medical situation will no longer be a low hours issue is, in essence, a request for one last chance.

Given the nature and circumstances of Claimant's violation, the Board concludes that the penalty of dismissal was not within the range of reasonableness. The Award so reflects.

AWARD: The claim is sustained in part and denied in part. Carrier met its burden to prove Claimant guilty of the charges but failed to prove his dismissal to have been an appropriate penalty. Claimant's dismissal is rescinded. He shall be reinstated to service, but without pay for any time lost. His absence will constitute a time-served suspension.

Dated this 27th day of MAY, 2013.



M. David Vaughn,
Neutral Member



Jason Ringstad,
Carrier Member



D. L. Young,
Employee Member