

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

UNITED TRANSPORTATION UNION

NMB Case No. 35
Claim of Dean A. Gilbert
Dismissal:
Attendance

STATEMENT OF CLAIM: Claim on behalf of Dean A. Gilbert, for return to service with all seniority rights and benefits unimpaired, with pay for all time lost, all fringe benefits intact and removal of the 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 August 17, 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 as a Foreman. His service with the Carrier began in 1996. At times relevant to the instant claim, he was in assigned service with five days on followed by two days off.

As part of the Carrier's Policy for Employee Performance Accountability ("PEPA"), it has promulgated attendance guidelines, including a system of progressive discipline for successive violations of the guidelines. An employee is subject to dismissal when the employee accumulates four attendance violations or when an employee accumulates five rules violations of any kind and combination, including attendance violations, during a 12 month period.

During the three month period of July, August and September, 2004, Claimant laid off a total of 22 days. Pursuant to the Carrier's Availability Policy ("Policy"), Claimant was entitled to no more than three days lay off for the period. Thus, Claimant's accumulated lay offs exceeded his authorized lay off threshold by 19 days and thereby violated the PEPA attendance guidelines.

Claimant had three active attendance violations at the time and, in the nine months prior to the July through September period, six other instances of discipline. When Claimant's attendance records for the period were processed and the number of layoff days during the period ascertained, he was notified to attend an investigatory hearing to ascertain his responsibility for the absences.

Claimant was given notice of the hearing but did not attend. The hearing was conducted in his absence. Based on the record developed, Claimant was found guilty of violation of the Attendance Guidelines and was dismissed from all service.

The instant claim for Claimant's reinstatement was presented in due course, 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 the record contains substantial probative evidence of Claimant's violation of the attendance guidelines and of other Carrier rules sufficient to justify his dismissal under PEPA. It points out Claimant's ongoing attendance violations as well as his violation of numerous other rules and contends that those cumulated violations support his dismissal. Indeed, maintains BNSF, Claimant's attendance record deteriorated over time.

The Carrier asserts that the evidence is that Claimant received proper notice and was absent for reasons other than sickness or injury and maintains, therefore, that the hearing was properly conducted in his absence. As to the Organization's other procedural challenge that the hearing was not timely held, the Carrier argues that it did not receive Claimant's attendance record for the three-month period at issue until the eighth of October, rendering its notice of investigation and the October 26, 2004 hearing well within the 30 days required by Rule 24 (a) of the governing Agreement.

The Carrier rejects the Organization's challenge that the Carrier impermissibly prejudged Claimant's guilt, since the hearing noted that the number of Claimant's absences in the month of September was so extreme that he could not have met the attendance guidelines for a period of many months. It concedes the fact of Claimant's absences, but denies that they indicate prejudgment. It also notes that the Organization failed to challenge the action until the final level of appeal, thereby waiving any such claim.

The Carrier rejects the Organization's protest that it failed to allow Claimant to be represented by an official of the Union. It points out that Claimant was responsible to notify the Organization of the hearing and arrange for representation. Where Claimant chose neither to attend the hearing nor to notify the Organization, that is not the Carrier's responsibility, BNSF maintains.

The Carrier urges that the claim be denied.

The Organization argues that the Carrier violated Section (a) of Article 24 of the governing Agreement by conducting the hearing in Claimant's absence. It protests that the Carrier made no attempt to contact either Claimant or his representative before proceeding.

The Organization argues that the Carrier failed to send the letter to the address at which Claimant actually resided, thereby failing to ensure that he received actual notice. It points to discrepancies in the addresses and certified numbers. UTU also complains that the Carrier failed to notify the Organization of the pending hearing. The Organization protests that the Carrier's ex parte hearing, conducted without the presence of the Organization or of any of the yardmen involved, violated Article 24, Sections (b), (c) and (d) and denied Claimant due process.

The Organization also argues that the Carrier failed to conduct its investigation within 30 days of the alleged violation, since the last day Claimant laid off during the rolling three-month period was September 22nd and the hearing was not conducted until October 26th. It further complains that the Carrier's recitation of Claimant's absences were such that he could not be back in compliance with the attendance guidelines for a period of several months indicates prejudice of his guilt.

The Organization urges that the claim be sustained and that Claimant be reinstated to service with seniority unimpaired and made whole for wages and benefits lost.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to prove Claimant guilty of the charges against him and to prove the appropriateness of the penalty of dismissal. For the reasons which follow, the Board concludes that the Carrier met its burdens. It was also the burden of the Carrier, upon challenge, to establish that it complied with contractual requirements and provided Claimant with due process and a fair hearing. The Board is not convinced that the Carrier's handling of the investigation violated Claimant's procedural rights.

The Carrier was obligated to notify Claimant of the charges against him and of the investigatory hearing by notice sent to his address of record. The evidence establishes that was done. The Board notes that Claimant was actively employed by the Carrier during the period and that it was his obligation to keep his employer apprised of any change in his address.

Good practice and good relationships would dictate that the Carrier give notice of scheduled investigations to the Organization, but UTU points to no provision in the governing Agreement or to any binding past practice requiring such notice. In the absence of such obligation, it was Claimant's obligation to contact his representative and obtain assistance. He did not.

Rule 24 requires the adjournment of hearings where the employee is absent due to illness or injury. There is no indication that Claimant was either ill or injured so as to preclude his attendance at the hearing.

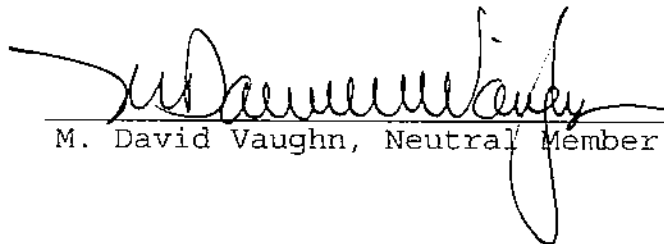
The Organization complains that the Carrier failed to conduct the hearing in a timely manner, counting the 30 day period from the date of Claimant's last non-contractual absence. The Carrier points out that Management does not receive attendance figures for any rolling three-month period until eight days after the close of the last month of that period and argues that, based on that date, the hearing was timely. The Board has previously addressed this argument, finding in PLB No. 6721, Case No. 40 that the 30 day period runs from the date the attendance is compiled and submitted to Management. The Board conclude that the hearing was not untimely.


As to the merits of the charges against Claimant, the importance to the industry of regular attendance by its employees is universally recognized, as is the concomitant obligation of employees to make themselves available for work, except as they may be excused by contract or law. Employees who fail to meet their attendance obligations are subject to progressive discipline and, if corrective efforts are unavailing, to dismissal.

The evidence persuades the Board that Claimant was absent with impermissible frequency in violation of its attendance guidelines, that the Carrier attempted to correct his violations through progressive discipline but without success and that he had several other Rules violations active at the time he was dismissed. The Board holds that evidence sufficient to confirm the appropriateness of the Carrier's dismissal of Claimant. The Award so reflects.

AWARD: The Carrier proved Claimant's violation by substantial credible evidence on the record as a whole and proved the penalty of dismissal to be appropriate in light of the circumstances of the case. The Carrier did not violate Claimant's procedural due process. The claim is denied.

Dated this 16th day of January, 2007.


M. David Vaughn, Neutral Member


Gene L. Shire
Carrier Member


R. L. Marceau
Organization Member