PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

NMB Case No. 121
Claim of W. J. Becker
Level S 30-Day

STATEMENT OF CLAIM: Claim on behalf of Engineman W. J. Becker requesting the removal of a level S 30 Day record suspension, removal of the three year probation and payment for any time lost while attending the investigation.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on December 2, 2011 in Washington, D.C. Claimant was not present at the hearing.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts. The Board makes the following additional findings:

In October of 2010, Claimant was assigned as a Conductor on through freights in the Stockton-Bakersfield CA pool. For the last two days of that month, he was assigned as an Engineer on the extra board. At times relevant to the dispute, he had 13 years of service.

Claimant was subject to the Carrier's Attendance Guidelines (also "ATG"), which obligate he and other employees to be available for service on a full-time basis. The Guidelines are intended to help balance work and time off and to distribute needed work across the relevant workforces. The Attendance Guidelines identify thresholds and boundaries for various assignments, below which employees are subject to counseling and progressive discipline. ATGs state that "meeting the [ATG] criteria . . . does not the necessarily preclude the company from challenging an employee's full-time attendance requirement based on some other reasonable standard."

The Carrier came to believe that the Attendance Guidelines were insufficient in their literal application to ensure that all employees were, in fact, carrying their fair share of the work. In its opinion, some employees became adept at "gaming" the system,

staying within the literal terms of the Attendance Guidelines, but nevertheless making themselves unavailable for service an excessive percentage of times. Accordingly, the Carrier enacted a Low Performance Review Process (also, "LPRP"), aimed, according to its stated purpose, at applying the existing Attendance Guidelines fairly and consistently. The Low Performance Review Process identifies employees who utilize various means, including those not violative of the Attendance Guidelines, to minimize their availability for work opportunities. Such tactics include, by way of example, timing or chaining layoffs.

LPRP involves monthly reviews of each employee in TYE in comparison in the same relevant group (e.g., through freight Conductors in the Stockton-Bakersfield pool; multiple groups pro rata when employees work multiple jobs during the same month). The Process assumes that employees in similar service will work similar numbers of hours. Teams of managers review the information on a centralized basis and identify employees who are deficient in hours, as compared with these relevant peer groups. Employees identified are referred to the employees' supervisors at their home terminals.

Employees so identified are subjected to a coaching and counseling session in which their patterns of attendance are identified, reviewed and compared against other, similar employees. Employees are advised at that time and in a follow-up letter that their performance must improve and, failing improvement, that they will be considered indifferent to duty and subjected to progressive discipline.

Beginning with his work in June of 2010, Claimant was reviewed under LPRP and was found not to have been working comparable hours to his peers. Claimant was coached and counseled on July 19th and advised that improvement was required. Claimant had been assigned the Engineers extra board and was on vacation part of the time, so his time was prorated for comparison purposes. By that standard, comparable employees worked on average 65.9 hours for the month. Claimant worked 33 hours, half as much as his peers. Consistent with LPRP, Claimant was sent a coaching and counseling letter with respect to his June performance.

The Carrier continued to monitor Claimant's performance. Notwithstanding the previous counseling, in October of 2010, when the average hours for comparable employees was 139.3; Claimant worked only 60.6 hours: 43% of the average number of hours for comparable employees. Indeed, between June and October, Claimant's performance got worse. He was the second lowest-performing Stockton employee, the 11th worst out of 1275 California Division

TYE employees. Indeed, for the entire system, Claimant was the 98th worst out of over 16,000 TYE employees, placing him in the bottom two or one percent.

Claimant was allowed six 24 hour layoff periods during October. By working the extra board and laying off close to the point where he would be called, Claimant was able to be off almost 19 days, including 12 days in a row during one period. Claimant's position in the Stockton-Bakersfield pool worked 18 starts between October 1 and 27; by timing his layoffs, Claimant worked only six of those starts. The information was provided to Claimant's home terminal Managers on November 15, 2010.

Based on Claimant's LPRP numbers, the Carrier ordered an investigation into his low performance and availability for the month of ~~November~~ October 2010. The investigation was held on December 13, 2010. Based on the evidence adduced and following consideration thereof, the Carrier assessed Claimant a Level S 30 Day Record Suspension and three years probation for violation of GCOR Rules 1.13 (Reporting and Complying with Instructions), 1.15 (Duty - Reporting or Absence) and 1.6 (Conduct - Indifference to Duty).

The Organization protested Claimant's suspension, which the Carrier denied on appeal. The Claim was progressed on the property up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was referred to the Board for binding resolution.

POSITIONS OF THE PARTIES: The Carrier argues that the evidence establishes Claimant's violation of the cited Rules. It points out that the Rules are clear and that Claimant had been instructed as to the unacceptability of the low number of hours he worked, but his performance declined following the corrective efforts. Moreover, contends the Carrier, the evidence establishes that Claimant continued the deliberate pattern laying off in order to avoid work, thereby establishing his indifference to duty. Citing authorities, the Carrier argues that employees who make themselves unavailable are subject to discipline.

The Carrier argues that Claimant's conduct violated several rules, including the obligation under GCOR 1.13 that employees must report to and comply with instructions, under 1.15 which requires employees to report for duty at designated times and places and under 1.6, makes indifference to duty a conduct violation. BNSF asserts that the Organization's multiple arguments constitute attempts to distract the Board from these clear violations.

As to the Organization's argument that the investigation was untimely because it was not held until longer than 30 days following the incident (Rule 50 (a)), the Carrier argues that the time must run from its first knowledge of Claimant's performance, which was necessarily related to his peers. Because of the timing and manner of that comparison, the manual, detailed review of October's data was not completed until November 15th, using reasonable diligence, and was not made available to an officer authorized to convene an investigation until that time. Citing authorities, the Carrier argues that time periods for purposes of investigation must be interpreted reasonably and, by such standard, date from that time, not from when Claimant's absences took place or even when the LPRP teams at headquarters assembled the data. In application of that standard, the investigation held on December 13th was not untimely, it contends.

As to the Organization's argument that "Low Hours" cannot be used as a basis for discipline because the process has not been reduced to writing, the Carrier points out that Low Hours or Low Performance are not new policies, but merely new processes to enforce existing Rules, such as those which require employees to protect their assignments. Indeed, the Carrier maintains that none of the examples cited by the Organization as establishing inconsistencies between existing provisions of the governing Agreement and the Low Performance process are apposite. It asserts that none of the cited provisions address the situations raised in the Low performance Review Process, which address noncompliance with existing rules.

The Carrier rejects the Organization's analysis which assumes that a set number of hours per month can be used to establish an acceptable workload. It contends that such a number merely seeks to establish a bare minimum, which is contrary to the very purpose of the "Low Performance" process. BNSF maintains that Claimant should simply be available to work full-time and, if he did so, the numbers would take care of themselves. Here, where Claimant worked less than half the average number of hours as his peers and got worse, rather than improved, following counseling, the Carrier argues that his violation was well-established, without resort to fixed numbers of hours.

The Carrier also rejests the Organization's argument that the Carrier earlier implemented a system-wide policy to catch a few bad actors and, in the process, punished many good employees and now complains that weeding out the "worst of the worst" is also defective. It protests that the Organization's position is hypocritical, in light of the legitimate objective of ensuring that full-time employees be available full-time.

As to the Organization's argument that Claimant was twice-punished for his June, 2010 work, the Carrier points out that Claimant was not disciplined for his failure to work in June; instead, he signed a Waiver for a Formal Reprimand for ATG violations in the three-month period ending that month, not for Low Performance, for which he received separate, non-disciplinary counseling in July. That, maintains BNSF, is not double jeopardy.

The Carrier argues, in response to Organization arguments, that the Attendance Guidelines are inapplicable to the violations at issue. Instead, maintains the Carrier, Claimant was disciplined for failures identified and uncorrected in the Low Performance Review Process. It contends that he was well-advised of the Carrier's expectations and that his assertions to the contrary are incredible and self-serving.

As to the Organization's assertions that the Carrier should have offered Claimant Alternative Handling, BNSF points out that there is no evidence that Claimant ever requested such treatment. Moreover, argues the Carrier, Alternative Handling was never intended to be applied to violations of GCOR Rule 1.6 involving personal conduct. Moreover, maintains BNSF, the Organization never appealed the lack of Alternative Handling through the steps of the Appeal process. It points, in this regard, to Part II, Article VII governing Alternative Handling, which requires such appeal. It points out that no conference was requested, thereby waiving any such argument. BNSF maintains that, in any event, that access to Alternative Handling required Claimant to admit guilt and accept responsibility, which he clearly did not do. It asserts that the Organization cannot argue Claimant's innocence of the charge and still assert a right to Alternative Handling.

As to the Organization's objections at the local level, the Carrier argues that UTU failed to prove any prejudice from the "inaudible" designations at different parts of the transcript. It also rejects any assertion of collusion or prejudgement between the Conducting Officer and the Carrier advocate at the investigation. Moreover, complains the Carrier, Mr. Costa was unnecessarily and improperly confrontational and disruptive during the investigation. It maintains that the Organization's conduct was merely diversionary from the core issue of Claimant's unacceptable conduct.

The Carrier argues that the evidence proves Claimant's violations of the cited rules. It urges that the discipline be upheld and the Claim denied as without merit.

The Organization argues, as an initial matter, that the Carrier failed to conduct its investigation in a timely manner. It points to Rule 50 (a) of the governing Agreement (as amended), which requires that investigations be conducted no later than 30 days following the incident. It maintains that the Carrier had knowledge of the incident no later than November 8, 2010, but that the investigation did not take place until December 13, 2010, more than 30 days. Citing authorities, the Organization argues that no lag time is allowed between when the Carrier receives the knowledge and when it is forwarded to the person appropriate to handle the information. It urges that a sustaining Award is required on that basis.

Without waiver of its position with respect to the untimeliness of the investigation, the Organization argues that the discipline is defective on its merits and must be rescinded. It argues that the concept of "Low Hours" (the same process the Carrier terms "Low Performance") is invalid as violative of several provisions of the governing Agreement, including Article 17 (f) 10, which requires that a Trainman lay off prior to his vacation in order to receive a displacement right upon his return; if the Trainman does not lay off, his job will be declared vacant and placed for bid. UTU protests that the process results in discipline which is arbitrary and subjective, in contrast to the Attendance Guidelines, which are, at the least, objective and measurable.

The Organization argues, in addition, that the Carrier previously punished Grievant for his alleged "Low Hours" violation and that Claimant testified that the Carrier counseled him that compliance with the Attendance Guidelines would relieve him of further liability under the Low Hours policy. It contends that he met the Attendance Guidelines but was disciplined nonetheless.

Further, argues the Organization, the Carrier improperly refused to grant Alternative Handling to Claimant. It asserts that Low Hours is not excluded from such Handling by the Safety Summit or by the Carrier's unilateral changes to that Agreement and that it should have been applied.

Moreover, contends UTU, the Carrier failed to prove that Claimant's conduct violated any Rule.

The Organization protests that if the Carrier wants to solve the problem of employees allegedly avoiding work, it needs to establish boards by agreement with set days off. Indeed, protests the Organization, the "Low Hours" assessment is merely a way for the Carrier to escape its obligations under applicable agreements

because it refuses to staff boards properly and otherwise manage existing manpower.

For each of the foregoing reasons, the Organization urges that the Claim be sustained, Claimant's Record Suspension and probation be rescinded and Claimant paid for any time lost attending the Investigation.

DISCUSSION AND ANALYSIS: The Board is persuaded that the Carrier did not violate the requirement of the Agreement to conduct its investigation within 30 days from when the incident occurred. That type of contractual language has generally been interpreted to calculate the time for investigation from the time when an officer with authority to schedule an investigation can review the data and conclude that a rules violation may have occurred. Any other calculation would be unreasonable, as it would trigger the time period for convening an investigation prior to when the appropriate Carrier official would have had actual knowledge of the events giving rise to such investigation.

The Board notes, in this regard, that the underlying purpose of time limit rules is to avoid stale claims and prejudice to the ability of a claimant and/or the Organization to procure evidence while records are available and memories are clear. There is no evidence that conducting the hearing on December 13th for work performed in October resulted in lost records, failed memories or other prejudice to Claimant or the Organization. Indeed, there is no dispute with respect to the evidence of the amount of Claimant's work or with respect to his explanation for his absences.

As to the merits of the dispute, the Board notes that employees who occupy full-time jobs are reasonably expected to be available on a full-time basis, excused from that obligation only in the exercise of contractual authorization, such as leave. Employees who fail that obligation not only encumber a full-time position which they are not supporting, but shift the burden of excess absences on to other employees. The Carrier acts reasonably in establishing processes to measure employee availability and to counsel and discipline full-time employees who fail to be available on a reasonably full-time basis.

The Board has searched the governing Agreement for indication that the Carrier's use of the Low Performance Review Process is violative of provisions of that Agreement, but finds none. The Process is not an independent policy, but is, instead, a means of assessing whether employees have met their obligations to be available for duty. The Attendance Guidelines provide a way to measure that availability, but include a notation that they are not

the exclusive measure of an employee's availability. LPRP is a supplemental process.

The Organization argumes that the Carrier has improperly established a process to measure availability which is not numerically based (as the Attendance Guidelines are) and which is, therefore, arbitrary. UTU's concerns have merit. A process which appears to measure the acceptability of employee attendance solely on the basis of a comparison with the averages for other, similarly-situated employees automatically singles out employees on the bottom of the list, regardless of the acceptability of their attendance on an objective standard. If, as might reasonably be the case, application of the LPRP results in improvement in overall attendance, it would appear that employees at the bottom would still be singled out, even if their attendance is at a level which might be acceptable. There are, for that reason, potential limits on the use of LPRP to establish indifference to duty.

That having been said, Claimant's demonstrated lack of availability for duty cannot be excused on the basis that his performance was at an acceptable level because the averages had improved or that he had improved his performance from the previous counseling. By any standard, Claimant's availability to perform his full time job was far less than full time and far less than acceptable: he was second lowest of 112 employees in his Station, 11th lowest of 1275 employees in his Division and 98th out of over 16,000 employees system-wide. He worked only 43% of the average hours worked by his peers.

There may be a line somewhere that would limit the Carrier's ability to discipline employees for Low Performance, as when average performance would increase and the difference between those averages and the bottom decrease. However, Claimant's hours establish his indifference to duty, which did not improve following counseling and which are not excused or mitigated by either his absolute number of hours worked or the proximity of those hours to the average number of hours worked by his peers.

The Board has reviewed the remaining Organization arguments but finds them to be without merit.

The Board finds Claimant guilty of the charge against him and finds the penalty to have been reasonable. The Award so reflects.

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AWARD: The Carrier did not untimely hold its investigation. The Carrier met its burdens to prove Claimant guilty of the charge of indifference to duty and to prove his 30 Day Record Suspension to have been an appropriate penalty. The claim is denied.

Dated this 20th day of JAN, 2012

M. David Vaughn,
Neutral Member

Melissa Beasley,
Carrier Member

D. L. Young,
Employee Member