

PUBLIC LAW BOARD NO. 6721

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE

RAILWAY COMPANY

NMB Case No. 45

Claim of S. J. Hartwick

Dismissal: Failure to
Protect Assignment

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Southern California Trainman S. J. Hartwick for reinstatement to service on the BNSF Railway Company with seniority and all other rights unimpaired including Health and Welfare and the removal of the alleged violation of GCOR of Rules 1.3.1 to 1.3.3, 1.6 (4) and 1.15 and BNSF Los Angeles and California General Notice No. 8, Appendix C paragraph 10 dated April 18, and California Division General Notice No. 132 dated September 9, 2005 from his personal record and paid for all time lost with no deduction for outside earnings.

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 craft.

Claimant was employed by the Carrier as a Conductor promoted to engineer. He had been receiving treatment through the Carrier's Employee Assistance Program for unspecified reasons but was released without conditions to return to service on October 31, 2005 and he was placed on an active Board and was required to be available for work. Claimant did not receive the notice of his release, as he was incarcerated; and he did not know he was required to report for service, despite numerous attempts by the Carrier to contact him, for a period of 17 days. Because of his incarceration, Claimant was unable to communicate and would have been unable to report for work, even if had known of his release. The Carrier was aware of Claimant's incarceration through communications with Claimant's father.

Claimant was notified to attend an investigation concerning his responsibility alleged violation of GCOR of Rules 1.3.1 to 1.3.3, 1.6 (4) and 1.15 and BNSF Los Angeles and California General Notice No. 8, Appendix C paragraph 10 dated April 18, and California Division General Notice No. 132. The notice was sent to a wrong address but it was retransmitted to the proper address, although it was not received until the date the investigation was held. He attended the investigation.

The Organization represented Claimant at the investigation. The Local Chairman requested the attendance of the Carrier's Road Foreman of Engines and the EAP Counsellor, both of whom had knowledge of Claimant's situation, but the Carrier did not produce them.

Following the investigation, the Carrier found Claimant guilty of violating the cited rules and dismissed him from service. The Organization appealed Claimant's dismissal. The Parties were unable to resolve the dispute on the property, and it was referred to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burden to establish by substantial evidence Claimant's violation of the rules cited and to establish that dismissal was an appropriate penalty. In specific, it points out that the evidence is that Claimant was absent without authorization for a period of 17 consecutive days, failing during that period to be available for service or to protect his assignment. The Carrier points out that Claimant was admittedly not injured or ill and never requested time off, but was incarcerated, which it argues is not and has never been a legitimate excuse for absences. BNSF points to evidence that it made repeated attempts to contact him to report, but was unable to reach him.

The Carrier rejects the Organization's challenges. It points out that Claimant's unauthorized absence was 17 days in duration, counting from the date he was cleared to return to work until November 16th when it contacted him. It denies that any policy allows employees time off without approval, pointing out that its leave of absence policy, on which the Organization relies, is available to employees laid off due to illness or injury, which Claimant concededly was not.

The Carrier also rejects the Organization's assertions that Claimant could not contact the Carrier because it would not accept collect calls and that Claimant's Father, who held his power of

attorney, was in touch with the Carrier to apprise them of his situation. It asserts that it was Claimant's failure to protect his assignment which resulted in his dismissal and that Carrier's knowledge of his status conveyed by Claimant's Father is not a substitute for Claimant acknowledging his availability for work and reporting for work when scheduled. The Carrier points out that Claimant never requested leave prior to or during his absence.

As to the Organization's argument that Claimant was denied a fair and impartial hearing because the notice was sent to the wrong address, the Carrier points out that the revised notice was sent to Claimant's proper address of record and that Claimant received the notice prior to the hearing and that neither Claimant nor his representative argued at the investigation that the delay in receipt prevented them from preparing for the hearing.

As to the failure of the Carrier to furnish specific witnesses and voice recordings requested by the Organization, the Carrier argues that it deemed them unnecessary in light of the evidence and witnesses already called and that there is no showing that the witnesses could have offered evidence material to the charges, thereby failing the Organization's burden to prove the necessity of witnesses.

The Carrier urges that the claim be denied.

The Organization argues that the penalty of dismissal was harsh, arbitrary and excessive and that the Carrier failed to afford Claimant a fair and impartial hearing, requiring rescission of the penalty and pay for time and benefits lost.

The Organization argues that the failure of the Carrier to give Claimant notice of the investigation until the day of the hearing and its failure to produce witnesses and voice recordings requested violated its contractual obligations to produce such witnesses and thereby denied Claimant due process and a fair hearing.

The Organization asserts that, had RFE DeLeon testified, he would have confirmed that Claimant's Father had been in contact with him and, had EAP Counselor Lopez testified, he would have confirmed that contact as well and confirmed that Claimant's Father was attempting to get help for his incarcerated Son.

The Organization urges that the claim be sustained, Claimant's dismissal rescinded and that he be reinstated to service with

seniority unimpaired and made whole for wages and benefits lost.

DISCUSSION AND ANALYSIS: It was the Carrier's burden to prove Claimant's guilt of the charges against him by substantial evidence and to prove that the penalty of dismissal was appropriate. For the reasons which follow, the Board is persuaded that the Carrier met its burdens.

The evidence is that Claimant was absent, without authorization or even request, for a period of 17 days following his release to return to service, thereby violating his obligations to make himself available for work and to protect his assignment and seniority. It is not disputed that Claimant was not at work or available to be contacted because he was in jail. The Board accepts that Claimant's incarceration may have been in consequence of the condition(s) for which he had been receiving treatment through the EAP, but it is not disputed that he had been unconditionally released from treatment on October 31st.

The Board accepts the Organization's assertions that Claimant's Father was in touch with the RFE and the EAP Counselor advising the Carrier of his status and attempting to get help for him. However, Claimant's violations are not a consequence of the Carrier not knowing where Claimant was; they are the result of his failure to be available for work and to protect his assignment. It has been uniformly held that incarceration is not an excuse for missing work.

While it is the Carrier's obligation to notify employees of an investigation sufficiently in advance to allow the employee and Organization to prepare their defenses to the charges and obtain witnesses, the evidence in this case persuades the Board that Claimant received notice of the investigation in time to be present and that neither he nor the Organization asserted at the hearing that their ability to defend the charges had been obstructed by the late notice.

As to the Carrier's failure to produce the RFE and EAP Counselor, the Agreement provides that the Organization shall have reasonable opportunity to arrange for the attendance of any desired witnesses and that the Carrier will require the presence of all witnesses whose testimony may be necessary to develop all of the essential facts. The Organization, not the Carrier, has the right to determine the defenses it will present and to have the Carrier produce those witnesses under its control who have information relevant to the Organization's defense. The Carrier may not

restrict the Organization's defenses or simply to refuse to call witnesses because it does not believe them to have information relevant to the disposition of the charges. It fails at its peril to produce requested witnesses.

There may be situations in which the Carrier's failure to produce requested witnesses within its control would require a sustaining award. In the instant case, the Board concludes that the appropriate consequence of the Carrier's failure is to accept as true the Organization's proffer as to what those witnesses would have testified. In truth, that testimony would add little to the record. The testimony would not refute Claimant's 17 days of unauthorized absence or change the unexcused reason for his absence. The mitigating factors, if any, which led to Claimant's incarceration were known to him and were, or could have been, explained by him. A review of the transcript of the investigation yields no such explanation.

As to the voice tapes, the record does not indicate the purpose for which they would be presented or make any proffer as to what they would contain. To the extent that the tapes would simply document the attempts of Claimant and/or Claimant's Father's to contact the Carrier, they do not alter the analysis of Claimant's conduct as being in violation of the Rules. To the extent that the tapes would document the Carrier's efforts to contact Claimant, the Organization does not contest the Carrier's efforts and there is substantial evidence to establish that it made the attempts.

The Carrier is entitled to have its employees be available for duty and to protect their assignments when called to work. That obligation is basic to the employment relationship; and the Carrier is entitled to set and enforce reasonable requirements to ensure that employees are available for assignment and protect their assignments when called and to discipline employees when they do not meet their obligations. The evidence is that Claimant failed to do that and persuades the Board that dismissal was an appropriate penalty. The Award so reflects.

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AWARD: The Carrier proved Claimant's violations of the rules charged by substantial credible evidence on the record as a whole and further proved the appropriateness of the penalty of dismissal. The claim is denied.

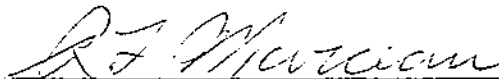
Dated this 18th day of December, 2000.



M. David Vaughn, Neutral Member



Gene L. Shire
Carrier Member



R. L. Marceau
Organization Member