

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

NMB Case No. 58

**Claim of R. L. Sallis**

Dismissal: Attendance

and

UNITED TRANSPORTATION UNION

**STATEMENT OF CLAIM:** Request on behalf of California Conductor R. L. Sallis, for return to service with all seniority rights unimpaired, with pay for time lost without the deductions of outside earnings, all fringe benefits intact, and removal of this incident from his 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.

At the time of the incident in question, Claimant had approximately three years' service with the Carrier.

The Carrier issued and posted General Notice No. 122 dated August 12, 2005 which contained the details of full-time employment for employees in both assigned and unassigned service. According to the Carrier's Attendance Guidelines, an employ is not permitted to lay off more than 25% of weekdays and weekends in a three month period. The Carrier provided an "Attendance Calculator" to employees which was designed to determine the amount and type of the days they would be charged for any pre-determined lay off. This appears allowed an employee to compute how many days he/she could lay off without violating the Carrier-established Policy for Employee Performance Accountability ("PEPA").

At some point following January 2006, the Carrier conducted an investigation into Claimant's attendance for the period November and December 2005 and January 2006. It issued no discipline for this period.

However, Claimant continued to absent himself from work on a period basis. During the period January through March 2006, Claimant was in unassigned service. In the course of that time period, Carrier records indicate that he was absent 22.5 weekdays and 8.0 weekend days. The Carrier asserted that these absences exceed Claimant's layoff threshold for the time period by 7.0 days for weekdays and 2.0 days for weekends (those thresholds being 15.50 and 6.0 days, respectively). It further asserted that prior to the above-referenced investigation, it excused 3.5 days of weekday absence, leaving Claimant 3.5 weekdays and 2.0 weekend days over the threshold.

Claimant's personnel record indicated that he had three active attendance-related disciplinary incidents for which he received progressive discipline of a formal reprimand, a 10 day record suspension, and a 20 day record suspension.

Claimant did not dispute the accuracy of the Carrier's records or his disciplinary record. He asserted that, because a review of his attendance conducted in January resulted in no discipline, he believed that his attendance for that month was "clean".

On April 21, 2006, the Carrier issued a notice to Claimant to attend a hearing concerning "your alleged failure to perform service as a full-time employee in accordance with the BNSF Attendance Guidelines during the three-month period of January-February-March 2006". That hearing was conducted on May 4, 2006, at which the preceding evidence was adduced.

Based on the evidence adduced at the May 4<sup>th</sup> investigation, the Carrier dismissed Claimant from service on May 18, 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 it is entitled to the availability of its employees and that its business depends on employees' fulfilling their obligation to come to work. It contends that is the employees' part of the employment bargain.

The Carrier anticipatorily rejects the Organization's argument that Claimant was experiencing personal legal problems which should excuse his absenteeism. It points out that Claimant laid off sick 12.5 the days during the period at issue, laid off sickness in the family 14.0 days, and laid off unpaid personal days 2.0 days. The Carrier argues that the record shows that the large majority of Claimant's absences were due to sickness, not legal matters. It

points out further that Claimant did not use available programs such as the Family and Medical Leave Act ("FMLA"), the Employee Assistance Program ("EAP"), or medical leave of absence to address his circumstances. The Carrier asserts that use of any of these programs would have not run afoul of the PEPA, but that Claimant's failure to avail himself of these programs made the absences unprotected.

The Carrier rejects the Organization's argument that Claimant was subjected to double jeopardy based on an investigation into his attendance in November and December 2005 and January 2006. The Carrier points out that no discipline was issued for this period. The fact that the previous investigation was performed in January does not cover attendance during the month of January.

The Carrier asserts that Claimant is a short-term employee with a poor attendance record. It contends that he accumulated four active disciplinary marks (including the instant one) over the period January 2006 to March 2006. The Carrier maintains that Claimant is classified as a full-time employee, but fails to abide by PEPA requirements and refuses to work. The Carrier argues that dismissal is the appropriate penalty based on the record.

The Carrier urges that the claim be denied.

**The Organization** argues that dismissal of Claimant is inappropriate.

The Organization contends that based on the Carrier's investigation of Claimant's attendance for the period November and December 2005 and January 2006 and the failure of the Carrier to issue any discipline for that period, Claimant thought that his record for the month of January was "clean". It maintains that he believed he was "free and clear" insofar as his layoffs for that month were concerned and that he only needed to concern himself with the months February-March-April 2006. The Organization points to Claimant's testimony that he did not believe that he was negligent in his duties. The Organization acknowledges that Claimant was counting his days off so as to avoid discipline for lack of availability.

The Organization argues that the Availability Policy is complex and that its intricacies are difficult to understand. It maintains that it is easy for an employee not to know whether he/she is in assigned or unassigned service, which in turn affects the parameters for time off.

The Organization described the difficulties of working in situations involving continuous 24 hour a day operations, such as the railroad industry, with as little as eight hours off between assignments. It asserts that employees' circadian rhythms and sleep patterns are disrupted and that their family lives and responsibilities suffer.

The Organization contends, on that basis, that the Carrier must be flexible and understanding in its application of the Attendance Guidelines, but complains that, instead, the Carrier has been rigid in its application of the Guidelines. It points out that Claimant exceeded the attendance limit by only one day following the Carrier's recalculation of his absences by subtraction of his sick time from the total days in layoff.

The Organization urges that the claim be sustained and that Claimant be returned to service with all seniority rights unimpaired, with pay for time lost without the deductions of outside earnings, all fringe benefits intact, and removal of this incident from his 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.

A fundamental obligation of an employee is to be regularly available to perform the work for which he/she has been hired. The obligation of employees to maintain regular attendance is particularly important in the railroad industry, which operates around the clock and on schedules. Employees who are not regular in attendance interfere with railroad operations. Therefore, the Carrier is entitled to expect its employees to be regular and reliable in their attendance, to impose reasonable attendance guidelines and to discipline employees if they fail to meet those guidelines. There comes a point where an employer will no longer be required to keep on its rolls an employee who is routinely unavailable to perform work.

The evidence establishes that Claimant was in layoff for more than 25% of the period January-February-March 2006, even after the deduction of Carrier excused 3.5 days. The record shows that this violates the Carrier's Attendance Guidelines. While proof of violation of PEPA requirements is not a substitute for the obligation to submit substantial evidence to establish just cause for disciplinary action imposed, it certainly constitutes notice to

employees of the Carrier's performance expectations and indicates the seriousness that the Carrier attaches to conduct that is inconsistent with these stated Guidelines. Claimant was clearly on notice of those Carrier requirements.

The record establishes that Claimant had received the benefit of warnings and progressive discipline in connection with his ongoing failures to be regular in his attendance, but that he continued to violate the Guidelines. Further, the evidence demonstrates that Claimant did not avail himself of alternative means of dealing with absences, such as FMLA, EAP, or medical leave of absence. There is no indication in the record that Claimant gave management any notice of specific problems he was experiencing during the course of the period in question.

The Organization challenges the Availability Policy as complex and difficult to understand as well as on the basis of the heavy burden it imposes on employees' personal lives. As discussed above, for the purpose of evaluating the merits of this case, that Policy is not applied mechanically and without consideration of the particular circumstances which resulted in the excessive absences. However, in the instant case, the complaints which the Organization makes about the Policy do not correlate with any particular difficulties which Claimant experienced in getting to work as he was scheduled and assigned. His assertion that he understood that his January attendance was satisfactory is not persuasive in light of the record. The complexity and burden of the Policy is not shown to be the cause of Claimant's absences and does not excuse his violations.

The record persuades the Board that the Carrier afforded Claimant the benefit of progressive discipline in connection with his failures to meet attendance requirements, but that he was either unwilling or unable to change his conduct. In view of his relatively short service and his prior record, the Board finds that he was properly disciplined and that the penalty of dismissal was appropriate. The Award so reflects.

PLB No. 6721 (BNSF/UTU)

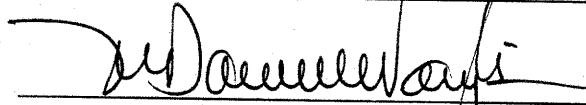
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**AWARD:** The Carrier sustained its burden to prove by substantial, credible, evidence in the record, that Claimant failed to perform service as a full-time employee in violation of reasonable Carrier rules and that his dismissal is appropriate. The claim is denied.

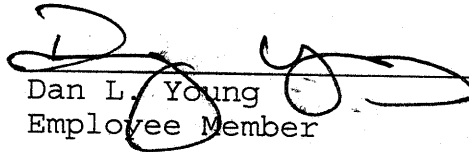
Dated this 14 day of Jan, 2007.



M. David Vaughn, Neutral Member



Gene L. Shire  
Carrier Member



Dan L. Young  
Employee Member