

PUBLIC LAW BOARD NO. 7292

ATDA File No.	DA-008A-08
BNSF File No.	06080422
NMB Case No.	18
Award No.	18

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 March 12, 2008, the Carrier arbitrarily disciplined train dispatcher Allen, assessing him 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 his 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**

Lenny Allen ("Claimant") was hired by the Carrier in November 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 office is a small local dispatching center with 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.

By letter dated January 11, 2008, the Claimant was instructed by the Carrier to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged excessive absenteeism on December 2 and 3, 2007. Following several mutually agreed to postponements, the investigatory meeting 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 0930 on 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 December 2 and 3 of 2007."** (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

### The Charges

During the Investigation, the Carrier submitted a letter addressed to the Claimant dated August 9, 2007, concerning "Coaching and Counseling I" which states:

This is to confirm our meeting regarding your attendance. As indicated in our discussion you have been absent 5 days in July, 8 days year-to-date and 23 days in a rolling 12-month period.

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.

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, as stated in our meeting, 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 your first 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 is attached and I urge you to review this information at your earliest convenience. **Subsequent failure to achieve regular, punctual attendance will result in progressive discipline, administered in accordance with the Guidelines per attachment "A".** (Emphasis added)

The Carrier also submitted another letter addressed to the Claimant dated October 10, 2007, concerning "Coaching and Counseling 2" which states as follows:

This is to confirm our meeting regarding your attendance. As indicated in our discussion you have been absent 2 days in September, 11 days year-to-date and 20 days in a rolling 12-month period.

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 August 16, 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, as stated in our meeting, 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 attendance will result in progressive discipline**, administered in accordance with the guidelines per attachment "A". (Emphasis added)

In each of the above Coaching and Counseling letters, the Carrier emphasized to the Claimant that he must have his attending physician release relevant medical information to the Carrier's Medical and Environmental Health Department if he was suffering from a chronic medical condition that prevented him from working on a full-time basis. Each of the Coaching and Counseling letters also reminded the Claimant of the options he may have under the FMLA and the EAP, and he was put on clear notice that his subsequent failure to achieve regular and punctual attendance would result in further action under the Attendance Guidelines.

A subsequent review of the Claimant's attendance in March 2008 revealed that he had been absent 16 days during the previous 12-month period. Eight of those absences were taken for personal business, and 13 of those absences were taken in conjunction with his rest days resulting in 3 or 4 day rest periods on 8 occasions.

During the investigation, the Claimant stated that he had only been coached and counseled regarding his attendance deficiencies on one occasion, and he disputed the Carrier's assertion that he had been counseled a second time. In addition, the Claimant pointed out that his signature did not appear on either of the subject Coaching and Counseling letters, and he disputed that he had received either of them. This conflict is resolved by the contents of an email from the Claimant to Company Official Jonathan Cain, dated October 17, 2007, in which the Claimant acknowledged that he had previously received 3 letters regarding his attendance deficiencies. The Claimant admitted sending the email, but he was unable to recall exactly when he had received the attendance deficiency letters mentioned in his email message. Therefore, based on the evidence and testimony, this Board is persuaded that the Claimant received the subject Coaching and Counseling letters, and he was clearly on notice that his attendance was unsatisfactory.

The Claimant displayed a cavalier attitude concerning his attendance deficiencies during the investigation, and he cleverly proposed several hypothetical situations that could have

caused him to be absent from work during the review period. However, he stopped short of offering any specific reasons for his unscheduled absences, and he made no assertion that he would endeavor to correct his attendance. In addition, he made no assertion that he was unaware of the existence of the FMLA or the EAP, and he also made no claim that any of his absences were caused by a medical condition or problem in his personal life 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 the Carrier, therefore, did not have just cause to issue to him 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 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. . ." (Emphasis added)

In the instant case, the majority of the Claimant's absences were for alleged "personal business" in conjunction with his rest periods, and he presented no documentation either before or during the investigation, to document the existence of any medical condition that would prevent him from reporting to work. Therefore, this Board finds the circumstances of the instant case to be clearly different than PLB 7240 Case No. 68.

The Organization also provided National Railroad Adjustment Board Third Division Award 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 Award 23555 provided adequate proof 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 contrast, the Carrier submitted Special Board of Adjustment No. 1128, Case No. 26, which this Board found to be particularly on point. In denying the claim, that Board had this to say concerning unsatisfactory attendance:

Claimant was apprised of her FMLA rights and offered EAP assistance. It appears that Carrier made a reasonable effort to work with her. Despite the wide variety of medical afflictions from which Claimant suffered (flu, sinusitis, earache, headache, nausea, sprains, and the like), this Board cannot help but conclude that her absenteeism was excessive. When employees develop extremely poor attendance records over a number of years and cannot point to major chronic conditions that prevent them from meeting basic attendance standards, there is often less willingness to countenance frequent absences due to minor complaints.

This Board agrees with the findings in the above-cited case. The Claimant in the instant case had been properly counseled regarding his attendance deficiencies as evidenced by two coaching and counseling letters. Although he had been coached and counseled, reminded of his FMLA rights, and offered assistance from the EAP, his attendance remained unsatisfactory.

It was disturbing to this Board that the Claimant adamantly maintained his record of absences in conjunction with his rest periods did not establish a pattern and that his absences were not excessive. In addition, he gave no indication that he understood his attendance was unsatisfactory. However, this Board finds that based on his lengthy service of more than 15 years with the Carrier, as well as the coaching and counseling he had received from management, he knew, or should have known, that his attendance must be corrected.

The Carrier operates a time-sensitive business and has a right to expect regular and on-time attendance. The Claimant's unscheduled absences 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, notwithstanding the Organization's spirited arguments on the Claimant's

behalf, it cannot be said that the Carrier was arbitrary or capricious when it required him to report for work regularly and on-time. Accordingly, this Board finds that the Carrier was justified in issuing to the Claimant the Letter of Formal Reprimand dated March 12, 2008, for his unsatisfactory attendance.

### **THE ORGANIZATION'S ASSERTIONS**

#### **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. As this Board has previously stated, an employee's right to a fair and impartial hearing is an absolute requirement before disciplined is assessed to an employee. A review of the record reveals that Mr. Mead provided the Claimant with a full opportunity to explain his version of the facts during the hearing. In addition, both the Claimant and his representative were each permitted to vigorously cross-examine the Carrier's witness without interruption and there is no evidence that the Claimant was not permitted to introduce any evidence, testimony or witness in support of his position. In addition, 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.

There is no evidence 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. Therefore, this Board finds no evidence to support a conclusion that the Claimant was deprived of a fair and impartial hearing.

#### **Adversarial Hearing**

A third argument advanced by the Organization asserted 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, regardless of how the Organization may view Mr. Mead's method of conducting the hearing, once again, this Board finds no evidence to show that he was not objective during the hearing or that he suppressed any relevant evidence or mitigating circumstances that could have proved the Formal Reprimand was not warranted.

**Carrier Had Not Challenged Positions Presented by the Organization**

Next, the Organization asserted that the Carrier had not challenged positions presented by it 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 which are summarized in 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 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. In that Award, the Board pointed out that the carrier had adequately explained its reasons for denying the subject claims, and the Organization did not rebutted those reasons. In the instant case, by letter dated October 10, 2008, General Director Labor Relations, O. D. Wick clearly provided in great detail the Carrier's reasons for denying the Organization's claim and 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.

**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


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 to him for just cause. This Board also finds that the Organization's technical arguments must be denied.

### 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