

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

NMB Case No.60  
**Claim of C. C. Magana**  
Dismissal: Missing Call

and

UNITED TRANSPORTATION UNION

**STATEMENT OF CLAIM:** Request on behalf of Southwest Division Conductor C.C. Magana for reinstatement to service with pay for time lost without the deduction of outside earnings, with all rights, seniority and all Health and Welfare Benefits restored unimpaired and removal of the alleged violation of rule 1.13 and 1.16 of the General Code of Operating Rules, Fourth Edition effective April 2, 2000 from his personal 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.

Prior to his dismissal, Claimant was employed by the Carrier and was assigned as a Conductor in the Winslow-Belen Interdivisional Pool. He had 10 years of service, during which time he had incurred 16 prior disciplinary offenses, 13 of which were attendance related. He had incurred five disciplinary violations in the nine months preceding the incident at issue, four of which were attendance related.

Claimant was subject to call on February 5, 2005. Employees subject to call are required to be available to be contacted by Crew Management by telephone; GCOR Rule 1.6, Subject to Call, provides that "Employees subject to call must indicate where they can be reached and must not be absent from their calling place without notifying those required to call them." Claimant had previously furnished the Carrier with two telephone numbers for that purpose and does not contend that those numbers were invalid or that he had notified Crew Management that he would be away.

The evidence establishes that Crew Management tried to contact Claimant by telephone beginning at 2020 on February 5<sup>th</sup> for an assignment with an on-duty time of 2150. The Carrier called him four times but he did not answer. He did not have an answering machine. It then "mis-called" Claimant and contacted another employee to take Claimant's assignment.

Claimant admitted at the hearing subsequently convened that "I was dealing with some personal issues and family issues that I had going on and I may have stepped away from the phone for a few minutes at the time." He acknowledged that the telephone numbers he had given were accurate and that he did not have an answering machine. He apparently did have the ability to see the telephone numbers of persons who called him.

Shortly after the incident, Claimant contacted and obtained assistance from the Carrier's Employee Assistance Program ("EAP"); and the Organization argues that he had brought his family and personal situation under control, thereby deserving an additional chance.

As indicated, the Carrier notified Claimant to attend an investigation to ascertain his responsibility in connection with the apparently-missed call. The hearing was held on May 4, 2005, at which the foregoing facts were ascertained.

Following the hearing and based on evidence adduced therein, the Carrier dismissed Claimant from all service for violation of the cited rules. The Organization filed a timely claim on Claimant's behalf, which was progressed on the property in the usual manner, but without resolution. The dispute was presented to this Board for resolution.

**POSITIONS OF THE PARTIES:** The Carrier argues that it met its burden to prove, by substantial credible evidence considered on the record as a whole, that Claimant is guilty of the charges against him and that the penalty of dismissal was appropriate.

The Carrier points out Claimant's clear violations of his obligation to be available for call. Indeed, it points to Claimant's admission that he stepped away from his phone during that time. The Carrier argues that Claimant thereby violated the Carrier's Rule 1.6, compliance with which is vital to its timely and efficient operation.

The Carrier argues that Claimant's record establishes that the violation was his fifth in the preceding nine months, subjecting him to dismissal under that provision of the Carrier's PEPA program which allows dismissal for five violations of any kind within a 12-month period.

The Carrier also points to Claimant's longer-term record, which included numerous attendance-related violations. It maintains that his record establishes that he is simply unable to comply with the Carrier's rules, GCOR 1.6 of which required him to be available while subject to call. The Carrier points out that having employees available when they are required to be so is vital to the timely and efficient operation of its business.

The Carrier concedes that Claimant obtained assistance for his claimed personal problems, but maintains that his record is simply too bad and his efforts too late to warrant another opportunity. It asserts that the Organization's claim sounds, in essence, as leniency, which it contends is the sole providence of the Carrier and which it declined to grant.

The Carrier urges that the claim be denied.

**The Organization** concedes that Claimant stepped away from his telephone while on call in order to attend to family problems, causing him not to hear the phone; and asserts that when he called Crew Support after he saw that the Carrier had attempted to contact him, he called back, but was misrouted, transferred and put on hold until it was too late to get his call changed. It maintains, on that basis, that Claimant tried to rectify the situation.

The Organization points out that Claimant shortly after the missed call contacted the EAP counselor and asked for help. The Carrier granted the request for a postponement and Claimant used the time to work through his issues.

The Organization also points out that Claimant admitted and took responsibility for his violations, asked for forgiveness, asserted that the violations were unintentional, pointed out that he attempted to redress the situation and apologized for any inconvenience caused.

The Organization also points to Claimant's 10 years of service, lack of any personal injuries, legal actions against the Carrier or problems in dealing with his work. It urges that the Board should show compassion and give him the opportunity to

demonstrate that he has corrected his problems. It urges that the claim be sustained.

**DISCUSSION AND ANALYSIS:** It was the burden of the Carrier to demonstrate that Claimant was guilty of the charges against him and that dismissal was the appropriate penalty. For the reasons which follow, the Board concludes that the Carrier met its burdens.

The Carrier is entitled to operate its trains and conduct its business in a timely and efficient manner. In order to accomplish those ends, employees on call must respond when called. To do otherwise is a violation of GCOR Rule 1.6, places the timeliness and efficiency of Carrier operations at risk and places more of a burden on other employees. Although not a substitute for proof of just cause and proof of the appropriateness of the penalty, cumulative violations of GCOR Rule 1.6 make an employee subject to dismissal.

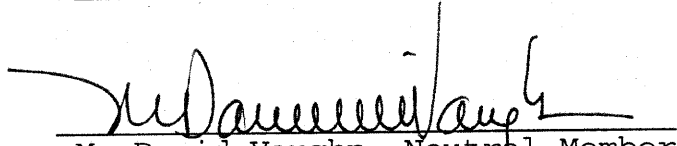
The facts before the Board clearly establish Claimant's violation of the Rule. Claimant's explanations that he "stepped away from the telephone a few minutes" and called back when he saw that the Carrier had called are not convincing. The evidence is that the Carrier called Claimant at least four times. Claimant's assertions that he called back but was unable to get through to the right people in time are self-serving and otherwise unsupported in the record.

Claimant's explanation that he had family problems for which he obtained EAP assistance following the missed call are likewise unavailing. While employees who have problems and obtain assistance through the Carrier-sponsored program are entitled to consideration in the disposition of discipline involving the subject of the EAP, the best judge of future employee conduct in attendance cases is the employee's past conduct. The facts in the instant case establish that Claimant had four attendance violations during the preceding nine months and that he sought EAP assistance only after the final incident which triggered his dismissal. Moreover, the representations that Claimant had solved his problems through his diligent use of EAP assistance are betrayed by his conduct thereafter. See Case No. 60 of this docket.

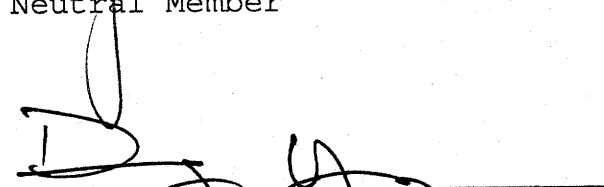
The Board does not substitute its judgment whether Claimant's determination not to answer his phone and deal instead with his family problems was the right decision. What the Board does hold is that such priorities, demonstrated over a period of time, are not compatible with employment by the Carrier. The Award so reflects.

**AWARD:** The Carrier proved Claimant's violations by substantial evidence considered on the record as a whole and further proved that the penalty of dismissal was appropriate. The Claim is denied.

Issued this 21<sup>st</sup> day of Nov, 2007.

  
M. David Vaughn, Neutral Member

  
Gene L. Shire, Carrier Member

  
R. L. Marceau, Employee Member  
D. L. Young 