

PUBLIC LAW BOARD NO. 7204

UNITED TRANSPORTATION UNION)
)
vs.) **CASE NO. 11**
) **AWARD NO. 11**
)
BNSF RAILWAY COMPANY)

STATEMENT OF CLAIM:

Claim and appeal in behalf of Great Falls, MT Conductor R.M. Guedesse for immediate return to service, pay for all time lost and complete record clearance account dismissed from service on December 19, 2005 for alleged violation of GCOR Rule 1.3.2 and BNSF's TY&E Attendance Guidelines (alleged failure to comply with instruction of BNSF's TY &E Attendance Guidelines as outlined in General Manger's Notice No. 2 dated August 24, 2003).

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, R.M. Guedesse, had been employed by the Carrier since 2003. On December 9, 2005, he was charged to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to comply with the Carrier's attendance guidelines. Neither Claimant nor his representative attended the hearing, held on December 14, 2005; Claimant was apparently incarcerated at the time. Carrier Trainmaster/Road Foreman Nick Mizelle testified that he had spoken to Claimant, who told Mr. Mizelle he had received a certified mail notification and asked whether it was an investigation notice. Mr. Mizelle stated that he confirmed that it was an investigation notice and told Claimant he needed to contact his local Organization chairman.

The Carrier presented evidence establishing that Claimant had a three-month rolling attendance threshold of seven weekdays and 2.5 weekend days, and during September, October and November 2005 he was unavailable 9.5 weekends and four weekend days. Following the investigation, the Carrier found Claimant guilty of the violations alleged and dismissed him from service.

Claimant's personal record indicates that he received a formal reprimand for attendance violations on November 22, 2004, a 10-day record suspension for missing a

call on February 28, 2005, a 20-day record suspension for a safety violation on February 28, 2005, a 30-day record suspension for a missed call on July 7, 2005, and a 30-day record suspension for a missed call on November 8, 2005. Thus, pursuant to Carrier's Policy for Employee Performance Accountability, Claimant was subject to dismissal for another rule violation within a 12-month period.

The Carrier first asserts that the appropriateness of its Attendance Guidelines Policy is well-established, and provides for a rolling three-month review of employee attendance. Here, the Carrier states, there is no merit to the Organization's argument that Claimant was not afforded a fair and impartial hearing, and the fact that he was incarcerated and unable to attend does not render the process unfair. Moreover, the Carrier notes, it is a settled principle that incarceration does not excuse an employee's failure to protect his assignment. The statement by the Carrier's witness that Claimant had violated attendance guidelines was never challenged on the property, the Carrier points out, and must stand as fact. Thus, the Carrier concludes, Claimant's guilt has been proven.

With respect to the penalty assessed, the Carrier argues that, contrary to the Organization's assertion, dismissal was neither harsh nor excessive. Claimant, the Carrier points out, had four previous violations in a 12-month period, and was subject to dismissal for this, his fifth, offense. The Carrier concludes that its decision was reasonable and should not be disturbed by this Board.

The Organization asserts that the discipline imposed upon Claimant was unwarranted and unreasonable. The Organization contends that the circumstances of Claimant's incarceration are not relevant, as he was charged with nothing more than an attendance violation. The Organization asserts that Claimant has addressed some personal issues which affected his employment, and would now be a better employee. Thus, the Organization urges that the claim be sustained.

The Board has carefully reviewed the record in its entirety. First, we find that the investigation was conducted in a fair and impartial manner. The evidence established that Claimant was notified of the investigation and urged to contact his local Organization representative to secure representation at the hearing. Moreover, it is well established that an employee's failure to attend an investigation because he is incarcerated does not render the process unfair.

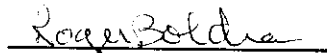
On the merits, the evidence established that Claimant violated the Carrier's attendance guidelines, and Carrier has therefore met its burden of proving his guilt by substantial evidence. While the Organization urges that Claimant has addressed the personal situation which caused his employment problems and deserves another chance to be a productive employee, the Organization essentially makes a request for leniency. However, leniency is the prerogative of the Carrier, not this Board. Given that Claimant was a relatively short-term employee who committed his fifth rules violation within a 12-month period, we cannot say the Carrier's determination that dismissal was warranted is 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 31ST day of March, 2009.