

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 6672**

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Parties to Dispute: )  
 )  
UNITED TRANSPORTATION UNION )  
 )  
-and- )  
 )  
THE BURLINGTON NORTHERN AND )  
SANTA FE RAILWAY CORPORATION )  
\_\_\_\_\_ )

**OPINION & AWARD**

Case No. 16  
Claimant R. L. Schmeck

**EMPLOYEE'S STATEMENT OF CLAIM:**

"This will present claim and appeal in behalf of Klamath Falls, OR Conductor R. L. Schmeck. Claim is for any lost time and benefits due to assessment of discipline and/or attending investigations. Appeal regards removal of any mark in association with the instant issue, Level One, formal reprimand and one (1) year probation from Mr. Schmeck's personal record for his alleged violation of the BNSF Attendance ('Availability Policy') Guidelines."

**FINDINGS**

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

In this claim the Organization moves the Board for an order directing the railroad to rescind the Level One – Formal Reprimand and probationary period assessed to Claimant on August 17, 2000, for attendance issues following a formal investigation held on August 3, 2000.

There is mild disagreement between the parties concerning the facts triggering Carrier's action. The relevant background preceding that action, however, is undisputed. On or about October 1, 1999, Carrier announced new policy relating to proper procedures to be followed by employees desiring to lay off. ("Availability Policy") Based upon its assertion that the policy was not well understood and for other reasons, the Organization both litigated and later engaged in arbitration over whether the policy represented an

unlawful unilateral change in the governing collective bargaining agreement. Although that argument was rejected in both forums, on December 1, 1999, the Carrier unilaterally rescinded the Availability Policy and on February 18, 1999, mailed a revised statement of its expectations regarding attendance to all TY&E employees to be effective March 1, 2000. ("BNSF Guidelines for TY&E Employees Attendance.") Under the amended policy, Crew Management would accumulate layoff records for each employee on a rolling 3-month basis and forward that data to the Operating Department for review and action, if necessary, with due consideration for the situations of each individual employee. Broadly, application of the policy was limited to unpaid time off since, in general, paid leave is not counted against employees for purposes of the Attendance Guidelines.

The reasonableness of that policy was affirmed in Public Law Board No. 6345, Case No 38 (Vaughn) (2003) (Attendance Guidelines were properly promulgated by Carrier to effectuate its right to reliable, full-time attendance and were entitled to be enforced; assertion that Guidelines are unclear rejected.)

In this case the Organization argues in part that the discipline imposed was unreasonable and inconsistent with the spirit of the Guidelines because in the relevant rolling 3-month period Claimant had averaged 88 hours weekly in May and 90 hours per week in June. Reliance on the policy to assess discipline in that context, it asserts, is therefore wooden and rigid since Carrier's expectations are unreasonable.

Carrier disputes those hourly numbers and contends additionally that its Guidelines are not an hours worked policy but an availability policy that takes into account more than simply high hours. Hours worked, it states, are of course considered, but the policy focuses as well on the days each employee is available to perform service. Thus, by allowing employees 25% of their time off, each on average will work 25 days per month. That calculates to slightly over five weekdays and two weekend days off each month, spreading the weekday/weekend burdens equitably among all employees.

Here, in April, May and June, 2000, contrary to the Organization's contentions, Claimant missed 5.5 week days and 9 weekend days. In May and June, the two months with the highest availability by Claimant, there were just under 9 weeks and he worked an average of 37.8 hours per week. When, as in Claimant's case, he was available for only

63% of the weekend days, he fell below the 75% availability standard of the BNSF Attendance Guidelines and deprived his coworkers of their fair share of weekend time off.

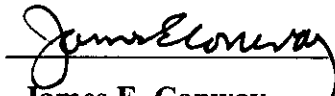
The record reflects that Claimant was allowed to layoff 5 weekdays and 2.5 weekend days in April, and 4.75 weekdays and 1.5 weekend days in May. In June he was permitted to lay off 5.5 weekdays and 2 weekend days, bringing his total to 15.5 weekdays off and 6 weekend days off in that 3-month period. However, he also had 4 unpaid weekday absences and 4 weekend absences in April, 1 weekday and 2 weekend days in May and .5 weekdays and 3 weekend days in June. That took his total unpaid weekdays to 5.5 and his unpaid weekend days to 9 during this timeframe. Under Carrier's guidelines, although Claimant could have taken an additional 10 weekdays off, instead he chose to take 9 weekend days off against a threshold of 6 weekend days under the guidelines.

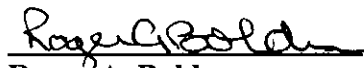
While the Board is not insensitive to Claimant's problems during this period, there appears to be no question but that his monopolization of weekend days off was out of compliance with his employer's legitimate attendance policy. That said, the Board notes that Carrier did give Claimant some degree of special consideration here, excluding from its computations an additional 4 weekdays and 2 weekend days.

Discipline under the circumstances was a reasonable exercise of Carrier's rights. In view of the fact that the first disciplinary step under the Guidelines is a 10-day record suspension, the level of discipline imposed was not unreasonable. The Board finds no basis for disturbing Carrier's judgment.

A W A R D

The Claim is denied.

  
James E. Conway  
Chairman and Neutral Member

  
Roger A. Boldra  
Carrier Member

  
J. L. Schollmeyer  
Employee Member

Dated: Great Falls, VA  
February 12, 2009