

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

UNITED TRANSPORTATION UNION

NMB Case No. 19

Claim of Delhart Numazu

Failure to Comply

AWOL

STATEMENT OF CLAIM: Claim on behalf of Northern California Division Yardman Delhart Numazu for reinstatement to service with all seniority and rights unimpaired and pay for all time lost including payment of Health and Welfare Benefits beginning on February 18, 2004 and continuing until returned to service, and the removal from his personal record [of] any reference to his dismissal for failure to follow instructions as contained in letters dated July 7, 2003 and November 12, 2003 instructing Delbert Numazu to provide supporting documentation concerning his leave of absence.

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 employed by the Carrier beginning in January of 2001. He remained in its employ on medical leave for an alleged on-duty injury which occurred on May 20, 2003.

The Carrier attempted on several occasions, including a letter sent to Claimant on July 7, 2003 and a second, follow-up letter dated November 12, 2003, to ascertain his medical status and requirements. The second letter referenced his earlier failure to respond, again requested information and warned him that failure to comply with the instructions might result in disciplinary action. There is no assertion that the letters were sent to an improper address or that Claimant was medically unable to receive and respond to the letters, but they were returned unclaimed. Claimant never provided the information and never executed a release form which would have allowed the Carrier to obtain the information directly.

Claimant called the medical department in January of 2004, just prior to the issuance of the notice of investigation,

acknowledged that he was supposed to talk with the representative and left a call-back number, but attempts to contact Claimant at the number furnished were unsuccessful. It does not appear that he ever called back.

The Carrier sent Claimant notice dated January 8, 2004 to attend an investigation regarding his failure to comply with the instructions. The hearing was conducted on January 21, 2004, at which the above evidence was adduced. Claimant did not attend the hearing, which was held in his absence. Following 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. The Organization asserted that the Carrier had simply lost Claimant's information and submitted some information as to Claimant's condition. The claim 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 was twice instructed to provide information, the second time under the threat of discipline, but he failed to do so and failed otherwise to timely contact the Carrier and comply with the instructions or even to assert that he had previously done so. It asserts that Claimant's conduct is inconsistent with his obligations as an employee. The Carrier also argues that there are no mitigating factors.

The Carrier argues that the Organization's submission of documentation during the processing of the claim was both tardy and insufficient. It maintains that the Organization's argument that the Carrier lost the documentation is an affirmative defense, which the Organization failed to prove.

The Carrier argues that there is nothing to support the Organization's request for leniency reinstatement. It points to the absence of mitigating factors and to Claimant's several previous rules violations in his short career.

The Carrier urges that the claim be denied and Claimant's dismissal upheld.

The Organization argues that the facts support Claimant's reinstatement and that the Carrier failed to provide Claimant with required due process.

The Organization contends, as an initial matter, that the Carrier failed its obligation under Article 24 (d) of the governing Agreement to conduct the disciplinary investigation with Claimant and representatives present. The Organization protests the use in the hearing of hearsay information in the form of an email from the Company's medical representative. It asserts that conducting the hearing in the absence of a Yardman representative deprived the Organization of the opportunity to cross-examine that indirect evidence.

The Organization argues that Claimant complied with his obligations to produce the requested medical information and asserts that the information establishes a continual medical certificate authorizing his absence for the entire period in question. It maintains that the Carrier's medical representative lost the information. The Organization asserts that, if the Carrier did not possess the information, it should have contacted the doctor directly; if the information was not provided, the Organization asserts that the fault lies with the doctor, not Claimant, and that he should not suffer the consequences.

The Organization argues that the claim should be sustained and urges that Claimant reinstated on a leniency basis.

DISCUSSION AND ANALYSIS: The Board concludes that the Carrier did not violate Claimant's due process rights, met its burden to demonstrate Claimant's failures to follow instructions and provide the Carrier with medical documentation for his absence and established that dismissal was the appropriate penalty.

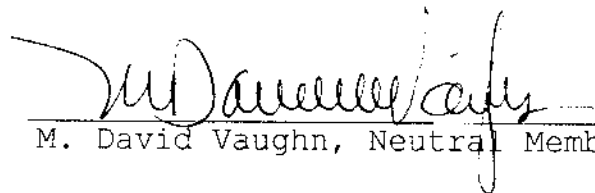
The Board is not persuaded that the Carrier violated Claimant's right to be present at the hearing because he did not appear after having been issued notice of the investigation and no request for postponement was made. Circumstances which would have justified postponement are not asserted in the claim.


The Organization's assertion that Claimant submitted the information requested but it was lost by the Carrier is an affirmative defense which the Organization failed to establish. Indeed, even its post-investigation submission does not establish that the Carrier received the documentation; and the documentation submitted was neither timely nor sufficient. The Organization's further assertion that it was Claimant's doctor's obligation to submit documentation and that the Carrier improperly failed to contact the doctor is misplaced: the proven charge against Claimant is that he did not comply with the instructions to provide the information.

The Board has searched the record for mitigating circumstances to support the Organization's request for leniency reinstatement. The Board finds none sufficient to overturn the Carrier's determination to dismiss Claimant.

AWARD: The Carrier proved Claimant's violation by substantial credible evidence on the record as a whole claim and proved the penalty of dismissal to be appropriate. The claim is denied.

Dated this 20 day of June, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire
Carrier Member


R. S. Marceau
Employee Member