

PUBLIC LAW BOARD NO. 7292

ATDA File No.	
BNSF File No.	06080314
NMB Case No.	13
Award No.	13

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY CO.

STATEMENT OF CLAIM:

"THE BNSF RAILWAY COMPANY (hereinafter referred to as "the Carrier") violated the current effective agreement between the Carrier and the American Train Dispatchers Association (hereinafter referred to as "the Organization"), including but not limited to Article 24(b) in particular when on March 12, 2008, the Carrier arbitrarily disciplined train dispatcher Woods, assessing her a "Formal Reprimand" without due cause and absent any demonstrated rules violation.

The Carrier must now overturn this decision to discipline and remove the mark from her personal record. Further, it is now incumbent upon BNSF to make principal whole for any and all lost time, including wages not paid as a result of attendance at the disciplinary hearing.

FINDING

This Board, upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Board has jurisdiction over the dispute involved herein.

BACKGROUND

Tammi Woods ("Claimant") was hired by the Carrier in April 2000 and at the time of the events leading to this appeal, she was assigned to work as a dispatcher at the Carrier's Spring, Texas office. That facility is a small local dispatching Center with six dispatching desks, 24 regularly assigned dispatchers and nine extra dispatchers. In

addition, the center is manned jointly with Union Pacific Railway employees and focuses primarily on the dispatching of trains and transfer movements in the Houston area.

On February 8, 2008, the Claimant was instructed by the Carrier to attend an investigation that was to take place on February 11, 2008, to ascertain the facts and determine her responsibility, if any, in connection with her alleged excessive absenteeism on January 9, 28, and 29, 2008. The investigation was temporarily postponed and subsequently took place on February 26, 2008. Following the investigation, a Letter of Formal Reprimand dated March 12, 2008 was issued to the Claimant which states in pertinent part as follows:

As a result of formal investigation held in Spring Dispatching Center, Spring, TX at 1:00 p.m., February 26, 2008, the following notation will be placed on your personnel record:

"Formal reprimand as a result of investigation held on February 26, 2008, for excessive absenteeism January 9, 28 and 29 of 2008." (Emphasis provided)

A timely appeal was filed protesting the issuance of the Disciplinary Notice and having been unable to resolve the matter during earlier steps of the appeal procedure, the claim was submitted to this board for final and binding resolution.

DISCUSSION

Prior to receiving the "Formal Reprimand Letter", a letter concerning "Attendance Issues" dated February 9, 2007, was issued to the Claimant which states in pertinent part:

We have just completed the attendance review for the month of January and find you have been absent 11.38 days in the rolling 12 months. **In many or all of the instances, the absences are adjacent to your rest days.** (Emphasis added)

Your health and well-being are important to BNSF. Your work history and pattern of attendance irregularities is concerning to your employer. The BNSF is committed to having full-time employees and it is expected that you will make improvements in your attendance to attain this goal

If you have a chronic medical condition that prevents you from working on a full-time basis, it is your responsibility to have your attending physician release this information to Burlington Northern Santa Fe's Medical and Environmental Health Department. **In addition, you have options such as FMLA (Family Medical Leave Act) or EAP (Employee Assistance Program)** should you feel either one of those options are appropriate to your situation. (Emphasis added)

A copy of *The Burlington Northern and Santa Fe Railway Company Train Dispatcher Attendance Guidelines October 14, 2002* is attached and I urge you to review this information at your earliest convenience. **Subsequent failure to achieve regular, punctual attendance will result in the next course of action of these guidelines.** (Emphasis added)

A copy of this letter will be placed in your office file for future reference.

If you have any questions or concerns, please do not hesitate to contact me. (Emphasis added)

A letter dated April 5, 2007, and titled "Coaching and Counseling 2" was mailed to the Claimant on April 16, 2007. That letter states as follows:

This is to confirm our meeting regarding your attendance. As indicated in our discussion you have been absent 2 days in March, 6 days year-to-date and 13.38 days in a rolling 12-month period.¹

As we have discussed, this pattern concerns me. Under the terms of the BNSF/ATDA agreement, Burlington Northern Santa Fe is obligated to provide not less than eight hours compensation for each working day. Accordingly, you have the responsibility to provide eight hours work each working day, unavoidable absences excepted. It is also your responsibility to maintain a regular work schedule, which, as evidenced by your attendance record, you have not been doing. There has been little or no improvement in your attendance since your last Coaching and Counseling held on February 22, 2007.

Your health and well-being are important to BNSF. Your work history and pattern of attendance irregularities is concerning to your employer. The BNSF is committed to having full-time employees and it is expected that you will make improvements in your attendance to attain this goal.

If you have a chronic medical condition that prevents you from working on a full-time basis, it is your responsibility to have your attending physician release this information to Burlington Northern Santa Fe's Medical and Environmental Health Department. **In addition, you have options such as FMLA (Family Medical Leave Act) or EAP (Employee Assistance Program)** should you feel either one of those options are appropriate to your situation. (Emphasis added)

This meeting today will be considered as your second Coaching and Counseling under the terms of *The Burlington Northern and Santa Fe Railway Company Train Dispatcher Attendance Guidelines October 14, 2002* and a copy of this letter will be placed in your office file in the NOC. A second copy of these Guidelines are attached and I urge you to review this information at your earliest convenience. **Subsequent failure to achieve regular, punctual**

¹ Although the Letter was sent to the Claimant, the coaching and counseling meeting did not actually take place for the reason that the Claimant was on a sick leave of absence at that time which was not considered in the assessment of her overall attendance record.

attendance will result in progressive discipline, administered in accordance with the guidelines per attachment "A". (Emphasis added)

In its February 9, 2007, letter to the Claimant, the Carrier emphasized to her that it was concerned with her pattern of absences in conjunction with her rest days. In addition, the letter advised the Claimant that in the event she was suffering from a chronic medical condition that prevented her from working on a full-time basis, it was her responsibility to have her attending physician release such relevant medical information to the Carrier's Medical and Environmental Health Department. The letter also reminded the Claimant of the options she may have under the FMLA and the EAP and cautioned her that her subsequent failure to achieve regular and punctual attendance would result in further action under the Attendance Guidelines.

In its April 5, 2007, letter to the Claimant, the Carrier advised her of her continued unsatisfactory attendance since her previous Coaching and Counseling session held on February 22, 2007, and it once again emphasized that her pattern of absences had been noted. The letter also reiterated that in the event she was suffering from a chronic medical condition that prevented her from working on a full-time basis, it was her responsibility to have her attending physician release such information to the Carrier's Medical and Environmental Health Department. In addition, the letter reminded the Claimant once again of the options she may have under the FMLA and the EAP and cautioned her that her failure to achieve regular and punctual attendance would result in the assessment of progressive discipline.

During the investigation, the Claimant acknowledged that she had received both of the above cited letters and she made no claim that she did not understand any of the information contained in those letters. Also, although the Claimant did not necessarily agree with the summaries of her attendance as outlined in either of the letters addressed to her dated February 9 and April 5, 2007, she was unable to cite with specificity which, if any, portion of either of those letters was not accurate.

The Claimant stated during the investigation that she did not believe 15½ days of absence during a rolling 12 month period was excessive and she made no assertion that she would endeavor to correct her attendance. At the same time, the Claimant made no assertion that she was unaware of the existence of the FMLA or the EAP and she made no claim that any of her absences were caused by a medical condition that would have benefited from the FMLA or the EAP.

The Organization argued that the Claimant had been legitimately absent with the Carrier's authorization on the occasions in question and that the Carrier therefore, did not have just cause to issue to her the Formal Reprimand dated March 12, 2008. In support of its position, the Organization submitted a number of Public Law Board cases for the Board's review. In PLB 7240, Award Number 68, the Board sustained the Claim in that particular case finding that:

" . . . The use of sick leave for a **documented bona fide illness** that reasonably precludes the dispatcher from reporting for duty cannot precipitate the imposition of discipline unless other aggravating circumstances exist. . .

. . . If an employee is actually debilitated by illness and follows reporting off procedures established by the Carrier, the Carrier may not penalize the employee for a **bona fide medical circumstance necessitating the use of sick leave**. . .

. . . At issue in the instant case is, can the legitimate use of sick leave be curtailed through discipline? The Board finds the answer to that question to be no. . . "

In the present case, no documentation of a bona fide illness was submitted by the Claimant, either before or during the Carrier's investigation. Therefore, this Board finds the circumstances of the instant case to be clearly different than PLB 7240, Award No. 68.

The Organization also provided National Railroad Adjustment Board Third Division Award No. 23555 for the Board's reference. In sustaining that claim, the Board found:

While the board does not support absenteeism and we have taken a position that Carrier has a right to expect that employees will show up for work on a regular basis, we cannot support Carrier in this instance. **Claimant was sick;** ... (Emphasis added)

Unlike the instant case, the evidence record in National Railroad Adjustment Board Third Division Award 23555 provided adequate proof to the Board that the Claimant was legitimately sick during the period in question and the claim was therefore sustained. At the same time however, the Board made it clear that the Carrier has a right to expect employees to report to work on a regular basis.

In PLB No. 7155, Award No. 17, also offered by the Organization in support of its argument, the Board examined another case involving a Formal Reprimand for unsatisfactory attendance. In sustaining that claim, the Board held as follows:

There is no evidence that Claimant's layoffs included pattern layoffs or sporadic absences.

Unlike the absences of the Claimant in the above case, the instant case involves this Claimant's pattern of laying off for one or two days in conjunction with her rest days. Therefore, PLB 7155, Award No. 17 is also clearly distinguishable from the instant case.

The Claimant in the instant case was counseled regarding her attendance on February 9, 2007, and it was noted at that time that she had been absent 11.38 days in the previous rolling 12 month period. The Claimant was again counseled on April 5, 2007, regarding her attendance, and it was noted in that letter that she had been absent 13.38 days in the previous rolling 12 month period. Finally, when the Carrier issued the March 12, 2008 Letter of Formal Reprimand to the Claimant, her record indicated that she had been absent from work 15½ days during the previous rolling 12 month period. In view of the evidence, it is clear that the Carrier's coaching and counseling of the Claimant was not effective, and her unacceptable attendance record was actually deteriorating further.

The Carrier also submitted a number of cases in support of its position, and the Board found the language contained in National Railroad Adjustment Board Third Division Award No. 31342 to be particularly on point. In denying the claim, the Board had this to say concerning attendance:

... The nub of the dispute centers upon the emphasis and significance that should be ascribed to the Claimant's absences, not only in 1992 but also over his entire work record.

The Board finds some merit in the Organizations contention that bona fide illness is not a valid basis for assessing discipline for absenteeism. However, it is necessary to guard against too simplistic a reply to this issue. Before determining whether the absences in question are excessive, it is necessary to review the position the involved employee occupies. The Carrier is properly entitled to hold that a Dispatcher should be kept to a higher standard than a clerk typist. Obviously, all employees owe a high degree of fidelity to the demands of their positions. Nevertheless, the importance of a Dispatcher to the efficient running of a railroad and his continued absences may properly be viewed in a somewhat more demanding and critical manner than an employee occupying a less responsible position.

The Carrier is also properly entitled to view judiciously the entire attendance record of the affected employees. Even though the absence of the employee may be due to a bona fide illness beyond the control of an employee, there is philosophical underpinning for the assessment of discipline. The Employee-Employer relationship creates a framework that demands the Employer

compensate employee with a fair rate for a fair day's work and the Employee obligates himself to render a fair day's work for his compensation.

When either one of the parties to this relationship fails to meet his obligations thereunder, the relationship may be considered severed or terminated. **This is the rationale that allows an employer to review the totality of the employee's attendance record and take corrective action even if part of the attendance record consists of absences caused by bona fide illnesses.** (Emphasis added) This is not to say the Carrier does not have to exercise his review of the employee's attendance record judiciously and compassionately. Before the Carrier can discipline an employee for excess absenteeism when part of the absences were caused by genuine illness, the Carrier must demonstrate it has not acted arbitrarily or precipitously

This Board agrees with the findings in the above-cited case. It is troubling to this Board that during the investigation, the Claimant in the instant case expressed her belief that 15½ days of absence in a rolling year was not excessive, and she gave no indication that her attendance would not continue to deteriorate. The Claimant is an experienced employee with more than 10 years of service, and the evidence established that she knew, or should have known, of the requirement to be regular in attendance. Therefore, notwithstanding the vigorous arguments on the Claimant's behalf, it cannot be said that the Carrier was arbitrary or capricious when it required her to report for work regularly and on-time. Accordingly, the Board finds that the Carrier was justified in issuing to the Claimant the Letter of Formal Reprimand dated March 12, 2008. for her unsatisfactory attendance.

The Organization offered several technical arguments in support of its position. First, the Organization argued that the initial charge letter was not issued to the Claimant within the requisite five-day time limits as specified in Article 24(b) of the Agreement which states, in pertinent part, as follows:

(b) INVESTIGATIONS.

A train dispatcher who is charged with an offense which, if proven, might result in his being disciplined, shall be notified in writing of the nature of the complaint against him **within five (5) days from the date that the knowledge of the facts on which such complaint is based was received by the Superintendent**, and he shall be given a fair and impartial investigation by the Superintendent or a designated representative within five (5) days of the date of such notice, (Emphasis added)

The Claimant's last absence occurred on January 29, 2008, and it was not until February 8, 2008, that the Notice of Investigation was sent to the Complainant. Thus, it would appear that the subject Notice may have been untimely. However, the evidence

established that although the last absence occurred on January 29, the Superintendent did not actually become aware of the Claimant's overall attendance deficiencies until the Carrier conducted its normal monthly attendance review on February 7, 2008. Therefore, the evidence clearly shows that the Notice of Investigation was issued one day following the day the Superintendent became aware of the Claimant's excessive absences; which is well within the five-day time limit.

Next, the Organization argued that the Claimant was not afforded a fair and impartial hearing because Transportation Process Specialist, Dennis L. Mead served as the Hearing Officer and ultimately assessed the discipline upon her. As this Board has previously stated, an employee's right to a fair and impartial hearing is an absolute requirement before the Employer assesses discipline to an employee. At the same time, however, there is no showing that any provision of Article 24 or any other provision of the Collective Bargaining Agreement prohibits a member of management from performing more than one role during the disciplinary process. In the instant case, the Claimant was provided a full opportunity to explain her version of the facts during the investigation. In addition, there was no evidence to indicate that Mr. Mead was biased during the process or that he neglected to consider all of the evidence before reaching his decision. Therefore, this Board finds no evidence to support a conclusion that the Claimant was deprived of a fair and impartial hearing.

A third argument advanced by the Organization asserted that Transportation Specialist Mead, while serving as the Carrier's conducting officer at the investigation, conducted the hearing as an adversary proceeding, rather than allowing the facts to be developed. However, regardless of how the Organization may view Mr. Mead's method of conducting the investigation, once again, this Board finds no evidence to show that he was not objective during the investigation or that he suppressed any relevant evidence or mitigating circumstances that could have proved the Formal Reprimand was not warranted.

Finally, the Organization asserted that the Carrier had not challenged positions presented by the Organization during the handling of this dispute and that the Claim should therefore, be sustained. In support of its argument, the Organization submitted several previous Board decisions which are summarized in National Railroad Board Third Division Award No. 28459 involving disputed work performed by an outside janitorial service. In denying those claims, the Board held:

With respect to the three separate Claims, we note that the wording of the individual Claims and the following correspondence is the same for each. The Carrier, in its identically worded denial letters, substantially gave its reasons for rejecting the Claims. There is nothing in the record properly before us that refutes these material statements and assertions. It has been consistently held by the Board that when material statements are made by one party and not denied by the other party, so that the allegations stand un rebutted, the material statements are accepted as established fact. On that basis, we must deny these Claims.

It is clear from the above cited language, that in Award 28459, the Organization had claimed the Carrier violated the Collective Bargaining Agreement when it subcontracted janitorial work to an outside contractor. In that Award, the Board held that the Carrier had provided material statements during the dispute resolution process which adequately explained its reasons for denying the subject Claims and that the Organization had not rebutted the Carrier's material statements. Likewise in the instant case, by letter dated August 22, 2008, General Director Labor Relations, O. D. Wick had clearly provided in great detail the Carrier's reasons for denying the Organization's claim and had disputed the Organization's assertions and arguments on the Claimant's behalf. Therefore, this Board finds that at that point, the Carrier had clearly responded to all of the Organization's positions and had set out its final position to the Organization; at which time the case was fully developed and ready for submission to arbitration for final resolution.

In its submission, the Organization requested a remedy that would make the Claimant whole for any and all lost time, **including wages for all time lost as a result of attendance at the disciplinary hearing.** (Emphasis added) However, Article 24 only provides for the repayment of lost wages minus interim earnings if the dispatcher is cleared of the charges, and it makes no provision for pay to a Claimant while attending an investigation. Public Law Board No. 6519, Award No. 4, examined this same argument and had this to say:

The Board must find that the only Article specifically written and applicable to the facts, is Article 24 pertaining to Discipline and denoting the provisions relevant to an investigation. **There is no language in Article 24 providing for compensation for attendance at an investigation.** (Emphasis added) The Carrier pointed out on property that there was no past practice. The facts indicate that the Claimant was charged and found guilty as a result of that investigation. Whatever the consequence of being censured and in addition, losing a day's wages, the parties have no language which provides compensation herein, and Articles 18 and 20 do not apply. Accordingly, the Board must deny the claim.

In view of the above, this Board must find that the Organization's request to have the Claimant compensated for time spent while attending the investigation constitutes a demand that is not provided for in the Collective Bargaining Agreement.

CONCLUSION

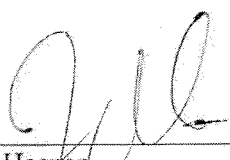
This Board finds that the Claimant's record of attendance accurately reflected excessive absenteeism and that the Letter of Formal Reprimand dated March 12, 2008 was issued for just cause. This Board also finds that the Organization's technical arguments should not be sustained.

AWARD

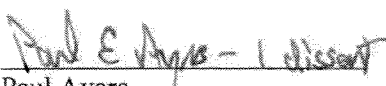
The claim is denied in its entirety.



Paul Chapdelaine
Chairman and Neutral Member
May 2, 2011



Joe Heenan
Carrier Member



Paul Ayers
Employee Member