PUBLIC LAW BOARD NO. 7292

ATDA File No.	DA-094B-08
BNSF File No.	06080622
NMB Case No.	17
Award No.	17

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 ("the Organization"), including but not limited to Article 24(b) in particular when on July 21, 2008, the Carrier arbitrarily disciplined train dispatcher L. L. Allen, dismissing him without cause and absent any rules violation.

The Carrier shall now overturn the previous decision to discipline the aggrieved and shall return him to service, remove this mark from his record, make him whole for any and all lost time, including wages (including wages for all time lost as a result of attendance at the disciplinary hearing) and shall restore the record of the aggrieved to its state prior to the Carrier's July 21, 2008 decision.".

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

Lenny Allen ("Claimant") was hired by the Carrier on November 9, 1994, and at the time of the events leading to this appeal, he was assigned to work as a dispatcher at the Carrier's regional dispatching office in Spring, Texas. This regional dispatching office consists of six dispatching desks, 24 regularly assigned dispatchers, and nine extra

dispatchers who both train and fill vacancies. In addition, the center is staffed jointly with Union Pacific Railway employees and focuses primarily on the dispatching of trains and transfer movements in the Houston, Texas area.

The Claimant was assigned to protect a dispatching job on the first shift on May 25, 2008. However, he failed to report as scheduled that morning. When he failed to report, the dispatcher scheduler made several attempts to contact him by telephone; leaving instructions on the Claimant's home telephone recorder to immediately contact the Carrier. As a result of the Claimant's failure to report for work on the morning in question, the Carrier moved a dispatcher from another job assignment to cover the Claimant's work assignment. The Claimant subsequently contacted the Carrier at 10:04 a.m. to report that he had been up all night with a sick child and that he had overslept. He did not report to work that day.

By letter dated May 27, 2008, the Claimant was instructed to attend an investigation of the matter that was scheduled to take place on May 30, 2008. Following several mutually agreed postponements, the investigatory meeting took place on July 2, 2008. Following the investigation, a Dismissal Letter dated July 21, 2008, was issued to the Claimant which states in pertinent part as follows:

> As a result of formal investigation held Wednesday July 2, 2008, you are hereby dismissed from the service of the BNSF Railway Company. In this investigation it was determined that you violated General Code of Operating Rule 1.15 **"Duty – Reporting or Absence"**, and General Code of Operating Rule 1.6 **"Conduct"**, when on May 25, 2008 you failed to protect your 1st shift Avondale Dispatching district assignment.
>
> In assessing discipline, consideration was given to your personal record.

A timely appeal protesting the issuance of the Dismissal Letter was submitted by the Organization 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

The Charges

During the investigation, the Claimant readily admitted that he was scheduled to protect the first shift job on the date in question, and he did not report for work as scheduled. He also admitted that he did not have permission to be absent from work that day. Thus,

there was no dispute that the Claimant was absent without leave ("AWOL") on the morning in question.

In National Railroad Adjustment Board Fourth Division, Award 4779, the Board examined the issue of the requirement for proof of the allegations involving disciplinary action. In discussing the issue, the Board held:

> While these contentions were advanced with skill and vigor and are not without merit, the Organization nonetheless cannot overcome the long-standing precedent in this industry that when there is an admission of guilt there is no need for further proof and the only remaining question is the degree of discipline, if any.

THE ORGANIZATION'S ASSERTIONS

The Carrier Administered Discipline Without a Transcript And/Or its Review

The Organization argued that the Carrier had assessed discipline to the Claimant without first reviewing the transcript of the investigation. The Organization pointed out that the investigation was conducted on July 2, 2008, and the subject discipline was imposed on July 21, 2008. However, the Organization maintained that because the Carrier had not provided a copy of the transcript to the Organization until July 22, 2008, the Carrier could not possibly have reviewed it before administering the subject discipline to the Claimant.

It is standard practice on the property to tape record the investigation and then submit the recording to a transcriptionist for typing. The processing of the recording and transcript is then tracked in an evidentiary record titled "*Events for File*". A review of the Events for File reveals the following:

- The recording was submitted by the Conducting Officer to the transcription service on July 2, 2008;
- A draft copy of the transcript was available for review by the Conducting Officer on July 7, 2008;
- The Conducting Officer resubmitted the transcript to the transcription service for final typing after making corrections to the draft;
- The final copy of the transcript was downloaded by the Conducting Officer on July 15, 2008.

In view of the evidence, it is clear that the Conducting Officer reviewed the transcript, made corrections, and received the final copy of the transcript well before the issue date of the Letter of Dismissal.

As this Board has previously held, a review of the transcript is absolutely necessary before disciplinary action is issued to an employee. However, when the Organization raised the argument that the Carrier failed to review the transcript before the Letter of Dismissal was issued, the burden shifted to the Organization to provide persuasive evidence to support that argument. As discussed above, the clear evidence established that the Conducting Officer reviewed and corrected the first draft of the transcript and the final copy was available to him six days prior to the issue date of the Letter of Dismissal dated July 21, 2008. Since no evidence was submitted to substantiate the Organization's argument, it is not sustained.

The Claimant Was Denied His Right to a Fair and Impartial Hearing

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 the Claimant. The Organization submitted National Railroad Adjustment Board Third Division Award 20014, which examined a similar argument of an unfair investigation. In sustaining the claim in that Award, the Board held:

> The conduct of the hearings in this matter gives us considerable concern. Hearings under the grievance provisions of the Agreement (Rule 22) are neither adversary proceedings nor criminal trials. As fact finding investigations such hearings must be conducted with utmost fairness and objectivity by the hearing officer; they must not be impeded by technical rules of evidence and must accord employees reasonable latitude in developing their defensive positions. Above all, such hearings must be conducted in such a manner that the conduct of the hearing officer is unimpeachably objective and unbiased in the development of facts. In the case before us, even though Claimant's representative may have been contentious, the hearing officer's conduct was clearly beyond the pale of acceptability. In the initial hearing the hearing officer interrupted Claimant's witnesses on over thirty occasions, attempting to exclude their testimony, we think grossly improperly. He attempted to answer questions put to Carrier witnesses and generally exhibited unmistakable bias and prejudicial conduct.

As this Board has previously stated, an employee has an absolute right to a fair and impartial hearing before disciplined is assessed. However, it cannot be presumed that a single member of management who performs more than one role during the disciplinary

process will not remain impartial. Although this Board agrees with the finding in Award 20014 under that specific fact scenario, we also find that the facts that existed in that case are clearly different than the facts in the instant case. The record in the instant case clearly established that the Claimant's due process rights were protected throughout the process. Mr. Mead provided him with a full opportunity to explain his version of the facts during the hearing and both the Claimant and his representative were each permitted to vigorously cross-examine the Carrier's witness without interruption. In addition, there is no evidence that the Claimant in the instant case was not permitted to introduce evidence or witness testimony in support of his defense. Further, there was no evidence to show that Mr. Mead was biased during the process or that he neglected to consider all of the evidence before reaching his decision. Finally, this Board notes that Article 24 contains no provision which prohibits a single member of management from performing more than one role during the disciplinary process.

In view of the foregoing, this Board finds no evidence to support a conclusion that the Claimant was deprived of a fair and impartial hearing.

The Hearing Was Conducted in an Adversarial Manner

The Organization also argued that Transportation Specialist Mead, while serving as the Carrier's conducting officer, conducted the hearing as an adversarial proceeding, rather than allowing the facts to be developed. However, a review of the record reveals that Mr. Mead conducted the hearing objectively and asked relevant questions of the witnesses in order to establish a complete record. Further, although Mr. Mead properly retained control of the hearing and required the Claimant to restrict his questioning of the Carrier's witness to relevant matters , there is no evidentiary showing that he suppressed any relevant evidence or mitigating circumstances that could have proved the Claimant was not guilty of the charged offense or that the penalty should be modified.

The Carrier Had Not Challenged Positions Presented by the Organization

Next, the Organization asserted that the Carrier had not challenged positions presented by the Organization during the handling of this dispute, and the claim should, therefore, be sustained. In support of its argument, the Organization submitted several previous Board decisions; including National Railroad Board Third Division Award 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 unrebutted, the material statements are accepted as established fact. On that basis, we must deny these Claims.

It is clear from the above cited language of Third Division Award 28459 that 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 pointed out that the carrier had adequately explained its reasons for denying the subject claims and that the organization had not rebutted those reasons. On that basis, the claims were denied.

National Railroad Adjustment Board Third Division Award 36516 examined a similar issue and had this to say regarding unrebutted material statements:

> In this case, the Organization's assertion that the work had routinely been assigned to Carrier forces, and at the time of contracting out, was assigned at other locations to Carrier forces, was never refuted by the Carrier. The board has often held that material assertions made by one party in the presentation and progression of a dispute that are not refuted or rebutted by the other party during the on-property handling of the dispute must be considered as being correct. That being the case here, we conclude that the Carrier violated Article IV of the National Agreement by failing to give the General Chairman advance written notice of its intent to contract out the work at issue.

As the Board made clear in the above cited Award, by presenting material statements, the organization established a *prima facie* case that the disputed work had routinely been assigned to carrier workers and was still assigned to carrier workers at other locations at the same time the carrier was contracting out the disputed work. The carrier did not dispute the organization's material statements, and the Board, therefore, accepted those statements as established facts.

In the instant case, however, in his lengthy January 9, 2009, letter to the Organization, General Director Labor Relations, O. D. Wick clearly provided in great detail the Carrier's reasons for denying the Organization's claim. At the same time, he disputed the Organization's assertions and arguments. Notwithstanding the Organization's diligent and spirited arguments on the Claimant's behalf, when Mr. Wick submitted his January 9

letter to the Organization, the parties had fully stated their respective positions and the case was ready at that time for submission to arbitration for final resolution.

Since the record contains no evidence of a specific material statement made by the Organization that had not been denied by the Carrier, the Organization's claim must be denied.

Discipline Excessive

When the Claimant called in on May 25, 2008, he stated that he had overslept because he had been up the previous night with a sick child. However, during the investigation he changed his story; claiming he suffered from a condition associated with his FMLA that prevented him from protecting his assignment of May 25, 2008. Unfortunately for the Claimant, his conflicting testimony and failure to explain the purported nature of his FMLA condition did little to establish a valid reason for his failure to protect his assignment on the date in question.

In the Letter of Dismissal, the Carrier asserted that the Claimant had violated General Code of Operating Rules ("GCOR") Rule 1.15 when he was Absent Without Official Leave ("AWOL") on the date in question. Rule 1.15 states:

> **Duty – Reporting or Absence**
>
> **Employees must report for duty at the designated time and place with the necessary equipment to perform their duties.** They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. **Continued failure by employees to protect their employment will be cause for dismissal.** (Emphasis added)

As previously stated, this Board finds that the Claimant's actions violated Rule 1.15 and on that basis alone, severe discipline was warranted.

The Carrier also asserted that the Claimant's AWOL that day constituted an act of negligence in violation of GCOR Rule 1.6 which states in pertinent part:

> Any act of hostility, misconduct, or willful disregard or **negligence affecting the interest of the company or its employees is cause for dismissal** and must be reported. Indifference to duty or to the performance of duty will not be tolerated. (Emphasis added)

During the investigation, the Claimant's supervisor stated his belief that the Claimant was negligent based solely on the fact that he had failed to protect his assignment on the date in question. However, the Claimant stated that he fully intended to work his shift that day, and he had not overslept deliberately. According to the Claimant, he set his alarm clock to wake him up but, because he had been up the previous night with a sick child, he unintentionally overslept.

The Organization did not dispute that the Claimant was AWOL on the date in question, but it argued vigorously that the Claimant's absence was not an act of negligence. Therefore, the Organization maintained that the Claimant had not violated GCOR Rule 1.6 as charged in the Letter of Dismissal. The Organization pointed out that the Claimant is a veteran employee of more than 14 years of service with the Carrier, and he had not committed an act of hostility or willful misconduct. Therefore, the Organization insisted that terminating the Claimant for unintentionally oversleeping is excessive..

The term "negligence" can hold different meanings under differing circumstances. However, that term generally infers that a person failed to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. This Board is of the belief that most, if not all individuals, depend on an alarm clock to wake them from sleep. Based on the Claimant's convincing testimony that he had set his alarm to wake him, and in the absence of any evidence to the contrary, this Board finds insufficient evidence on the record that the Claimant was negligent or that he failed to exercise a normal degree of care as required by Rule 1.6.

The Claimant's employment history reflects an abysmal disciplinary record which includes 21 disciplinary actions for various rules infractions, and four disciplinary actions for similar acts of failing to cover his assignment. Most recently, he was issued a formal reprimand in March 2008 for excessive absenteeism, and in May 2008 he signed a waiver in which he agreed to accept a serious 30-day record suspension for failing to report to work and cover his assignment.[1] Therefore, it is clear that the Carrier had placed the Claimant on notice that his job was in serious jeopardy. Notwithstanding the Claimant's terrible disciplinary record, however, the Carrier bears the burden of proving the Claimant was guilty of all the charges contained in the Notice of Termination. Since this Board has found insufficient evidence to establish that the Claimant violated Rule 1.6, the

[1] A claim concerning the March 2008 Formal Reprimand was heard and denied by this same PLB 7292 in Award No. 18.

Carrier's reliance upon a purported violation of Rule 1.6 to support its decision to terminate the Claimant's employment creates a fundamental flaw in the Carrier's decision. For that reason, this Board finds that the penalty of termination is too severe.

Pay For Attendance at the Disciplinary Hearing

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 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 remedy that is not provided for in the Collective Bargaining Agreement.

CONCLUSION

As this Board has previously held, the Carrier operates a time-sensitive business and has a legitimate right to expect its employees to report for work regularly and on-time. The Claimant's AWOL interfered with the daily scheduling of dispatcher assignments and placed an undue burden on the Carrier, as well as the other employees who were required to perform his duties while he was absent. In addition, he exposed the Carrier to additional labor costs in the form of costly overtime. Therefore, this Board finds that the Claimant violated Rule 1.15 when he was AWOL on May 25, 2008 and that severe

disciplinary action is warranted. However, in view of the lack of sufficient evidence to support a charge that the Claimant had also violated Rule 1.6, this Board finds that the penalty of termination is too severe.

AWARD

The claim is granted in part and denied in part. The Claimant is reinstated to his employment with the Carrier with seniority and benefits unimpaired, but without back pay. The period of July 21, 2008, to the date of the signing of this award will be reflected as a disciplinary suspension without pay.

Paul Chapdelaine
Chairman and Neutral Member
May 8, 2011

Joe Heenan
Carrier Member

Paul Ayers
Employee Member