

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

NMB Case No. 61  
**Claim of C. C. Magana**  
Dismissal:

and

UNITED TRANSPORTATION UNION

**STATEMENT OF CLAIM:** Request on behalf of Southwest Division Engineer, 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, 1.15 and 1.16 of the General Code of Operating Rules, Fifth Edition effective April 3, 2005 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. The Board makes the following additional findings.

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Claimant was employed by the Carrier and was reassigned as an Engineer in pool service in the Winslow-Belen 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 April 26, 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 on April 26<sup>th</sup> for an assignment with an on-duty time of 1230. The Carrier called him several times but he did not answer. He did not have an answering machine and did not return any of the Carrier's calls. It then "mis-called" Claimant and contacted another employee to take Claimant's assignment.

Claimant admitted at the investigatory hearing subsequently convened that he was unavailable in violation of the Rule quoted. He explained 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 had not furnished the Carrier with different, temporary numbers.

Claimant testified that he had recently returned to work in Winslow, Arizona and was working out of Belin, having been involuntarily assigned there, following enrollment in the Carrier's EAP. He was residing somewhere away from Belin because he was short on funds.

Claimant attempted, for reasons not clearly related to his shortage of money, to take emergency vacation. His request was denied. Despite the lack of approval from Management for the vacation, Claimant was away from Belin when the call came in, which he missed.

Claimant testified that he tried to return the call, but was misrouted and kept on hold until it was too late to talk with anyone.

Claimant had contacted and obtained assistance from the Carrier's Employee Assistance Program ("EAP") following a previous missed call (see Case No. 60); and the Organization argued that he had brought his family and personal situation under control, thereby meriting 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, despite being on call, he was away from his terminal at the time the Carrier attempted to contact him. 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 at least 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. It points to Claimant's dismissal, the appeal of which was then pending, for having missed a call in February of 2005 (See Case No. 60 before this Board).

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 missed the call, but it asserts that it was because he was short of money and had no residence in Belin, which rendered it impossible for him to take the call, which came while he was enroute back. It asserts that Claimant called Crew Support after he saw that the Carrier had attempted to contact him, 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 had been receiving

help from the EAP counselor for his problems. It points out that Claimant had not had attendance problems during the first years of his career.

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 maintains that Claimant was acting in good faith and that the Board should show compassion and give him the opportunity to demonstrate that he has corrected his problems. UTU 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, under PEPA, 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 was away from the terminal to which he was assigned, causing him to miss the call, simply confirms that he violated the Rule. He was responsible to be available to take assignment while he was on call. 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. Even if true, those efforts do not excuse his failure to be available for the call.

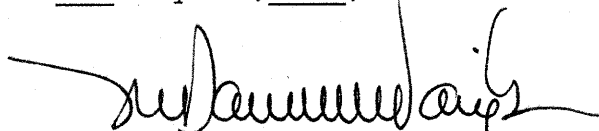
Claimant's explanation that he had family problems for which he obtained EAP assistance following the missed call are likewise unavailing. While employees who have problems and obtain assistance through the Carrier-sponsored program are entitled to consideration in the disposition of discipline involving 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 earlier conduct and opportunity, which apparently did not resolve his issues, the Union's representations notwithstanding. See Case No. 60 of this docket.

The Board does not substitute its judgment whether Claimant's determination to live far distant from his assigned terminal was the right decision under his circumstances. What the Board does hold is that an employee's determination to live too far away to take assignments while on call, 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.

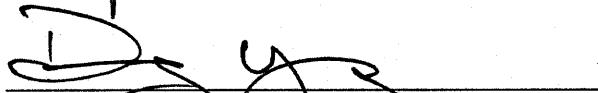
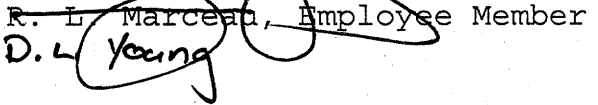
Issued this 21<sup>st</sup> day of Nov, 2007.



M. David Vaughn, Neutral Member



Gene L. Shire, Carrier Member

R. L. Marceau, Employee Member

D. L. Young