

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6672

Parties to Dispute:

UNITED TRANSPORTATION UNION

and

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

OPINION AND AWARD

CASE No. 25

Claimant J. N. Wright

STATEMENT OF CLAIM:

“This will present claim and appeal in behalf of Interbay, WA Conductor J. N. Wright for immediate return to service, pay for all time lost, including attending investigation with all benefits, and complete record clearance of the entire incident account dismissal for alleged violation of GCOR Rule 1.5 (Duty reporting or Absence) and GCOR Rule 1.16 (Subject to Call) on July 13, 2003.”

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.

According to this record Claimant Wright, hired as a trainman on May 26, 1992, and working at Balmer Yard in the Seattle Terminal during the relevant timeframe, missed a call for service on July 13, 2003.

Carrier scheduled an investigation and hearing for July 21, 2003, by certified mail, return receipt requested, which was signed for on July 19 by K. Werima. When Claimant failed to appear for his hearing on July 21, the hearing was recessed for 30 minutes while the parties made an effort to locate him. After determining that his cell phone was no longer in service, Carrier conducted its investigation *in absentia*. By letter dated July 31, 2003, Assistant Terminal Superintendent Thomas E. Martin informed Claimant that based upon the evidence adduced at the investigation he was being dismissed from service. The

Organization subsequently appealed the dismissal, and when Carrier's highest designated officer declined the final appeal on April 4, 2004, the matter was conferenced and then advanced to this Board for final and binding resolution.

The Organization takes the position that Claimant was denied a fair and impartial investigation. It stresses that while Carrier contends it properly notified Claimant of the upcoming investigation and produced a signed receipt for the notice from an unknown individual, Carrier knew that Claimant was incarcerated at the time and unable to appear. There were any number of ways Carrier could have handled this issue—including through employee assistance or postponing the hearing pending his release—thereby avoiding this rush to judgment.

General Code of Operating Rule 1.16 reads:


“Employees subject to call must indicate where they can be reached and must not be absent from their calling place without notifying those required to call them.”

Upon review of the record, the Board finds neither any fatal procedural irregularity in Carrier's handling of this matter nor any compelling substantive evidence suggesting that its action was unwarranted. In accordance with the abundant arbitral precedent offered by Carrier, the fact that an employee is in jail is not an excuse for an absence or failure to protect an assignment. See, *e.g.*, Public Law Board 2529, Award No. 34 BMW & Burlington Northern Railroad (Lazar) (1986) (“It is well established in the railroad industry that incarceration does not justify an absence. Conscious violation of the law does not constitute an unavoidable absence for good cause. Violations of the law are presumed avoidable.”)

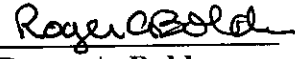
In this instance Carrier may have been aware that Claimant was incarcerated. Such knowledge, however, does not mechanically translate to a an infringement on Claimant's right to due process. Hearings held *in absentia* are relatively common under such circumstances, and are uniformly and consistently held to be appropriate providing proper notice of hearing has been served on the grievant. This was the Claimant's fifth missed call within 12 months. Carrier's response was neither arbitrary nor capricious. The record affords no basis for disturbing the dismissal.

A W A R D

The Claim is denied.


James E. Conway
Chairman and Neutral Member


Jay Schollmeyer
Employee Member


Roger A. Boldra
Carrier Member

Dated: ~~November~~ ^{Feb 24 2009}, 2008
Great Falls, VA