

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 175

Claim of L. K. King

Dismissal - Failure to
Comply with Attendance

Guidelines

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Trainman L. K. King requesting reinstatement to service, restoration of seniority and fringe benefits and pay for 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 October 10, 2014, 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.

Claimant has worked for the Carrier since February 23, 2004. Claimant is subject to the Carrier's Attendance Guidelines, which require employees to be regular in attendance and set maximum allowable weekday and weekend thresholds for layoffs. For the three-month rolling period March, April and May 2013, Claimant, while working unassigned service in Richmond, California, had an established layoff threshold of 16.5 weekdays, that is, 25% of the weekdays that he should have been available to work.¹ However, during the March-May 2013 time frame, Claimant used unpaid layoffs on a total of 18.0 weekdays, placing him 1.5 days over his weekday layoff threshold.

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 1.3.3 (Circulars, Instructions, and Notices) and 1.13 (Reporting and Complying with Instructions) and dismissed him from service.

¹The number of "available" days excludes vacation or pre-approved PL days and authorized leaves like FMLA, jury duty and medical or personal leaves of absence.

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 facts and testimony presented at the investigation make it clear that Claimant failed to comply with the Attendance Guidelines and, therefore, violated its Rules. BNSF urges that the penalty of dismissal was appropriate to the violations.

BNSF maintains that Claimant violated TYE Attendance Guidelines for the three-month rolling period of March, April and May 2013. It points out that Claimant's 18.0 weekday layoff days placed him 1.5 weekdays over his layoff threshold.

As to the Organization's arguments that the Carrier committed procedural errors and that, with respect to the merits, the Carrier's Attendance Guidelines are wooden and rigid, BNSF asserts that they are without merit. As to the latter, the Carrier points out that Claimant claimed that his son was ill at the end of May and his wife could not take off work to care for him. It maintains, however, that Claimant did not present an explanation for the other 13.5 weekdays that he laid off during the period. It contends that, more importantly, many of Claimant's layoffs were in conjunction with weekend PLD or vacation layoffs, including the three days for which he claimed he needed to care for his son.

As to the former, the Carrier asserts that, even though the Hearing Officer did not allow statements on the record that allegedly proved its prejudice toward Claimant, the hearing was fair and impartial. It maintains that the investigation was meant to determine if Claimant violated the Guidelines, not if he had a poor relationship with his Terminal Manager, and that, therefore, non-pertinent hearsay was correctly left off the record. It points out that Claimant's Terminal Manager played no role in scheduling the hearing, holding the hearing or issuing discipline. As for the Hearing Officer asking Claimant's Terminal Manager about how he handled employees - the Organization suggests Claimant was singled out - BNSF contends that the record shows that the Hearing Officer was merely attempting to hear all the facts and ask questions based on the defense proffered by the Organization.

Finally, with respect to the penalty, the Carrier argues that the discipline imposed is appropriate and that the record fails to support any of the Organization's claims to the contrary. It

asserts that Claimant had 18 unexcused absences in a three-month period, that this incident represents his third active attendance violation in addition to a Serious violation and that its discipline policy is clear that an employee stands for dismissal with three active Attendance Guidelines violations and a Level S.

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

The Organization argues that the Carrier's investigation was flawed because it failed to meet its obligation to provide Claimant a fair and impartial hearing. It contends, in addition, that the Attendance Guidelines and those who administer them are wooden and rigid.

The Organization protests that the Hearing Officer refused to allow the Local Chairman to enter pertinent information, that is, two statements that proved that the investigation was tainted. It maintains that both statements showed that Claimant was prejudged by his Terminal Manager, who was part of the hearing and was overheard saying that he had every intent to fire Claimant.

The Organization contends, in addition, that, although it has previously argued that many cases the Carrier has brought have been defective, the instant situation is truly one of them. It asserts that the reason Claimant was over his threshold was that he had a sick child at home and he thought it important to care for that child. It maintains that Claimant has been a hard working and dependable employee and contends that dismissal is not warranted.

The Organization urges that the Claim be sustained, that Claimant be returned to service with his seniority intact and that he be made whole for wages and benefits lost.

DISCUSSION AND ANALYSIS: The Attendance Guidelines govern Claimant's work. They limit the number of absences an employee may take during any rolling three-month time frame. Claimant was subject to those requirements. The Guidelines do not themselves, differentiate as to the reasons for chargeable absences. The premise for the Guidelines is that the Carrier is entitled to employees who are available for service on a reasonably full-time basis, being excused only on the basis of contractually recognized leave or for statutorily protected reasons. The requirements of the Guidelines are well established and Claimant was familiar with them.

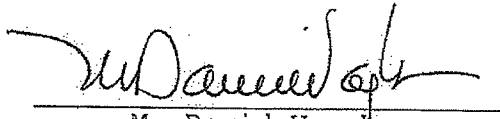
The Board has carefully considered, but is not persuaded by, the Organization's challenges to the discipline imposed. Claimant was or should have been aware that his absences were in excess of the number allowed under the guidelines, but did not do anything to

prevent the violation. Even if Claimant's Terminal Manager was prejudiced toward him, there is nothing in the record to demonstrate that the investigation and/or the Hearing Officer or any other Carrier officer had a direct impact on Claimant's discipline. As for Claimant's sick child, there is evidence that a few of Claimant's absences may have been the result of his taking care of his child. However, there is no evidence indicating that his child was the cause of most, or more than a handful, of his numerous unexcused absences. Given Claimant's prior attendance record, in addition to his Level S violation, the Board finds the discipline assessed not to be arbitrary or unreasonable.

Given the nature and circumstances of his violations, the Board concludes that termination was within the range of reasonableness. The Award so reflects.

AWARD: The Carrier met its burdens to prove Claimant guilty of the charges and to prove his termination to have been an appropriate penalty. The claim is denied.

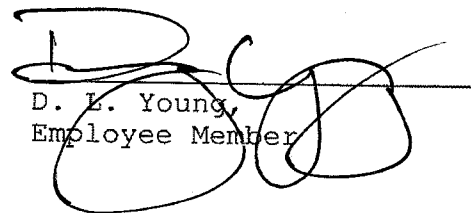
Dated this 5th day of November, 2014



M. David Vaughn,
Neutral Member



Jason Ringstad,
Carrier Member



D. L. Young,
Employee Member