

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

UNITED TRANSPORTATION UNION

NMB Case No. 53

Claim of K. S. Witham

**Dismissal: Laying Off On
Call**

STATEMENT OF CLAIM: Request on behalf of Southwest Division Conductor, K. S. Witham for reinstatement to service with pay for time lost without the deduction of outside earnings, with all rights, seniority and all Health and Welfare Benefits restored unimpaired and removal of the alleged violation of Rules 1.13 and 1.15 of the General Code of Operating Rules, Fifth Edition effective April 3, 2005 as supplemented or amended, Southwest Division General Notice No. 9, effective October 25, 2004 and Item B (9) of the Southwest Division General Notice No. 179, effective December 1, 2005 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 June 14, 2007, at Kansas City, Missouri. 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. The Board makes the following additional findings.

Claimant was employed by the Carrier as a Conductor. At the time of the incident in question, Claimant had approximately three years' service with the Carrier.

On February 18, 2006, Claimant held an assignment on the Guaranteed Combination Extra Board. Claimant went off duty at 1500 hours on that date.

Claimant stated that he was fatigued and made two telephone calls to Carrier officers on February 19, 2006 in an attempt to lay off fatigued ("LOF") from his next call, but no one answered and he left no voice mail messages in support of his request. Claimant left his request to LOF at 0047 hours that date. Without human intervention, the Carrier's computer system automatically declined the request at 0247 hours (two hours later). His request to lay off fatigued was never approved.

On February 19, 2006, Claimant called at 0706 hours to serve as the conductor on the S-SBACLO1-18A at 0825 hours. He refused the assignment and laid off on call ("LOC").

The Carrier maintains an Employer-established Policy for Employee Performance Accountability ("PEPA"). It provides, in relevant part:

Dismissable Violations

* * * Dismissal also may be imposed in response to a series of rule violations, coupled with no sign of significant improvement in employee's behavior. [One of the four] combinations of events that may result in dismissal [is]:

- five violations of any kind in a 12-month period (which may include a combination of non-serious, serious and attendance violations[).]

The February 19th incident was Claimant's fifth PEPA violation within an eight month time period.

Item B(9) of Southwest Division General Notice No. 179 provides:

Lay Off on Call

Employees may not lay off on call or change lay off request if denied to lay off personal.

On March 2, 2006, the Carrier issued a notice to Claimant to attend a hearing "concerning your allegedly laying off on call when called to service as conductor . . . called on duty 8:25 a.m. February 19, 2006 at Needles, California". After a postponement, that hearing was conducted on March 21, 2006, at which the preceding evidence was adduced.

Based on the evidence adduced at the investigation, the Carrier dismissed Claimant from service on April 10, 2006.

The instant claim was progressed on the property in the usual manner but without resolution; it was submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that Claimant admits that he laid off call on the date in question. It maintains that the record establishes that Claimant thereby violated Item B(9) of Southwest Division General Notice No. 179, which prohibited him from doing so.

The Carrier rejects the Organization's argument that Claimant attempted to contact the Carrier in order to LOF. It contends that by Claimant's not leaving a voice mail when he called the Carrier, the

Carrier was unable to respond to the LOF request. The Carrier also argues that Claimant's LOF request was automatically denied at 0247 hours and that Claimant did not call back after that when he did not receive authorization based on his alleged request to LOF. It maintains, on that basis, that Claimant was not excused from accepting the assignment when called.

The Carrier also challenges the validity of Claimant's LOF request, pointing out that he had 17 hours 25 minutes' off between service trips.

The Carrier points to Claimant's five previous violations of PEPA in the eight month preceding February 19, 2006 and to the provision of PEPA that five such violations within a 12 month period is a basis for dismissal.

The Carrier argues that Claimant was a short service employee with a large number of Rules violations. It asserts that he is guilty of the violations charged and that his dismissal was warranted.

The Carrier urges that the claim be denied.

The Organization argues that Claimant properly LOFed and that he had the right to LOF under the circumstances. It contends that Claimant followed Carrier procedures for LOF, but that the Carrier failed to contact him regarding his request.

The Organization points out that the Carrier acknowledges that it does not monitor the layoff telephones on a 24-hour-a-day basis. It points out that Claimant openly admitted LOC, that he indicated to the Carrier that his violation was unintentional, and that Claimant apologized for any inconvenience he caused to the Carrier.

The Organization urges that the claim be sustained and that Claimant be reinstated to service with pay for time lost without the deduction of outside earnings, with all rights, seniority and all Health and Welfare Benefits restored unimpaired and removal of the alleged violation of Rules 1.13 and 1.15 of the General Code of Operating Rules, Fifth Edition effective April 3, 2005 as supplemented or amended, Southwest Division General Notice No. 9, effective October 25, 2004 and Item B (9) of the Southwest Division General Notice No. 179, effective December 1, 2005 from his personal record.

DISCUSSION AND ANALYSIS: The Carrier had the burden to establish Claimant's guilt of the charges against him through substantial evidence, considered on the record as a whole, and to establish that the penalty of dismissal was appropriate. For the reasons which follow, the Board holds that the Carrier met its burden and that dismissal is appropriate.

The Carrier requires employees to protect their assignments. In particular, the Carrier requires that employees on the Guaranteed Extra Board to accept calls unless excused from doing so.

The record makes clear that Claimant was not given approval to lay off fatigued. The evidence establishes that, while he might have attempted to request LOF, he failed to leave a voice message and failed to call back after the point at which his alleged request would have been automatically denied (i.e., 0247 hours).

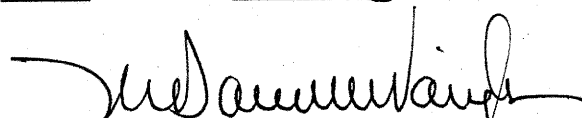
The record also makes clear that Claimant had over 17 hours between his off duty time from his last assignment on the 18th and the time for which he was called on the 19th. The record contains no persuasive explanation why Claimant could not have obtained adequate rest during that period.

The Carrier argues that a fifth violation of the PEPA entitles it to dismiss an employee. PEPA is established by the Carrier without negotiation, and a violation of the standards in the PEPA is not a substitute for proof of the appropriateness of a particular penalty. However, PEPA constitutes notice to employees of the Carrier's performance expectations and indicates the seriousness that the Carrier attaches to conduct inconsistent with these stated standards.


In the instant case, the evidence establishes that Claimant LOced in violation of the Carrier's rules. The record further establishes that Claimant committed numerous previous violations within a 12 month period. He failed to respond to efforts to correct his conduct. In view of Claimant's relatively short service and prior record, the Board finds that dismissal is supported by substantial evidence. The Award so reflects.

AWARD: The Carrier sustained its burden to prove by substantial, credible, evidence in the record, that Claimant laid off service on February 19, 2006 in violation of numerous reasonable Carrier rules and that dismissal was an appropriate penalty. The claim is denied.

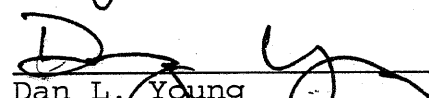
Dated this 14 day of JAN, 2007.



M. David Vaughn, Neutral Member



Gene L. Shire
Carrier Member



Dan L. Young
Employee Member