

**PUBLIC LAW BOARD NO. 7204**

**UNITED TRANSPORTATION UNION** )  
 )  
 **vs.** ) **CASE NO. 5**  
 ) **AWARD NO. 5**  
 )  
**BNSF RAILWAY COMPANY** )

**STATEMENT OF CLAIM:**

Claim and appeal in behalf of Willmar, MN Conductor M.J. Sheridan for immediate reinstatement and pay for all time lost account dismissed from service for alleged violation of GCOR Rules 1.15 and 1.16 (absent without authority) since November 18, 2005.

**FINDINGS:**

Public Law Board No. 7204, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The Claimant, M.J. Sheridan, had been employed by the Carrier since approximately 1997. On January 12, 2006, the Carrier charged Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged absence from work without proper authorization since November 18, 2005. Following several postponements, the investigation was held on February 8, 2006. Claimant did not attend, and the Organization protested the fact that the Carrier would not grant additional postponements. Thereafter, the Carrier found Claimant guilty of the charges and dismissed him from employment.

Jan Ruby, Terminal Manager of Carrier's Willmar, Minnesota facility, testified that he received a note from Complainant, dated December 23, 2005, stating, in part, that he was "off and doing exactly what I should/need to be doing and I am working closely with George Kane (apparently Carrier's EAP counselor) and expect to be back to work in March, maybe sooner." Mr. Ruby received another note from Complainant, dated "2-1" again stating that Complainant was doing what he needed to, and that, "Any other option other than treatment would of (sic) resulted in my eventual untimely death. Walking away from the job I am proud of and the friends I love wasn't an option." Mr. Ruby stated that after he received Claimant's second letter, he sent Claimant a letter stating that he had learned Claimant was incarcerated and the EAP counselor had not been able to reach him. The letter further stated that incarceration was not an excuse for an extended leave of absence, Claimant was not on leave of absence, and he was expected to protect his seniority. Mr. Ruby stated that he had received no response and Claimant had never

formally requested a leave of absence. Mr. Ruby testified that he was aware that Claimant had been working with the EAP counselor and had apparently asked him for a medical release.

Carrier GCOR 1.15 provides, in relevant part:

#### Duty Reporting or Absence

Employees must not leave their assignment . . . without proper authority. Continued failure by employees to protect their employment will be cause for dismissal.

Carrier's Policy for Employee Performance Accountability, Appendix C, Dismissible Rule Violations, includes "extended unauthorized absence."

The Organization's representative stated at the hearing that Claimant had been involved in an automobile accident involving the use of alcohol approximately two years earlier, and had been jailed and sent to an alcohol rehabilitation center. He further stated that following his treatment Claimant returned to work and had no work-related problems. However, he stated, on or about December 15, 2005, Claimant called and told him that he might be in trouble, as he had failed a random alcohol test required as a condition of his probation. As a result, he added, Claimant had been jailed to complete the remainder of his sentence. He stated that Claimant was undergoing treatment, and was scheduled to be released in late February or early March, 2006. He stated that Claimant had remained in contact with Carrier officials, an Employee Assistance Program (EAP) counselor, and the Organization, and wished to continue working for the Carrier.

The Carrier first points out that despite several postponements, Claimant did not attend the investigation and so did not testify on his own behalf. Willmar Terminal Manager Ruby, the Carrier states, testified at the hearing that Claimant was incarcerated and not able to protect his assignment. The Local Chairman, the Carrier notes, confirmed this information on the record, and also indicated that Claimant had been jailed because he failed alcohol/drug testing required as a condition of his probation. The record is very clear, the Carrier states, that Claimant was incarcerated for more than 60 days and, accordingly, abandoned his position with the Carrier.

The Carrier also urges that the penalty of dismissal is appropriate. The Carrier states that while it supported Claimant during his first incarceration, the situation changed when he failed the random testing required by the State of Minnesota. The Carrier notes that Claimant has demonstrated he is unwilling to give up alcohol, which creates a very dangerous situation for an employee working in this industry. The Carrier points out that it is well established that incarceration is not a justification for an employee's absence or failure to protect his/her assignment. Therefore, it concludes, dismissal is appropriate in this case and the claim should be denied.

The Organization contends that the investigation was not conducted in a fair and impartial manner. In particular, the Organization objects to the Carrier's refusal to recess the hearing until Claimant could appear to hear testimony, question witnesses and prepare a defense, and to afford the Organization an opportunity to have the Carrier's EAP Manager present. The Organization also notes that the Carrier failed to disclose the source of its information, presented by a Carrier witness at the investigation, that the Claimant was incarcerated and had not requested a leave of absence.

The Organization asserts that the penalty of dismissal is excessive and unreasonable. The Organization states that Claimant was in treatment and had requested a leave of absence, which the Carrier should have granted as it has to hundreds of other employees. The Organization concludes that the Carrier was aware of Claimant's personal situation and simply chose to dispose of him, while it has offered far more support and assistance to other employees in similar situations. Therefore, the Organization urges that the claim be sustained.

The Board has carefully reviewed the record in its entirety. First, we cannot accept the Organization's contention that Claimant was denied his right to a fair and impartial investigation. The Carrier in fact granted several postponements to give Claimant an opportunity to appear, and the Organization conceded that Claimant failed to appear at the investigation because he was incarcerated. It is well established that incarceration does not justify a failure to attend an investigation or require that the hearing be postponed. Similarly, it is well established that incarceration does not excuse a failure to report for duty and protect one's assignment. There is no dispute that Claimant was absent for an extended period as alleged, and, as the Organization representative conceded at the hearing, his absence was due to his incarceration. Therefore, the Carrier has met its burden of proving Claimant's guilt by substantial evidence.

Given Claimant's extended absence as a result of his incarceration, and the circumstances underlying that incarceration, we cannot say that the Carrier's determination that dismissal was the appropriate penalty was an unfair, arbitrary or discriminatory exercise of its discretion.

**AWARD**

Claim denied.

  
JACALYN J. ZIMMERMAN

Neutral Member



**ROGER BOLDRA**  
Carrier Member

  
J.L. SCHOLLMAYER  
Organization Member

Dated this 31<sup>st</sup> day of March, 2009.