

PUBLIC LAW BOARD NO. 7292

ATDA File No.	DA0011A-08
BNSF File No.	06-08-0558
NMB Case No.	16
Award No.	16

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY CO.

STATEMENT OF CLAIM:

The Burlington Northern Santa Fe Railway Company ("Carrier") violated the current effective agreement between the Carrier and the American Train Dispatchers Association ("Organization"), including but not limited to Article 24(b) in particular when on June 9, 2008, it arbitrarily disciplined train dispatcher Dethmers, assessing him a thirty (30) day record suspension, with further conditions indicated below, without due cause and absent any demonstrated rules violation.

The Carrier shall now overturn this decision to discipline and remove the mark from his personal record. Further, it is now incumbent upon the Carrier to make him whole for any and all time lost, 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 the 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

T. G. Dethmers ("Claimant") has been a Dispatcher with the Carrier since March 2001 and, at the time of the events leading to this arbitration, he was assigned to work as a train dispatcher at the Carrier's Ft. Worth, Texas, Network Operations Center.

At approximately 10:05 PM on Thursday, April 17, 2008, the Claimant called in and reported that he was sick and would not be able to work his regularly scheduled, second shift assignment on Friday, April 18, 2008. Subsequently, on Friday, April 18, the Claimant was observed by two members of Carrier management attending an entertainment event in downtown Fort Worth during the hours of his scheduled work hours. As a consequence, he was presented with a Letter of Formal Investigation dated April 21, 2008, which states in pertinent part:

Arrange to attend an investigation in the MDPR Conference Room, on the second floor of the BNSF East Office Building (EOB), 3017 Lou Menk Drive, Ft. Worth, Texas at 1400 CT, April 25, 2008, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged falsification of your reason for laying off from your dispatching assignment (2nd Montana Branch) on Friday April 18, 2008.

The Investigation was postponed two times and was eventually conducted on May 21, 2008. At the conclusion of the investigation, a formal Disciplinary Letter dated June 9, 2008, was issued to the Claimant which states in pertinent part as follows:

As a result of formal investigation held at 0930 on May 21, 2008, the following notation will be placed on your personnel record:

"Thirty (30) day record suspension for violation of General Code of Operating Rule 1.6, Conduct, when you dishonestly and improperly laid off sick from your dispatching assignment, 2nd Montana Branch on Friday April 18, 2008."

As a result of this rules infraction, the following will apply:

- This thirty (30) day suspension will be considered a record suspension that will become part of your personnel record but will not result in lost time or wages.
- This rules infraction is classified as "Serious" and will remain under review for three (3) years extending until April 18, 2011. If another "Serious" infraction is progressed against you during this review period, and it is proven in a separate hearing, progressive discipline, up to and including dismissal may be assessed.
- Attached medical review must be completed by your physician and submitted to BNSF Medical Department as indicated on the form no later than 5:00 p.m. June 20, 2008. You will remain in service during this medical review period.

A timely claim was filed protesting the issuance of the subject Disciplinary Letter 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 essential facts in this case are undisputed. The Claimant called in at approximately 10:05 p.m. on Thursday, April 17, 2008, and reported that he was sick and unable to report for his assigned (3:00 p.m. to 11:00 p.m.) shift on Friday, April 18. Accordingly, the Claimant did not report for work on April 18. However, at approximately 7:00 p.m. on April 18, he was observed attending the Fort Worth Arts Festival in downtown Fort Worth by the Carrier's Manager of Dispatcher Scheduling and the General Superintendent of Transportation.

During the investigation, the Claimant insisted that he was suffering from irritable bowel syndrome and back pain on the night of April 17 and that he had called in to the scheduler that night in order to allow the Carrier sufficient time to obtain a replacement worker for the following day. He also insisted that he had been seen by his doctor for those conditions prior to the beginning of his shift on April 18. The Claimant readily acknowledged that he and a co-worker had visited the Fort Worth Arts Festival where he spoke to the Manager of Dispatcher Scheduling and the General Superintendent of Transportation.

The Organization presented documentary evidence that the Claimant had been seen by his doctor on April 18 for a medical condition that prevented him from working that evening. In addition, the Organization asserted that the Claimant took a prescription medication that day that would likely affect his judgment and, therefore, render him unfit for work that night. At the same time, the Organization asserted that the Claimant's doctor had verbally recommended to him that he walk and stretch to alleviate his back pain, and the Claimant's short visit to the Arts Festival was in compliance with his doctor's orders.

The Carrier insisted that the Claimant's attendance at the Arts Festival during the time he claimed to be too sick to work amounts to dishonesty and falsifying the need to be off from work. Therefore, the Carrier maintained that severe disciplinary action was warranted. In support of its position, the Carrier offered Public Law Board 6829 Award 8, in which that Board examined a similar case of a dispatcher who was terminated for falsifying his reason for calling in sick. In that award, the Board held:

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support a finding that the Claimant was guilty of misrepresenting facts surrounding his layoff from work and his falsely claiming sick time on June 7, 2003, as well as other dates in November. The record reveals that the Claimant indicated that he was sick and was unable to work on the dates in question and, yet, he played 18 holes of golf in a golf tournament on June 7, 2002, and attended another golf tournament event and handed out trophies on November 23 and 24, 2002. The Claimant was clearly dishonest when he laid off for sickness on those dates.

In the above award, the Board made it clear that the claimant in PLB 6829, Award 8, had attended three separate golf tournament events after calling in sick. In addition, the claimant had completed a Sick Leave Form which indicated he was sick on one occasion with a migraine that necessitated bed rest. However, the Board concluded that the claimant's act of playing golf at a tournament was not consistent with a person needing bed rest and, therefore, ruled that he had been laying off under false pretenses. In the instant case however, this Board finds no persuasive evidence that the Claimant had falsified his reason for calling in sick or that he was not complying with his doctor's orders to walk and stretch when he attended the Arts Festival.

The Carrier also submitted Public Law Board 6829, Award 6, in which the Board examined another case involving a Dispatcher who was terminated for misrepresenting the facts when he called in sick and then proceeded to play golf. In that award, the Board had this to say:

... The record reveals that the Claimant teed-off and played golf 37 minutes after the time that he called in and laid off, claiming that he had a bad back. The Claimant has admitted that he played golf in California on the date that he laid off sick.

The record does reveal that the Claimant was receiving prescription drugs from his physician to deal with some back problems, but it is clear that the Claimant misrepresented the facts when he called off work on April 15, 2003, and played golf. Consequently, the Claimant acted in violation of the Carriers rules and the agreement.

In PLB 6829, Award 6, the Board made it clear that the claimant had called in sick from another state claiming he had a bad back and then played golf 37 minutes later. Therefore, based on the evidence in that case, the Board concluded that the claimant's actions were not consistent with a person who was suffering with a bad back and the claim was denied. However, no such persuasive evidence was submitted in the instant

case to support a finding that this Claimant's attendance at the Arts Festival were not consistent with his physician's verbal order to walk and stretch to alleviate his back pain.

In a disciplinary case, the Carrier is the moving party and therefore, bears the burden of supplying evidence to support the disciplinary action imposed. In National Railroad Adjustment Board Second Division Award 8432, the Board had this to say concerning the quantum of proof:

The carrier has the burden of proffering substantial evidence that the claimant is guilty of the charges assessed against him. Substantial means more than a mere scintilla. The record when viewed on the whole, must lead a reasonable mind to conclude the claimant committed the offenses. Second Division Award No. 7237 (Roadley)

There is no doubt that the Carrier had a legitimate reason for suspecting that the Claimant had falsified his reason for laying off sick on April 18, 2008, and it was reasonable for the Carrier to investigate further. The evidence shows that the Claimant voluntarily supplied medical documentation and prescription receipts which verified he had been treated for back pain, irritable bowel, and a neck rash on April 18. In addition, after examining him, his doctor instructed him to walk and stretch to alleviate his back pain. In the Disciplinary Letter which was issued to the Claimant on June 9, 2008, the Carrier now directed the Claimant to submit additional medical documentation as follows:

Attached medical review must be completed by your physician and submitted to BNSF Medical Department as indicated on the form no later than 5:00 p.m., June 20, 2008. You will remain in service during this medical review period.




Frequently, there are many unanswered questions concerning the medical issues involved in a case such as the one before this Board. However, such questions can only be answered by the medical professionals and not laymen. Therefore, this Board agrees that it was not unreasonable in the instant case to direct the Claimant to supply additional documentation if a legitimate question existed concerning his medical condition or the validity of his explanation for his absence. However, the fact that the Carrier included that directive in its Disciplinary Letter to the Claimant rather than during the investigation, leads to the inescapable conclusion that the disciplinary action was assessed before the investigation was completed.

CONCLUSION

This Board agrees that sick leave abuse is very serious and when proven, warrants severe disciplinary action, up to and including termination. However, for the reasons outlined above, this Board finds insufficient evidence to support a finding that the Disciplinary Letter dated June 9, 2008, was issued to the Claimant for just cause.

AWARD

The claim is sustained. The Disciplinary Letter dated June 9, 2008, shall be removed from the Claimant's file and shall not be referenced in any other matter. Further, since the claim has been sustained, it is not necessary for this Board to address the other technical arguments that were advanced by the Organization.


Paul Chapdelaine
Chairman and Neutral Member
May 2, 2011
Joe Heenan
Carrier Member
Paul Ayers
Employee Member