

**PUBLIC LAW BOARD NO. 7204**

**UNITED TRANSPORTATION UNION** )  
 )  
 **vs.** ) **CASE NO. 8**  
 ) **AWARD NO. 8**  
 )  
**BNSF RAILWAY COMPANY** )

**STATEMENT OF CLAIM:**

Claim in behalf of Great Falls, MT Conductor L.A. Watson for immediate return to service with pay for all time lost and complete record clearance account dismissal on December 28, 2004, for alleged violation of GCOR Rule 1.16 (alleged missed call) on December 8, 2004.

**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, L.A. Watson, had been employed by the Carrier for approximately one year. On December 9, 2004, the Carrier charged Claimant to attend an investigation in connection with his alleged missed call on December 8, 2004. As a result of the investigation, and in consideration of Claimant's personal record, the Carrier dismissed him from service on December 28, 2004.

The underlying facts of this case are not in dispute. On December 8, 2004, Carrier's Auto Call system called Claimant for service, beginning at 3:32 a.m. and continuing until 4:13 a.m., a total of 41 minutes. Claimant was called on both his home and cellular telephones, and the Carrier's records indicate that the Auto Call system reached Claimant's answering machine six times.

Claimant acknowledged at the investigation that he marked up at 1:25 a.m. on December 8, 2004, and was three times out. Claimant did not deny that he missed a call. However, he contended that he was at home with his telephone working, but it never rang. His cell phone, the second contact number he had given the Carrier, was turned off and charging. Consequently, Claimant contended, he was never notified of the call. Carrier's records indicate that Claimant never attempted to log on to the VRU system to check his status or to receive a call until 9:44 a.m., when he realized he had missed a call. Claimant denied that he had attempted to lay off.

The Carrier first points out that Claimant admitted he missed the call, thus establishing his rule violation. The Carrier asserts that given Claimant's short career with the Carrier and extensive record of poor performance, dismissal is the appropriate penalty and should be upheld by this Board.

The Organization concedes that the Carrier's Auto Call system may have called Claimant for service on the day in question. However, the Organization stresses, Claimant did not knowingly receive any calls. Thus, the Organization urges, the record does not establish Claimant's guilt of the charged offense.

Should the violation be sustained, the Organization asserts that dismissal is a harsh and excessive penalty. The Organization notes that none of Claimant's prior offenses involved a serious infraction. In addition, the Organization states, two prior disciplinary actions are being challenged before this Board, in Case Nos. 6 and 7, and, if either is overturned, Claimant's record cannot support dismissal under the Carrier's disciplinary policy. For these reasons, the Organization concludes, the claim must be sustained.

The Board has carefully reviewed the record in its entirety. Claimant and the Organization do not dispute that the Carrier called Claimant for service on December 8, 2004, and he missed the call. Claimant was responsible for making himself available to receive the call and his unlikely defense, that his telephone did not ring, does not provide justification for his failure, especially given that he turned off his cell phone, the alternate number he had given the Carrier. Thus, Carrier has satisfied its burden of proving his guilt by substantial evidence.

As to the penalty of dismissal, at the time of this infraction Claimant had been employed for 17 months. As the Carrier points out, he had already amassed a significant record of poor performance and disciplinary action, and clearly was not making the necessary effort to improve. This Board has denied the claims in Case Nos. 6 and 7, so they do not provide a basis to overturn the dismissal. In the particular circumstances presented herein, and in light of Claimant's overall record, we cannot say the Carrier's decision that dismissal was appropriate is an unfair, arbitrary or discriminatory exercise of its managerial 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.