PUBLIC LAW BOARD NO. 7292

ATDA File No.	DA-100-09
BNSF File No.	06-09-0243-D-DI
NMB Case No.	19
Award No.	19

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 ("Organization"), including but not limited to Article 24(b) in particular when on February 6, 2009, the Carrier arbitrarily disciplined train dispatcher L. L. Allen, dismissing him from service without due cause and absent any demonstrated rules violation.

The Carrier must now overturn the previous decision to discipline the aggrieved and restore Mr. Allen to service. Further, it is now incumbent upon BNSF to make principle 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 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 Spring, Texas office. The Carrier operates a small local dispatching center at the Spring office 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 by Union Pacific Railway employees and focuses primarily on the dispatching of trains and transfer movements in the Houston, Texas area.

On May 6, 2008, the Claimant called the Carrier and reported that he would be unable to work that day due to an FMLA condition. The Claimant laid off FMLA again on May 7, 2008, and he returned to work on May 8, 2008. The Carrier was subsequently informed that the Claimant had been arrested on May 6, 2008, and that he had been incarcerated on May 6 and May 7, 2008.

By letter dated July 15, 2008 the Claimant was instructed by the Carrier to attend an investigation on July 18, 2008 regarding the following charge:

> . . . to ascertain the facts and determine your responsibility, if any, in connection with your alleged misrepresentation of the reasons you laid off FMLA the evenings of May 6th and 7th, 2008 when assigned as a train dispatcher in the Spring Dispatching Center, Spring TX. Information received in this office indicates you were in custody in the Harris County Jail, Houston, TX on May 7th and May 8th, 2008. . .

Following several mutually agreed postponements and a recess, the investigation was completed on January 20, 2009. Following the investigation, a Letter of Dismissal dated February 6, 2009, was issued to the Claimant which states in pertinent part as follows:

> As a result of investigation completed January 20, 2009, you are hereby dismissed from the service of the BNSF Railway Company. Testimony at this investigation confirms that you laid off FMLA while under arrest May 6, 2008 and while incarcerated May 7, 2008 misrepresenting the reason you could not work your dispatching assignment which is a violation of General Code of Operating Rule 1.6 **Conduct, item 4. Dishonest**. (Emphasis provided)
>
> In assessing discipline, consideration was given to your personal record.

A timely appeal protesting the issuance of the Letter of Dismissal 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

By letter dated February 29, 2008, the Claimant had been approved for 12-months of intermittent FMLA leave during the period of February 18, 2008, through February 17, 2009. The basis for the FMLA leave was reported as "family stressors, work attendance issues and reported work related stress due to his having a variety of problems attending work consistently, which was causing him to have attendance difficulties with his management team".

On the afternoon of May 6, 2008, the Claimant was stopped by local police for a traffic violation and he was subsequently placed under arrest and incarcerated. Following his arrest, the Claimant placed a phone call to the Carrier at 7:38 p.m. on May 6, 2008, and informed the scheduler that he was laying off his 3rd shift assignment because of an FMLA condition. The Claimant again contacted the Carrier at 6:50 p.m. on May 7, 2008, and informed the scheduler again that he was laying off his third shift for May 7 because of an FMLA condition.[1] The Claimant was subsequently released from custody on May 8, 2008, and he worked his regular 3rd shift assignment that evening.

The Claimant continued to work his regular schedule without informing the Carrier that he had laid off FMLA on May 6 and 7, 2008, while he was incarcerated. On July 11, 2008, the Carrier received formal confirmation from the Harris County Sherriff's Department that the Claimant had been incarcerated on May 6 and 7, 2008.

An investigation was held with the Claimant and, during the investigation, he readily admitted that he was in police custody on May 6 when he contacted the Carrier to lay off under the provisions of the FMLA that evening. He also admitted that he was still in custody when he again contacted the Carrier on May 7 to lay off under the FMLA for that evening. At the same time, the Claimant revealed that his call on May 7 was made from a pay phone in the jail to one of his friends. According to the Claimant, his friend subsequently relayed the call to the Carrier through a "3-way call" so that the Claimant could speak directly to the scheduler to report he would be laying off FMLA that

[1] The Claimant did not work his shift on either of those nights.

evening. At the same time, the Claimant admitted that he had not informed the Carrier during either of those calls that he was under arrest and in jail.

The Claimant stated during the investigation that he had been in contact with a bail bondsman while he was in jail, and he maintained that the bondsman could have obtained his release from jail at any time if he had simply advised the bondsman to post his bail. However, according to the Claimant, he had deliberately remained in jail because he believed he had been unjustly arrested. The Claimant maintained that he was under stress during both of his calls to the Carrier because both he and his wife were incarcerated at the time, and he was concerned about the welfare of his children. The Claimant insisted therefore, that he was entitled to the FMLA leave.

General Code of Operating Rules, Rule 1.6 prohibits employees from engaging in various forms of personal misconduct as follows:

> **1.6 Conduct**
>
> Employees must not be:
>
> 1. Careless of the safety of themselves or others.
> 2. Negligent
> 3. Insubordinate
> **4. Dishonest**
> 5. Immoral
> 6. Quarrelsome
> 7. Discourteous.
>
> 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)

The Organization argued vigorously and skillfully that, prior to his arrest and incarceration, the Claimant was suffering from undue stress. The Organization also argued that he had been granted FMLA protection for exactly this reason: mental duress and stressors that might prevent him from working effectively. Therefore, in the Organization's view, the Claimant had not been dishonest or deceitful.

In PLB 5642, Award 2, the board examined a similar case of a railway worker who requested and was granted a leave of absence to take care of a number of purported problems in his personnel life. That worker was later terminated when it was discovered that he was actually in jail during the period of his leave. In denying the claim, the Board had this to say concerning dishonesty:

> Numerous tribunals have held that incarceration is not a valid reason for failing to protect an assignment, nor is it a valid reason to grant a leave of absence. The awards do reveal that failing to tell the Carrier of incarceration is dishonest. In Third Division Award No. 18562 it was held:
>
> > The record amply supports the charge that Mr. Staples made a false statement to be absent from duty as charged by the Carrier. Mr. Staples stated that he told his father to mark him off sick. He alleges that he was both sick and in jail. However, the withholding of essential information may also constitute the making of a false statement. In the instant case Mr. Staples had an affirmative duty to inform the Carrier of the entire reason for his absence, to wit, the fact that he was in jail.

Similarly, in PLB 6681, Award 30, the board held:

> Here, the record reveals that the Claimant's incarceration prompted his call to the Carrier's Crew Management to extend his layoff on grounds of sickness when, in fact, he was not sick. The Board agrees with the Carrier that the real reason for the extension he requested was linked to his uncertainty whether he would be released from jail in time to protect his assignment. This is not a valid reason for extending his layoff unless he informed Crew Management, which he did not, of his incarceration. Suffice it to say that it is dishonest to provide false, misleading or incomplete information to obtain permission to be absent. By seeking an extension of his layoff on false grounds, the Claimant specifically breached, among the other rules cited herein, Operating Rule 1.6(4).

This Board has carefully reviewed each of the above cited Awards and finds that they have direct application in the instant case. Even though the Claimant in the instant case may have been under stress at the time he called in to report his intended absences, he still had a duty to inform the Carrier that he was incarcerated. However, he deliberately withheld the fact that he was incarcerated, and he made no attempt to reveal his incarceration to the Carrier when he returned to work.

While it is regrettable that the Claimant may be encountering difficulties in his personal life, the Carrier has established that the Claimant violated Rule 1.6(4) when he claimed FMLA for his absences on May 6 and 7, 2008, when, in fact, he was incarcerated.

THE ORGANIZATION'S ASSERTIONS

The Hearing Was Not Fair and/or Impartial

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 maintained that the combination of Mr. Mead's roles in the process seriously compromised the Claimant's due process rights to such a point that it cannot be overcome.

As this Board has previously stated, an employee has an absolute right to a fair and impartial hearing before discipline is assessed. However, it cannot be presumed that a single member of management will not remain impartial while performing more than one role during the disciplinary process. In National Railroad Adjustment Board Third Division Award 26239, the board examined a similar argument advanced by the Association and ruled:

> While duality of roles is neither condoned nor encouraged, the key is to determine whether demonstrable prejudice to the employee exists by virtue of multiple roles of the Officer.

And in National Railroad Adjustment Board Second Division Award 13692, the board had this to say concerning the subject of multiple roles of the Hearing Officer:

> Based on a careful examination of the record, the Board finds that no demonstrable prejudice has been shown. The Claimant's rights were not adversely affected. On the contrary, the Hearing Officer heard the testimony and observed the witnesses and was in the best position to resolve the factual issues that were presented in the instant case. Thus, the fact that the determination of guilt and the assessment of a penalty were both rendered by the Officer who conducted the Hearing did not deprive the Claimant of a fair Hearing.

The record in the instant case clearly established that the Claimant's due process rights were protected throughout the process. Mr. Mead provided him and the Organization a full opportunity to explain his version of the facts, and both the Claimant and his representative were each permitted to vigorously cross-examine the Carrier's witnesses without interruption. In addition, there is no evidence that the Claimant was denied the opportunity to introduce evidence or witness testimony in support of his defense

After a careful review of the record, there is no evidence to support a finding that Mr. Mead was biased during the process or that he neglected to consider all of the evidence before reaching his decision. In fact, Mr. Mead demonstrated his neutrality by granting the Claimant's request for a lengthy recess of several weeks during the investigation to allow the Claimant additional time to secure further information from the court in support of his defense.

Further, there is also no evidence that any provision of Article 24 or any other portion of the Collective Bargaining Agreement prohibits a single member of management from performing more than one role during the disciplinary process. Accordingly, this Board concludes that the Claimant was not 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 at the investigation, chose to act in a prosecutorial fashion and attempted to prove the charges against the Claimant. The Organization maintained that Mr. Mead had therefore, conducted the hearing as an adversary proceeding, rather than allowing the facts to be developed.

The role of the hearing officer is to conduct the investigative hearing is such a way that the facts of the case are fully developed and recorded. A review of the investigation transcript reveals that Mr. Mr. Mead conducted the investigation objectively and asked relevant questions of the witnesses in order to establish a complete record. Further, although Mr. Mead properly retained control of the investigation and required the Claimant to restrict his questioning of the witnesses to matters relevant to the investigation, 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 Violated Article 24(b).

Next, the Organization argued that the initial complaint letter was not issued to the Claimant within the requisite five-day time limit as specified in Article 24(b) of the Agreement; outlined 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 Organization correctly pointed out that although the Claimant laid off under the FMLA while incarcerated on May 6 and 7, 2008, the Carrier did not bring charges against him until July 15, 2008. The Organization asserted that the Claimant had overheard other employees discussing his incarceration in the workplace as early as mid-June 2008 and argued that management must, therefore, have been aware of the situation long before the notice of investigation was issued. For that reason, the Organization insisted that the notice of investigation was untimely.

While the Organization's assertion is serious and worthy of consideration, the evidence established that the Superintendant did not actually become aware of the Claimant's FMLA lay off while incarcerated until he was presented with evidence of that fact on July 11, 2008. Therefore, the evidence clearly shows that the Notice of Investigation dated July 15, 2008, was issued within the requisite 5-day time limit after the Superintendant became aware of the Claimant's misconduct.

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 that 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 Award 28459 that the organization in that case 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 subcontracting the subject work, and the organization had not rebutted those reasons. On that basis, the claims were denied.

National Railroad Adjustment Board Third Division Award No. 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 in that case did not dispute the organization's material statements, and the board accepted those statements as established facts.

In the instant case, however, the Carrier's reasons for denying the Organization's claim had been thoroughly addressed in a lengthy 10-page letter dated April 16, 2009, from BNSF General Director Rules and Field Support, D. E. Bodeman to ATDA Vice General Chairman R. B. Aldridge. In his letter, Mr. Bodeman disputed the Organization's assertions and arguments made on the Claimant's behalf. Subsequently, in a letter dated July 15, 2009, General Director Labor Relations, O. D. Wick reiterated to Mr. Aldridge that Mr. Bodeman's previous letter had addressed the salient points of the Organization's argument in this case, and he also denied the claim.

Notwithstanding the Organization's diligent and spirited arguments on the Claimant's behalf, this Board finds that when Mr. Wick submitted his July 15 letter to Mr. Aldridge, 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 view of the above, in the absence of

any evidence that a specific material statement had been made by the Organization that had not been denied by the Carrier, the Organization's claim must be denied.

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 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, and in the absence of a demonstrated past practice to the contrary, 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

In assessing discipline to the Claimant, the Carrier considered the Claimant's record which reflects an appalling disciplinary history. During his employment, the Claimant had been assessed 21 disciplinary actions for various rules infractions, and five disciplinary actions for acts of failing to cover his assignment. Therefore, it is clear that the Carrier has taken a measured approach and applied progressive discipline by which the Claimant knew, or should have known, that his job was in serious jeopardy. Notwithstanding the numerous warnings he received, however, the Claimant continued on his path of misconduct and permanently damaged his employment relationship with the Carrier.

The precedent has been established in this industry that all employees are prohibited from engaging in dishonesty in their dealings with the Carrier, the Carrier's customers and other Carrier employees. The Claimant was dishonest when he laid off for FMLA on May 6 and 7, 2008, while he was incarcerated and, in so doing, he violated Rule 1.6(4). Therefore, this Board finds that dismissal was appropriate in this case.

AWARD

The claim is denied in its entirety.

Paul Chapdelaine
Chairman and Neutral Member
May 8, 2011

Joe Heenan
Carrier Member

Paul E Ayers – I dissent
Paul Ayers
Employee Member