IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BNSF RAILWAY COMPANY Plaintiff,	§	
v.	§	Civil Action No.
INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS – TRANSPORTATION DIVISION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,	§	4:22-CV-00052-P
Defendants.	§	

SUPPLEMENTAL DECLARATION OF SALVATORE MACEDONIO

1. My name is Salvatore (Sam) Macedonio. The following facts are true and correct and within my personal knowledge. I am of legal age and otherwise competent to make this declaration.

2. I am Assistant Vice President, Labor Relations at BNSF Railway Company. The purpose of this Declaration is to supplement my declaration in support of BNSF's Motion for a Temporary Restraining Order dated January 18, 2022 (ECF No. 8 at 167). I provide additional details about the nature of BNSF's operations, outline the attendance rules and requirements, explain why the railroad's newly announced attendance rules are reasonable, and respond to the Union's specific objections to those rules.

Nature of BNSF's Operations

3. BNSF is one of the country's largest freight railroads. It operates a complex rail network that spans the western half of the continent, totaling more than 40,000 miles of track. It runs hundreds of trains every day. These trains are operated by locomotive engineers represented by the BLET and trainmen represented by SMART-TD.

EXHIBIT
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4. Rail operations are inherently variable. Freight transportation is a derived demand industry – railroads must move freight when it is tendered to them, and have limited control over when or how much freight must be moved at any given time. For many decades, customer demands have required BNSF to operate 24 hours per day, seven days a week, 52 weeks a year.

5. Moreover, rail traffic levels rise and fall based on a large number of factors – macro economic conditions, customer operating cycles, factory production levels, ocean vessel arrivals and departures, grain harvests, and so on. In addition, carload variations, weather conditions, track maintenance, accidents, and a multitude of other factors can alter network movements, delaying not just a single train, but all other trains on the same network. Accordingly, the number of train crews that will be needed varies from day to day, and the time that crews must be called to service likewise changes on a daily basis.

6. Although railroads are unable to adhere to specific timetables, they are nevertheless under enormous pressure to deliver freight in a timely fashion. For example, many railroad customers rely on "just-in-time" delivery of critical parts and materials. Likewise, coal-fired power plants often have only a 4 to 5 day supply of coal on hand, and thus need regular and timely shipments. As a result, delays in rail traffic – including delays due to lack of available personnel – can have serious consequences for both rail shippers and the public at large. It is therefore critically important that railroads have available crews to move trains.

Train Service Staffing & Time Off

7. In order to meet these service demands, BNSF employs several different staffing systems for its operating employees. Because precise scheduling is often impossible, many operating employees are assigned to a "pool" that is responsible for runs between two locations. These jobs include what we refer to as "unassigned" service, meaning that employees do not work

a set schedule. Pools are handled through a complex system. Greatly simplified, employees in the pool are placed on a rotating list (sometimes called a "board"). When a train is ready for departure, the employee at the top of the board is called to work, and everyone else moves up one slot. Employees who have just completed service are placed at the bottom of the board. Railroad employees in pool service operate trains from one terminal, called the home terminal, to another terminal, sometimes called the away-from-home terminal. These employees stay overnight at the away-from-home terminal to rest according to federal statutory requirements, and after getting the required rest, they are called to operate a train back to the home terminal.

8. Other train and engine service employees may elect to work jobs with fixed hours and assigned off days in yard, local or road switcher service. Employees working yard, local and road switcher assignments work primarily at home during their on-duty hours. Still others may elect to work "guaranteed extra boards," on which employees are assured a minimum monthly income to fill temporary vacancies created when other employees are unavailable because of vacations, jury duty, union business, bereavement leave, or other absences.

9. Although operating employees often need to work odd and/or unpredictable hours, they have multiple options for ensuring sufficient off-duty time, including paid and unpaid leave provided pursuant to a variety of federal statutes, collective bargaining agreements, and practices. As noted in my previous declaration, many employees work in pools that have so-called predictive work schedules or "earned rest." But even employees in regular pools have various protections from over-work:

(A) Contractual Leave: By agreement, train and engine service employees have up to six (6) weeks of paid vacation and up to eleven (11) paid personal leave days based on seniority. This compensated time off may be taken in small blocks or single day increments throughout the

year to accommodate any personal or medical need without loss of income and without having it considered a layoff for points purposes. In addition, operating employees may be granted unpaid contractual leave. For example, employees who are "on-call" (such as operating employees working in a pool or on an extra board) may, in certain circumstances, "mark off" or "lay off," meaning that they temporarily remove themselves from the list of available employees. Employees lay off for various reasons, including personal business, sickness, and sickness in family. The employees typically do this by advising crew management in advance that they would like to be marked off for a requested period of time. In general, rail carriers, including BNSF, have always retained the right to refuse a request to mark off based on the needs of service.

(B) Family and Medical Leave Act ("FMLA"): On top of their contractual leave, qualified operating employees also have a statutory right to take up to twelve workweeks of unpaid leave for family or medical reasons. 29 U.S.C. § 2601 *et seq.* FMLA leave may be taken on either a "block" or "intermittent" basis, allowing employees who have been certified for FMLA leave to be absent on a recurring basis.

(C) Hours of Service Laws: Employees also get time off by virtue of the rest requirements of the federal Hours of Service Act, 49 U.S.C. § 21101. In general, the Hours of Service Act provides that employees may not

(a) work more than 12 consecutive hours;

(b) go on duty unless the employee has had at least 10 consecutive hours of undisturbed rest;

(c) work for more than 6 consecutive days; or

(d) work more than 276 hours in a month.

See Rail Safety Improvement Act of 2008, P.L. 110-432, Div. A, Title I, § 108(a), 122 Stat. 4860.

10. As a result of this combination of contractual and statutory leave, all operating employees, regardless of work schedules, have substantial time off. The Unions seem to suggest that BNSF train service employees are always on the job. That is simply incorrect. I asked our timekeeping department to run an analysis for those BNSF train, yard and engine (TYE) employees who were in either assigned or unassigned service for an entire year. For those employees, the average number of work "starts" and rest days – both contractual (assigned rest days, vacation, personal leave days, etc.) and ad hoc layoff days (laid off sick, laid off personal business, FMLA, etc.) – were as follows:

- Assigned service: 204 starts per year; 113 contractual days off; and 40 ad hoc days off.
- Unassigned service: 174 starts per year; 40 contractual days off; and 81 ad hoc days off.

As these totals reflect, for employees in unassigned service, there are many days of the year when they are neither working nor "marked off," but are just waiting to be called to work.

11. Notwithstanding the generous amount of time off provided by law and contract, a minority of TYE employees abuse the lay off process in order to avoid working on weekends, holidays, or at any other time that the employee may find it inconvenient to work. Weekend lay offs in particular tend to go up in the summer months. Likewise, whenever the Super Bowl is played, or a popular college or pro football team plays a home game, BNSF inevitably sees a spike in the number of TY&E employee laying off near those locations. The worst offenders are those employees who would prefer to treat railroad work as a *de facto* part-time job and mark up

only a few days each week, just enough to maintain their chosen life style and remain eligible for health benefits.

12. Excessive absenteeism causes substantial problems. When a significant number of employees lay off, BNSF cannot staff its trains. Crew shortages mean that trains must be parked in yards or sidings until sufficient rested crew members can be located. When even a few trains are delayed, the delays can ripple throughout BNSF's system. For example, the carrier may have to use employees who were called to staff other trains to crew the delayed train. Connections may be missed, causing further delays. Excess trains in yards cause congestion, further exacerbating delays. Once part of BNSF's system is shut down because of crew shortages, it can take as long as 36 hours before the system is back and running at a normal schedule.

13. These delays impose substantial costs. Aside from extra labor costs (in the form of overtime and additional penalties or costs for diverted crews), BNSF incurs additional costs in fuel, car hire expenses, per diem costs for foreign road cars, and extra capital costs. BNSF may also suffer penalties for late deliveries in shipper contracts, and, at worst, may lose customers if delays are too extreme or frequent. Excessive absenteeism also adversely affects the majority of BNSF employees who do *not* shirk their work responsibilities when called for an assignment. These employees end up shouldering extra work that would have been done by those who prefer to stay home.

14. BNSF has long maintained attendance standards designed to mitigate these problems. As discussed in the prior declarations, BNSF routinely updates and modifies those attendance rules to keep pace with operational needs.

Hi-Viz Attendance Program

15. The Hi-Viz Attendance Program (Hi Viz or the Program) is intended to provide guidelines for what the railroad expects from employees in train, yard and engine service (TYE, basically engineers and conductors) and Yardmasters in terms of availability to work. Hi Viz provides a point-based tally system that assigns points for certain negative non-attendance/non-availability events and the ability to earn back points (referred to as Good Attendance Credits), for positive attendance incidents. A true and correct copy of the Program is attached as Ex. 1 to this Declaration.

16. The purpose of Hi Viz is to set a clear standard for full-time employment; allow employees to easily, accurately, and contemporaneously determine where they stand in comparison to BNSF attendance standards; and to provide employees with an opportunity to improve their standing through regular, steady attendance.

Assessment of Points

17. Under the Program, employees begin with 30 points and points are deducted for various incidents where an employee is unavailable for work, including full and partial day absences. Point deductions are determined based on the type of service the employee is in at the time of the unavailable event. Once an employee exhausts the employee's points (i.e., reaches or falls below zero), the employee is subject to progressive discipline.

18. Importantly, the Program does *not* assess points for unavailability incidents or absences covered by the Family Medical Leave Act (FMLA) or related to an employee's participation in union business, among other things. Ex. 1 § 1 (Point Schedule Table listing Unavailable Events). An employee who marks off for union business and/or to take FMLA will continue to maintain a perfect 30 points under the Program. Various other forms of absences or

unavailability (for training, various forms of paid leave, and so on) are also exempt and do not incur points.

19. While the Unions have argued that the Program punishes employees for taking sick leave during a pandemic, that is not true. Hi Viz does not assess points when employees take leave in order to recover from COVID-19.

20. The Unions also assert that the Program will result in a "shocking" reduction in time off. That is not so. While Hi Viz is designed to improve availability, employees will continue to have access to all of the substantial time off referenced above. Moreover, the Unions' characterizations of the Program ignore the ability of employees to earn points for good attendance, as described below.

Good Attendance Credits

21. Under the Program, employees can earn Good Attendance Credits. Ex. 1 § 2. Existing BNSF attendance policies do not provide employees the ability to earn back points or Good Attendance Credits. Under Section 2(a) of the Program, an employee earns Good Attendance Credits for any 14-day period without an unavailable event and in which they are not otherwise absent from work. Ex. 1 § 2. An unavailable event is commonly called a "layoff" when the employee lays off making the employee unavailable for call or work. A rest day is not considered a layoff.

22. It is important to emphasize that, for purposes of the Program, "availability" does not mean actually working. More specifically, the calculation for Good Attendance Credit merely requires an employee to be *available* for work on assigned work days over a fourteen day period, not to actually report and perform service every day for fourteen days. Indeed, under federal regulations (discussed further below) it is not possible for an employee in train service to work

fourteen days in a row.

Similar Leaves are Treated Similarly
(and not Less Favorably) Under the Program

23. The Program and Good Attendance Credits section treat all similar periods of unavailability and leaves of absence similarly. In particular, the Program does not treat FMLA leaves less favorably than other forms of unpaid leave of absence. Under the Program, Good Attendance Credits are earned for any 14-day period so long as the employee has been available for work as required by the position they hold. So, for example, an employee in 5-day assigned service (with 2 scheduled rest days) would generally earn a Good Attendance Credit if available for work each of their 10 scheduled work days in a 14-day period. An employee in unassigned pool service would earn the Credit if they stayed available for 14 days and worked each time called to staff a train.

24. There are a limited number of codes an employee can use and still be eligible for a Good Attendance Credits. The first set of codes cover situations where the employee still reports for work and is getting paid, but is not doing their usual job related to moving trains: for example, Computer Based Training (CBT), Rules Class (RUL), Engineer Recertification (ERC), Engineer Training (LET), Working Lite Duty (LIT), Layoff Alternative Handling, to complete follow-up alternative-handling training (LAH), and Company Business (LCB). Ex. 1 § 2(b)(ii). These layoffs are not absences or leaves of any kind. In each of these events where Good Attendance Credits are earned, the employee is not only available to work, the employee is actually performing duties as directed by BNSF--albeit in a role different from the employee's regular work (e.g., training, performing other company business, or working lite duty). Ex. 1 § 2(b)(ii).

25. Other codes that do not interrupt Good Attendance Credits accrual include those where the employee is still available for work, but something has been modified. For example, an

employee exercising the Foot of Board (FOB/NFB/BFB) code remains available for service, but their position in the "pool" work rotation goes to the bottom of the board. LXX is a status for an employee who is available, but who is pending notification of a seniority bump or other change in work status. And the other codes in this bucket are those related days an employee is not available when off on their fixed rest days (as provided by that particular work assignment) (LRC/LRP/LRD).

26. Critical Incident Report (CIR) is the code is for employees distressed following a critical incident, such as a highway grade crossing accident. An employee laying off CIR is eligible for Good Attendance Credits and is paid while on leave. Good Attendance Credits can also be earned for Military (MLV/LML) and National Guard (NGD) leave of absence. The intent under Hi Viz is to allow for Good Attendance Credits during a military leave eligible for BNSF make-whole pay. If a military leave is not eligible for BNSF make-whole pay (if, for example, the employee does not file the required military paperwork) that military leave would no longer allow the employee to earn any Good Attendance Credits while on that military leave.

27. Thus, there are no unpaid leave of absences that are eligible to earn Good Attendance Credits under the Program. Ex. 1 § 2(b).

28. Good Attendance Credits are not partially earned or prorated for partial satisfactory completion of any 14-day period, and is only earned upon full completion of the 14-day period. In other words, the days of a Good Attendance Credit period are not a "benefit" that is earned until the employee completes the entire 14-day period.

No Unpaid Leave of Absence Qualifies For Good Attendance Credits

29. FMLA at BNSF is generally an unpaid leave of absence. FMLA leave under the Program is treated no better nor worse than other unpaid leaves of absence. Good Attendance

Credits are not earned for any unpaid leaves of absence. In other words, all unpaid leaves of absence are treated similarly under the Good Attendance Credits portion of the Program, and no unpaid leaves of absence are treated more favorably in that no unpaid leaves of absence earn Good Attendance Credits.

Union Business (UBN) Mark-Offs

30. There is no merit to the Unions' assertions that the status of lay-offs for union business under the Program will interfere with their representation of members. As a threshold matter, it is important to understand the scope and depth of union representation of employees on BNSF. Significant roles in the Unions are performed by full-time Union officers, such as general chairperson and vice chairperson. To the extent these individuals are BNSF employees, they are on full-time leave and are not subject to the Program at all. They do not need to worry about attendance in the first place, let alone accumulation of Good Attendance Credits. The only union officers for who this is relevant are so-called "working" union officers, who hold positions in train service and also serve as part-time union representatives. To say that the Unions are fully staffed with these officers is an understatement. There are currently over 1,300 employees in TYE eligible to use union business (UNB) codes to mark off. They took off a combined 23,000 days under UNB in 2021 alone.

31. The Good Attendance Credits are a discretionary benefit to incent good attendance by BNSF employees. There is no punitive aspect to the Good Attendance Credits, only a net positive for employees who complete a 14-day period without an unavailable event or other absence.

32. As explained in my earlier declaration, union officers who regularly mark off on

union business under BNSF's existing policy have never had a way to earn credits or rehabilitate poor attendance (for reasons other than union business). If a working union officer ran afoul of attendance rules under the existing policy, he would need to wait for a year to re-set his discipline status. Now, he will have the opportunity to earn credits if he so chooses. That is hardly a penalty or an effort to prevent union officers from performing their duties.

33. I have read the November 24, 2003 and January 1, 1972 Agreements between BNSF and BLET that BLET cited in its Response to the BNSF's Motion for a Temporary Restraining Order (Exhibits 1 and 2 in ECF No. 21). Those agreements state, in summary, that union officers who lay off for specific union business will not be considered to be laying off or missing a call. BLET claims that the Good Attendance Credits portion of the Program punishes union members by not awarding time toward Good Attendance Credits for time spent conducting union business.

34. That is not an accurate interpretation. The cited agreements merely preclude BNSF from disciplining officers for marking off for union business, and as noted above, no points are assessed for doing so. However, nothing in those agreements – or in any other agreements between BNSF and the Unions – requires BNSF to provide a discretionary benefit or credit to union officers for participating in union business. There is a clear and obvious distinction between treating a day marked off on union business as an absence (prohibited) and treating such a day as something other than a regular work day (allowed). In other words, counting a day marked off on union business as neutral – neither penalized nor rewarded – is permissible under the terms of the relevant agreements. Indeed, that is the way BNSF has treated union business under its existing policies for at least 20 years.

35. Moreover, there is no plausible argument that Union officer lack the ability to

arrange their affairs to qualify for Good Attendance Credits, should they wish to do so. For example, individuals who mark off on union business are free to request that BNSF adjust deadlines if performance of union business would prevent the individual from earning a Good Attendance Credit and therefore could avoid being assessed discipline.

36. Union officers can also cover for one another, if necessary. For example, if a particular officer needs to conference claims with BNSF, it is possible for one union officer to cover for another when Good Attendance Credits are close to being acquired. And BNSF's labor relations officials routinely grant union requests for deadline adjustments. So while all discipline decisions are tailored to the individual facts, I am highly doubtful – speaking as BNSF's TYE Highest Designated Officer under the Railway Labor Act – that BNSF would hold an employee accountable under Hi Viz where the sole reason the employee stood for discipline was legitimate use of UNB code layoffs and the employee had also made the attempts described above to work around UNB/Good Attendance Credits conflicts.

37. As noted in my earlier declaration, BNSF conducted modeling of the Hi Viz policy's implementation and found that some of the highest UNB code users would have a perfect 30 points under Hi Viz, based on layoff patterns from September thru December 2021. Moreover, despite requests from my team, the unions have been unable to identify specific employees who would have been subject to discipline as a result of historical patterns of UNB code usage.

How Vacations Work for TYE Employees

38. Any Union suggestion that train-service vacations, once scheduled, are not subject to movement or modification is simply incorrect. Under the current ATG, if a train-service employee is called to work the day before a vacation day and that trip would extend into the scheduled vacation, the employee is still expected to staff that train. If they do not, that missed

call or lay off is subject to outcomes under the current ATG (for example, if the employee either lays off to ensure their vacation starts as originally scheduled or if they intentionally miss the call they may be subject to discipline). Moreover, BNSF has for decades had the power to modify vacations based on the railroad's "needs of service." And BNSF has invoked that right to cancel or modify vacations as required to ensure that trains are staffed. In such situations, employees are either able to reschedule the vacation or are paid for the time if those vacation days are not used in the calendar year.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 31st, 2022.

Salvatore Macedonio

BNSF RAILWAY

Hi-Viz Attendance Program

System General Notice

Effective February 1, 2022

BNSF System General Notice Nos. 46, 156, 208 and 223 are canceled:

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Effective February 1, 2022
New Hi-Viz Attendance Program is placed into service and replaces information previously contained in the following System General Notices:
- TY&E Failure to Take Notification
- TYE Earned Rest
- Guidelines for TYE and Yardmaster Attendance
- TY&E Time Off

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BNSF Hi-Viz Guidelines for TYE and Yardmasters

Hi-Viz Guidelines is a tally system that:

- Sets a clear standard for full-time employment.
- Allows employees to easily, accurately and contemporaneously determine where they stand in comparison to BNSF's attendance standard.
- Provides employees with an opportunity to improve their standing through regular/steady attendance.

1. Assessment of Points

Subject to the Point Schedule below, employees begin with 30 points and points are deducted for various incidents of non-attendance including both full and/or partial day absences.

a) Point deductions are determined based on the type of service the employee is in at the time of the unavailable event.

b) Unavailable time is associated with the day the event began.

c) Unavailable time is measured in 24-hour increments.

d) High Impact Day (HID) point values apply if:

- For unassigned service: The unavailable event occurs on the day of the HID, or the unavailable event occurs prior to the HID and employee is not marked up by 0600 on the HID.

EXHIBIT
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- For assigned service: The employee misses their assigned shift on the HID. If the assigned service does not include specific start times, then HID applies if the unavailable event occurs on the day of the HID, or the unavailable event occurs prior to the HID and employee is not marked up by 0600 on the HID.

e) Any unavailable event that immediately (not separated by a work event) precedes or follows a VAC, PLD, UNB, SRS, FML, CLD event will be charged an additional 2 points for Unassigned Service and an additional 3 points for Assigned Service regardless of day of week. This is referred to as a Conjunction Penalty.

- EMC/LOC/NOS are the exception; they will continue to be charged according to Point Schedule

f) Handling results each time the employee exhausts their points.

g) Each employee has electronic access to their point record.

- Any addition or deduction in points is reflected in this record.

Point Schedule

Incident	Unassigned Service				Assigned Service	
	Point Value				Point Value	
	M-TH	FR-SA	SU	HID	MO-SU	HID
Unavailable Event	-2	-4	-3	-7	-7	-10
EMC (Missed Call) / LOC (Layoff on Call)	-15	-15	-15	-20	-15	-20
NOS (No Show)	-20	-20	-20	-25	-20	-25

Unavailable Events include: **LOS** (Sick), **LOP** (Personal Business), **SIF** (Sickness in Family), **FEM** (Family Emergency), **LOF** (Fatigue), **LXU** (Failure to take Notification), **LFT** (Failure to Tie Up), **LOA** (Layoff Active Board / Away Terminal or After Start of Shift), **LOD** (Layoff Dressed & Ready to Work)

2. Good Attendance Credits

a) An employee is awarded a Good Attendance Credit (worth 4 points) for any 14-day period they are marked up and available to work without an unavailable event and in which they are not otherwise absent from work. Example: An employee remains available between March 1 and March 14, they will receive a Good Attendance Credit on March 15. If they continue to remain available between March 15 through March 28, they would earn another credit on March 29.

b) Good Attendance Credits are earned for any 14-day period if the employee:

i. Has no Unavailable events, NOS, EMC, or LOC.

ii. Has not otherwise been absent for any reason, apart from the paid leaves listed below:
- Training/Rules (CBT/RUL/LAH/ERC/DRT/CRN)
- LET (Engineer Training)
- LIT (working lite Duty)
- Company business (LCB)
- Layoff for jury duty (LOJ)
- Death in family (DIF)
- CIR (Critical incident report)
- Military leave/NGD with supporting LES/orders

iii. Has no absences/leave other than those listed in 2.b.ii (e.g. does not have FML/PFM, FUR, LAM, MED, MEV, LOI, HFS, LAB, R79, PLD, SUA/SUT, UNB, VAC, etc.).

iv. Has no bump board time > 2 hours after taking notification.

c) An employee's point total cannot be greater than 30.

3. Discipline (10-day, 20-day and Dismissal)

a) The first 2 times an employee exhausts their points (balance reaches or falls below zero), they are subject to discipline.

b) The third time an employee exhausts their points, they are subject to Dismissal.

c) Each time an employee exhausts their points, their point total will be reset at 15.

d) The first Hi-Viz infraction is a 10-day suspension with a 12-month review period. The second Hi-Viz infraction is a 20-day suspension with a 24-month review period. If an employee remains Hi-Viz discipline free during their review period, then their Hi-Viz progression is reset.

e) Maintaining a positive point balance does not preclude the company from challenging an employee's full-time status requirement based on another reasonable standard.

4. Initial Placement in Discipline Process

Employees with active discipline for BNSF Attendance Guidelines at the time of the cut-over to the new Hi-Viz Guidelines will be considered to have already received the equivalent Discipline Step.

Hi-Viz Guidelines are not intended to assess points for use of any legally protected leaves such as FMLA (Family and Medical Leave Act) or other leave of absences that are properly certified and/or documented. But as noted above, there are only 6 types of absence that allow for the good attendance credit referenced in Section 2 above.

BNSF leadership should consider all relevant information when using the Guidelines. In every case, they should apply the Guidelines with consistency and common sense.

NOTE: Being unaware of your point total is not an excuse for exhausting your points.

TYE Time Off

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Table of Contents

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A. Laying Off on Call

Employees MUST NOT lay off on call. For employees in planner-activated pools, a layoff while on the active board will be considered as laying off on call.

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B. Emergency Lay Off

Lay off code “FEM,” Family Emergency, is defined as a lay off code for an emergency involving an employee or their family. An “emergency” under this code is an unforeseen circumstance that requires immediate action and is of such seriousness and magnitude that the employee must immediately absent themself from duty and no other layoff code governs the situation,

e.g. DIF, LOS, SIF, etc. Employees must use the layoff code that most appropriately describes the reason for the absence and may not use "FEM" as an excuse to be absent from duty for reasons other than those that can accurately be described as an emergency. Use of code "FEM" will be closely monitored.

Once granted authorization for layoff code "FEM," the employee must contact their supervisor within 24 hours to provide reason for the FEM. Misuse will result in corrective action against the offender and review of the code "FEM" as an unrestricted emergency code.

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C. Bereavement Leave and DIF Layoff Codes

Train, yard and engine employees who unfortunately suffer the loss of a family member covered by Bereavement Pay agreements can use the layoff code DIF (Death in Family) in the Workforce System to mark off. Employees will be automatically marked up from DIF at the expiration of the approved time off.

Family members who are covered by all the Bereavement Pay agreements include brother, sister, parent, child (including a legally adopted child), spouse and spouse's parents. Based on the location and craft of the employee's current assignment, additional family members covered may include grandchildren, half and stepbrothers, sisters and stepchildren. Refer to the agreement covering the employee's area or visit the Labor Relations' website under the TYE Payroll Services link.

The Bereavement Pay agreements provide for 3-day's pay at the agreed to pay rate. The employee need not have stood for work on 1 or more of the days to receive payment, and all 3 days qualified for bereavement pay will not count as an absence under the Hi-Viz Guidelines.

Employees claiming bereavement leave should use CA Code 05 on a special claim and send the obituary notice with the special claim ticket number to TYE Payroll Services via email at FINDLTYEBereavementPay@BNSF.com or fax to 785-676-5186 or 8-676-5186.

BNSF understands a person may lose a family member not covered by the Bereavement Pay agreements. The DIF code should not be used in these cases, but the code FEM (Family Emergency) is available for immediate layoffs. Documentation must be maintained that explains the absence in the event the employee is required to provide the information to their supervisor. The supervisor may also help schedule additional time off through use of alternate codes such as LOP (Layoff Personal), PLD (Personal Leave Day), or a Leave of Absence if applicable.

Employees who lay off DIF, but do not send the supporting documentation to TYE Payroll Services will be considered unavailable for duty and handled in accordance with the Hi-Viz Guidelines.

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D. Pre-Approved Lay Off System

The following enhancements have been made to the pre-approved lay off system. The supervisor should be contacted if there are any questions.

- In the 30-day period between day 90 and day 60, BNSF will accept and hold all requests for PLD and SDV only. On the 60th day prior to the layoff date TSS will distribute the allocation of days according to seniority.

- Requests 60 days in advance and less, employees can be approved for up to four unpaid personal days (identified by layoff code LOP). Employees are still able to request all of their PLD and SDV days. When calculating LOP days, any portion of a calendar day is considered one day.

- Once approved, individuals can move an LOP, SDV, or PLD up or back one calendar day. The employee can request this change of start day within 48 hours of requested start time.

- Employees may request a single day of vacation or a personal leave day between 60 and 90 days in advance of the day it would be taken. For example, on September 8, an employee could request a day off that he/she plans to take November 7. The employee will be able to check if the request has been approved 60 days in advance or at 0001 September 9. Employees can request as many vacation or personal leave days as they have currently available to them.

<u>Bidding and sliding process</u>

Employees can enter a pre-approval layoff request for a single day or multiple days. If a multiple day request is entered, the request cannot be submitted until the whole request is within the request window. None of the days will be considered for approval until the entire request is within the approval window as the program will not address (approve/deny) until the last calendar day of the multi-day request.

Employees desiring high demand days off are encouraged to enter their requests one day at a time so that each day will be considered as it reaches the approval date. For example, an

employee makes a three-day request for PLD. All 3 days have to be within the 90-day window before the request can be entered into the system.

At 60 days prior to day one of the request, the first day of the request will not be considered for approval because portions of a three-day request cannot be approved. All 3 days of the request must be within the 60-day window for any of it to be considered. Entering single days at a time eliminates the possibility of an allocation being full before a multiple day request will be taken into consideration.

Assigned employees cannot slide their requests as they already have assigned rest days. The slide function was designed for unassigned service where start times are not known in advance.

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E. Lay Off Process for Military Personnel

Two distinct lay off codes have been established which apply to military service. It is important to use the appropriate lay off code to distinguish between these two types of military service, as these codes ultimately drive benefit and pay eligibility.

NGD = This code should be used only for National Guard, Drill, Training or State Emergencies.

Note: NGD leaves greater than 10 days must be covered by a leave of absence.

MLV = This code should be used for all other military service including:
Global War on Terror (Operation Iraqi Freedom, Operation Noble Eagle and Operation Enduring Freedom), enlistment into the military, or any other military service or training (other than National Guard).

Note: Military leaves greater than 10 days must be covered by a leave of absence.

Benefit Coverage

Employees who wish to retain coverage under the BNSF program while on leave will continue to pay the monthly contribution. Contribution will be taken out of any make whole payments received from BNSF while on leave. Otherwise, these contributions are required to be caught up upon return.

Compensation

Employees should send paperwork supporting Military Pay claims and any questions regarding pay for Military leaves to FINDLTYEMilitary@BNSF.com.

Note: Employees who wish to earn Good Attendance Credit must submit their LES or training documentation no later than 60 calendar days after their return to work from leave.

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F. Jury Duty

BNSF and the Labor Organizations representing BNSF employees support employees summoned to perform their civic duties in the form of Jury Duty by providing negotiated agreements for compensation for time lost to employees who are summoned for Jury Duty. The collective bargaining agreements will govern any dispute as to compensation for Jury Duty. However, the following guidelines are provided to minimize such disputes and provide for prompt and proper payment of valid Jury Duty claims. In the event of a dispute, BNSF and the appropriate Labor Organization will work to resolve the matter.

Employees instructed to report for Jury Duty at a specific date and time are authorized to mark off for Jury Duty to make sure they are rested and available for Jury Duty. They are also expected to make an effort to perform their normal duties whenever reasonably possible.

Employees subject to certain call-in or "stand by" notification procedures used by some courts will remain marked up except in circumstances where protecting service will obviously jeopardize such notification.

If there are questions about the ability to protect service, the employee should consult with a designated supervisor before marking off and jointly set up a strategy to ensure compliance with the court's instructions and to protect their assignment when reasonably possible.

Employees will be expected to mark up immediately upon release from the courts or, if on call, immediately after receiving notification they will not have to report to the court.

To validate qualification and provide the proper documentation with the claim:

<u>Qualifies for Jury Duty Lost Wages</u>:

- Reporting at a specific location and time for jury selection and/or Jury Duty when an actual loss of wages occurs.

- Reporting for Jury Duty conflicts with the employee's ability to obtain rest under the Hours of Service Act before or after the Jury Duty. Booking additional rest does not apply to Jury Duty.

- Extra board personnel who mark off for 24 hours or less will receive the equivalent of a day's guarantee if the trip missed is not completed prior to the mark up.

Does Not Qualify for Jury Duty Lost Wages:

- Jury Duty that occurs on a rest day or other periods of scheduled or unscheduled time off when no loss of wages occurs.

- Layoffs when courts are not in session. Examples include weekends and major holidays.

- Any days over the 60-day maximum. The Agreements provide for a maximum of 60 days in any calendar year.

- Failure to follow supervisor's recommendations for protecting service or reporting at the court without specific instructions to do so.

Supporting Documentation for Jury Duty Claims:

- The following information must be included on the Jury Duty claim:

  - Date(s) scheduled for Jury Duty
  - Location
  - Time scheduled to report
  - Time released for each day
  - Lost trip information.

- The following documents should be sent to TYE Payroll Services via email at FINDLTYEJuryDutyPay@BNSF.com or fax to 785-676-5186 or 8-676-5186.

  - A copy of the Jury Duty notice
  - The Court's reporting instructions.
  - A copy of the Court receipt for amount paid while performing Jury Duty which will be deducted from the lost wage payment. Note: If payment is delayed or there is no payment for that day from the Court, authorization must be obtained from the supervisor for payment of lost wages.

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G. Lay Off Fatigue (LOF)

BNSF wants to ensure that everyone is rested and prepared to work safely. Employees who are fatigued as a result of working numerous trips in a row or working consecutive long trips can

use the LOF to take 24 hours off for rest. The LOF code may not be used for any other purpose and employees who misuse the LOF code will be subject to discipline under the Policy for Employee Performance Accountability. For example, this code may not be used to extend rest days, vacation, or other layoffs. An LOF counts as an unavailable day under the Hi-Viz Guidelines.

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H. Lay Off/Mark Up for Outlying Assignments

Following a layoff, employees assigned to outlying positions must mark-up prior to the tie-up of their regular assignment in order to release the extra board employee covering their position. If an assigned employee fails to mark-up prior the tie-up of their regular assignment, the extra board employee will be held to protect the assignment's next tour of duty and the regular employee will be charged an unavailable day (LOP) under the Hi-Viz Guidelines. This does not apply going into the rest days of the assignment.

Example: Employee Smith fails to mark-up from a one-day sick layoff prior to the tie-up of their assignment and, as a result, ends up missing two days of their assignment. Employee Smith will be charged points for two assigned days under the Hi-Viz Guidelines.

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I. High-Impact Days

BNSF has the responsibility to provide our customers with reliable service every day, including High-Impact Days. High-Impact Days are days that have historically reflected higher train crew absenteeism and more missed opportunities to meet customer expectations. Those days are currently identified as: New Year's Day, Super Bowl Sunday, Easter Sunday, Mother's Day, Memorial Day, Father's Day, Independence Day, Labor Day, Halloween, Thanksgiving Day, Day after Thanksgiving, Christmas Eve, Christmas Day, and New Year's Eve.

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J. Failure to Take Notification

An employee is required to accept notification when their assignment has changed (displaced, forced, cut, awarded a successful bid, etc.). Employees is then afforded their bump board time based on the applicable CBA. An employee who has not accepted notification upon first attempt will be placed in an LXX status until notification is accepted.

- Employees whose **last inbound assignment upon tie up** was "other than assigned service," the employee will have 10 hours to accept notification for all future bid/bump events which occur prior to their next work event. Employees who do not accept notification within 10 hours will have all time pending notification for that event count as unavailable time, and points will be deducted using Unassigned Service Point Value.

  - 0 to 10 hours - no exception
  - >10 hours - points will be deducted according to the Hi-Viz Guidelines

- Employees in assigned service that are bumped or cut from their assignment while on duty are considered "other than assigned service" upon tie up.

- Being on a rest day does not exempt an employee from accepting change notification of an assignment.

Example: an employee out-bounds on an assigned 05/02-yard job; however, the employee is bumped while on duty, takes notification upon tie up and is placed on the bump board. The employee's inbound status is "other than assigned service" account being placed on the bump board.

Example of pending notification: An extra board employee is "rested" and available for call at 1300. Upon the employee becoming rested, the Crew Office attempts to notify employee of a displacement (bump) at 1301. The employee does not respond to the notification. The Crew Office continues to attempt notification every 2 hours. If the employee has not taken notification by 2301, the Hi-Viz system will recognize this employee as having more than 10 hours of avoiding notification and mark the employee with an unavailability event. The crew office will continue to attempt notification to this employee and the attendance system will continue to account for time in which the employee has made themself unavailable.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BNSF RAILWAY COMPANY Plaintiff,	§	
v.	§	Civil Action No. 4:22-CV-00052-P
INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR, RAIL AND TRANSPORTATION WORKERS – TRANSPORTATION DIVISION and BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,	§	
Defendants.	§	

DECLARATION OF MATTHEW GARLAND

1. My name is Matthew Garland. The following facts are true and correct and within my personal knowledge. I am of legal age and otherwise competent to make this declaration.

2. I am Vice President, Transportation at BNSF Railway Company. The purpose of this Declaration is to support BNSF's Motion for Preliminary Injunction and to explain why it is a priority for BNSF to proceed with immediate implementation of the Hi-Viz Attendance Program.

Reasons for Implementation

3. BNSF must implement the Hi Viz Attendance Program ("Hi Viz" or "the Program") on February 1, 2022, to remain competitive with other railroads and other modes of transportation, improve efficiency and production, move forward with related business plans, and avoid further significant economic losses that have been occurring due to train crew availability levels under the current attendance policy. BNSF has strategically structured its 2022 hiring and organizational plans around the implementation of Hi Viz. More specifically, we have initiated hiring based on projections of employee availability under the new Program.

EXHIBIT B

4. BNSF operates 24 hours a day, 7 days a week, and 365 days a year. When crew availability falls below 70%, BNSF is generally forced to stop trains. At 60% availability, BNSF is forced to stop roughly 50 trains, and if availability dips into the 50% range BNSF must stop between 60 to 70 trains. When 70 trains are stopped from operating there are roughly 10,000 railcars that are not moving, which is roughly equivalent to 17,500 intermodal containers, 8,500 coal cars, or 8,000 merchandise cars.

5. Under its current attendance policy, BNSF is experiencing an average crew availability of less than 70% every weekend. On Saturday, January 22, 2022, BNSF saw availability drop from 73% to 63% over the course of one day. Over the first NFL playoff weekend (January 15-16, 2022), BNSF saw availability dip all the way to 58%. As a result, it had to stop between 70 and 80 trains, the network slowed down roughly 20% across the entire BNSF system, and shipments are still currently behind schedule.

6. Over the last several days, BNSF has again seen crew availability numbers decline precipitously. As of the morning of January 28, 2022, we were holding more than 70 trains for lack of crews. That is not sustainable.

7. By stopping trains, BNSF is impacting its intermodal network that moves millions of shipping containers per year, its energy and utility customers that require millions of tons of coal to operate and maintain heat and power to homes across the country, its chemical and plastics shippers in the Gulf of Mexico region that manufacturers across North America rely on for plastics for packaging, rock and aggregate shippers that provide supplies for highway and bridge construction, and the Los Angeles/Long Beach Ports that rely on BNSF to transport cargo from vessels into land transport otherwise further congestion in the supply chain may occur. Any negative impact on the service to these customers causes a significant harm to the economy and

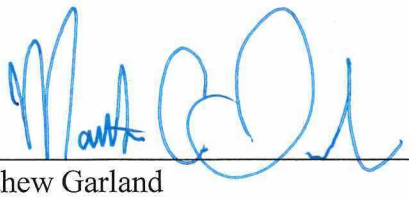
infrastructure of our country. We must improve availability in order to help the country fix the current supply chain problems it is experiencing.

8. The Program should benefit the majority of BNSF employees that currently meet availability expectations. Those employees should benefit from access to a good attendance credit feature (which the current attendance process does not have) and will, like all employees, get greater visibility into how they are doing against the availability expectations.

9. Currently, the average BNSF road employee has 24 hours of time at home between trips and 32 days of paid vacation per year. And the average terminal employee has at least 12 hours of time at home between shifts, 2 days of scheduled rest per week, and 28 days of paid vacation per year. By increasing availability and reducing the number of employees who take excessive unplanned time off, BNSF employees overall should have more time at home with their families because they will be called upon to cover fewer shifts or travel less. The demand for employees should be spread more evenly across all BNSF employees rather than just those employees who are currently meeting availability expectations.

10. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 28, 2022.



Matthew Garland

Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
FIRST DIVISION

Award No. 27028
Docket No. 46517
10-1-NRAB-00001-060208
06-1-208

The First Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Locomotive Engineers and Trainmen**
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"It is hereby requested that Conductor L. A. Henry's discipline be reversed with seniority unimpaired, requesting pay for all time lost including the day(s) for investigation with restoration of full benefits and that the notation of 30 Day Record Suspension be removed from his personal record, resulting from investigation held April 27, 2004."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Carrier hired the Claimant as a Conductor on July 16, 2001. By letter dated April 9, 2004, the Claimant was directed to report for an Investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in

EXHIBIT
C

connection with your alleged failure to meet the BNSF's and Chicago Division attendance guidelines for the three month rolling period ending March 31, 2004." This charge is the third of four separate charges against the Claimant that were heard on April 27, 2004, in Hearings at which the Claimant did not appear. (See First Division Awards 27026, 27027, 27029.)

At the Hearing, the Carrier presented evidence and testimony that during the three-month measurement period, the Claimant was on the Overlay Board for the months of January and February 2004, and on Mixed Service (assigned and unassigned) in March 2004. During this period, the Claimant laid off on 17.5 weekdays and five weekend days. Under the Carrier's Attendance Guideline Policy, employees are expected to be available 75% of the time, on both weekdays and weekend days, excluding time off with pay. Under this standard, the Carrier expected the Claimant to be unavailable at most five weekdays and 2.5 weekend days. Based on his attendance record, the Carrier concluded that the Claimant had violated General Code of Operating Rule 1.13 – Reporting and Complying with Instructions, as well as Rule 1.14 Duty - Reporting or Absence, and issued him a 30-day record suspension by letter dated May 5, 2004.

The Carrier contends that the Claimant received a full and fair Hearing and that the evidence adduced supported its findings and the discipline assessed. As in the other appeals of discipline that followed from the April 27, 2004, Hearings, the Organization objects that the Carrier denied the Claimant his rights to Agreement due process by holding the Hearing in absentia. As the Board noted in First Division Awards 27026 and 27027, every effort should be made to insure that an employee's rights to representation and to prepare his defense are respected. However, for the reasons given in those Awards, the Board finds that the Carrier's decision here to hold the Investigation in absentia did not deny the Claimant his Agreement due process rights. The Carrier sent the Notice of Investigation, and a subsequent postponement notice to the Claimant's last known address, return receipt requested. Both were signed for; the postponement notice was signed for by the Claimant himself. At the Hearing, a short recess was taken, and unsuccessful attempts were made to reach the Claimant by phone. Not only did the Claimant not appear for the Investigation, but the Organization acknowledged that it had been unable to contact him either before or after the Investigation. No reason for the Claimant's absence was given at the time of the Hearing. As in First Division Award 26384, the record indicates that the Carrier did everything necessary to notify the Claimant of the Investigation. The Claimant

was fully represented at the Hearing by an Organization representative, and the Carrier presented its evidence, which was subject to examination, cross-examination, and argument by the Claimant's representative. Because the Claimant apparently knew of the Hearing but failed to appear through his own choice, the Hearing in absentia was not prejudicial. See also Public Law Board 6041 No., Award 69. In addition, because the Organization agreed in advance to hold all four Hearings on the same day, the Carrier cannot be held to have violated the Claimant's rights by such an arrangement.

The Organization also objects that the Carrier failed to serve the Investigation Notice within the applicable time limit. The applicable Rule requires that the Investigation date be set not later than ten days from the date of an alleged violation of Operating Rules, "except that personal cases will be subject to the ten (10) days from the date information is obtained." (Memorandum of Agreement dated January 16, 1947.) In this case, the attendance record statistics became available for the Trainmaster's review on or about the 8th of the month for the previous three-month rolling period, although the raw data had already been collected and stored by the Carrier before that. Nonetheless, the Board finds that the Carrier's practice of running the three-month reports and making them available to the responsible operating officer shortly after the close of the measurement period is in general a fair and reasonable method of implementing its attendance standards. Barring unreasonable delays in generating and transmitting the report, the time limit therefore runs from the officer's receipt of the report, which is in practice "the date information is obtained." The Claimant here was notified by letter dated April 9 of an Investigation scheduled for April 16, 2004. The Carrier thereby satisfied the 10-day time limit See also, Public Law Board No. 4901, Award 212, wherein Referee Wallin held that the time limit did not begin to run until absenteeism statistics became available for review by the responsible operating officer.

The Organization's most serious objections are to the Availability Policy and the Attendance Guidelines themselves. The Carrier contends that it had the right to promulgate the Attendance Guidelines as an exercise of its right to expect full time employment from its employees and to adopt a reasonable attendance policy for that purpose, that the Guidelines do not violate any Agreement, that the Guidelines are reasonable, and that they have been reasonably applied to the Claimant. The Organization disagrees on all counts. Its reasons are voluminous and thorough; all have been considered even if not mentioned in the discussion that follows.

The Organization objects that the Availability Policy conflicts with the Agreement by penalizing an employee for marking off when sick, even though the Agreement contemplates employee illness and allows employees to mark off sick without producing a doctor's certificate unless the illness exceeds six days. This, the Organization observes, is consistent with the Carrier's agreement with all operating crafts in the settlement dated May 9, 1949. The Organization contends that the parties have a long established history of not dealing with illness as a disciplinary matter, a principle violated by the Attendance Guidelines, and cites numerous communications in which the Carrier has recognized employees' rights to "take time off for legitimate purposes, including their own illness or that of a family member."

The Organization further asserts that the Attendance Guidelines are contrary to various provisions of the 1991 and 1996 National Agreements that address full employment. For example, Article II, Section 6 of the 1991 National Agreement, in providing a means for pro-rating lump sum payments for employees working less than "full time" defines full time as "2,000 or more straight time hours paid for" during a year, demonstrating that a policy that ignores the hours an employee works, and counts only the time he is available to define whether an employee is working "full time" violates the Agreement. In the 1996 National Agreement, also known as the "Core" Agreement, the parties changed the standard for employee eligibility for various fringe benefits, so that an employee must work seven days per month to remain eligible for certain benefits. (Articles III, IV, and V of the 1996 National Agreement) This is another instance where the measure of employment is based on the time or frequency an employee works rather than the employee's "availability." The Organization asserts that these provisions demonstrate that full-time employment was defined as seven days per month, a standard violated by the Availability Policy. The Organization cites other agreements that grant employees reasonable layoff privileges, subject to availability of sufficient manpower. In brief, citing a number of Awards from the Second Division (13445, 13446, 13447, 13448, and 13614) the Organization contends that the Carrier's Availability Policy and Attendance Guidelines result in impermissible discipline of employees for exercising their contractual rights.

The Organization also objects that the Carrier has failed to maintain a sufficient number of Engineers so as to permit reasonable layoff privileges, as provided in, for example, the parties' Agreement on extra boards dated April 4, 1994. Notwithstanding that commitment, the Carrier has denied employees' requests for

paid time off due to the lack of a sufficient number of Engineers, a number within the Carrier's control, and then penalizes employees who are forced to lay off when they are denied paid leave. The Carrier's reduction in the number of Engineers on extra boards is a direct cause of this conundrum, the Organization asserts, and it cannot discipline employees for a manpower shortage of its own creation. The Organization further objects, based on the history of correspondence on this subject and the Burlington Northern's pre-merger standard of 2,000 hours as full-time employment that the Carrier cannot unilaterally impose a new method of determining full-time employment or excessive absenteeism that disregards these precedents. Nor can the Carrier add a new standard, as it has by considering separately an employee's availability on weekdays and weekend days.

After careful review of the parties' arguments and authorities, the Board concludes that the Organization's objections are without merit.

In the first place, the Kasher Award confirmed in 1999 that the Carrier has the right "to manage employees' attendance through the promulgation and implementation of a reasonable attendance/availability policy," and at least as of the date of that Award, had not relinquished that right in collective bargaining or through "a consistent, long-standing, mutually-recognized past practice." After issuance of that Award, the Carrier cancelled the Availability Policy considered by the Kasher Board, and thereafter issued the "BNSF Guidelines for TY&E Employee Attendance, effective March 1, 2000. [1] **The Attendance Guidelines emphasize the Carrier's expectation that "each TY&E employee in unassigned service fulfills his or her responsibility to maintain „full-time' status, in general, by laying off not more than twenty-five percent of weekdays and weekends in any three month period." Management officers are to apply the Guidelines considering "special individual circumstances;" they are not to act in a "rigid or „wooden' manner," and in every case should use "common sense." The Guidelines also state explicitly that in case of conflict, a labor Agreement must prevail. The Guidelines establish a rolling three month measurement period, and provide that a 12-month period clean of violations completely clears the employee's record of past failures to meet the 25% standard. The measurement of full-time status considers all time an employee is not marked off, and also jury duty, bereavement leave, Engineer recertification, and layoff for union**

[1] The Organization's Submission repeatedly cites the "Availability Policy," even though it was the Attendance Guidelines, first promulgated in 2000, under which the Claimant was disciplined. We read the Organization's Submission to make identical criticism of the Attendance Guidelines, and analyze the record accordingly.

or company business to be the same as on-duty time. Vacations, personal leave, other paid leave not mentioned, FMLA leave, layoff on miles and foot of the board are excluded from the calculation.

The purpose of a policy like the Guidelines has been well expressed by Referee Vaughn in Public Law Board No. 6345, Case 38:

> **"The Carrier is entitled to have its full-time employees be available and report for work, as scheduled. When the Carrier holds a full-time position for an employee, an implicit part of the bargain is that the employee will be available on a reasonably full-time basis. The Carrier is, of course, in the business of providing reliable, scheduled service. TY&E employees who are excessively absent threaten the Carrier's ability to deliver this most basic part of its business. The absences of such employees must be covered, requiring extra employees and resulting in extra costs. For these reasons, it has been consistently held that the Carrier is entitled to promulgate and enforce reasonable rules to ensure regular attendance by its employees, to take disciplinary action to correct attendance problems and, ultimately, after progressive efforts to correct unacceptable attendance have been exhausted, to dismiss such employees from service."**

The Organization's objections that the Guidelines violate contractual provisions or past practices with respect to the employees' rights to lay off sick or for personal reasons are without merit. As long ago as February 1995, the Carrier notified one Local Chairman that "Granting permission for an employee to lay off does not condone excessive absenteeism. Crew callers are not expected to examine employee's attendance record before granting permission to be absent." Employees have the right to "reasonable" lay offs, but at some point, too many lay offs are not reasonable, regardless of their basis. In particular, numerous Boards have upheld the right of a carrier to discipline an employee for excessive absenteeism, even if some or all of that absenteeism was due to illness. (See Public Law Board No. 6523, Awards 4 and 6.) In any case, there was no evidence presented at the Hearing that any of Claimant's absences were due to illness.

The Organization also objects that the nuances of the policy, such as the definition of a "weekend layoff," have never been explained to covered employees.

However, there is no evidence in this record that the Claimant was confused by or misunderstood the Guidelines, and it cannot be said that they are unclear on their face.

The Board respectfully disagrees with the Organization's assessment of the impact of the various provisions of the 1991 and 1996 National Agreements that address full employment. The fact that the parties in Article II, Section 6 of the 1991 National Agreement defined "full time" as "2,000 or more straight time hours paid for" in pro-rating lump sum payments for employees working less than "full time," does not preclude the Carrier from using a different definition to determine excessive absenteeism. Indeed, the Organization itself notes that in the 1996 National Agreement, the parties adopted a different standard of full employment (working seven days per month) to determine eligibility for various fringe benefits. Although these two measures relied on the time or frequency an employee worked, nothing in the parties' Agreements or practices barred the Carrier from adopting a reasonable standard of attendance based on an employee's availability.

The Organization's assertion that the Carrier failed to maintain a sufficient number of Engineers so as to permit reasonable layoff privileges has not been demonstrated in this record. The Claimant laid off 17.5 weekdays and five weekend days in a three month period, an unavailability rate of more than 75% on weekdays and more than 50% on weekend days. Regardless of the Carrier's staff levels, the Claimant's absences were excessive. This is not a case where an employee has been disciplined for exercising his contractual right to <u>reasonable</u> layoffs. More generally, there is no evidence that the 75% availability standard itself is unreasonable, or that the Carrier's staff levels prevent employees from meeting that standard. The Carrier's adoption of its Attendance Guidelines was not barred by any Agreement, past practice between the parties, or any of the other factors cited by the Organization.

Finally, the Organization objects to the Carrier's implementation of the Guidelines to discipline the Claimant here. The Organization contends that the Carrier failed to establish just cause for discipline, having failed to demonstrate or to consider the reasons for the Claimant's absences. However, this silence was not due to any failure on the part of the Carrier; it was the result of the Claimant's decision not to attend the Investigation where he could have provided that information. Under these circumstances, we find that the Carrier presented substantial evidence to

support its finding that the Claimant committed the offense charged and to justify the level of discipline assessed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 5th day of March 2010.

PUBLIC LAW BOARD NO. 6823

UNITED TRANSPORTATION UNION	)	
	)	CASE NO. 36
v.	)	AWARD NO. 36
	)	
CSX TRANSPORTATION, INC.	)	

STATEMENT OF CLAIM:

"The discipline assessed Mr. D. L. Hardin should be set aside. [The discipline assessed was a 2-day overhead suspension]. Mr. Hardin should be paid for all time lost including the time attending the investigation. Any and all benefits which he may have lost should be restored; any and all notations should be removed from his personal record concerning this incident."

FINDINGS AND OPINION:

Public Law Board No. 6823, upon the whole record and all the evidence, finds that the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. Parties to said dispute were given due notice of hearing thereon.

As Third Party in Interest, the Brotherhood of Locomotive Engineers and Trainmen (BLE-T) was advised of the pendency of this dispute. The General Chairman filed a Submission and the System Vice General Chairman participated at the October 12, 2006 arbitration hearing.

On December 13, 2005, the Claimant, a locomotive engineer with approximately five years of service, attended a formal investigation regarding a charge which specifically stated that he "failed to meet the requirements for the Minimum Availability Policy for weekends per System Notice 102, effective October 3, 2005, for the period of October 3, 2005 through October 30, 2005." On January 11, 2006, the Carrier found that the Claimant's attendance record for the 28-day period reviewed during the disciplinary investigation was evidence that the Claimant had violated the Availability Policy. The Carrier imposed discipline of a two-day overhead suspension (to remain on the Claimant's record for a period of six months).

The Organization promptly appealed the Carrier's disciplinary action and the parties discussed the appeal in conference, the record shows. This matter is now properly before the Board for final and binding adjudication.

EXHIBIT
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CARRIER'S EXHIBIT K
PAGE 1 OF 4

According to the Organization, on October 7, 2005, the Claimant was displaced from his assignment at 2:19 p.m., after completing a tour of duty that had ended at 5:10 a.m. Pursuant to Article XII(h) of the May 28, 1996 Agreement between the Carrier and the Brotherhood of Locomotive Engineers, the Claimant exercised his seniority within 24 hours. Citing Second Division Awards 13614 and 13615; and Award 1 of Public Law Board No. 1315, the Organization argued that because the Claimant had complied with Article XII(h), the Carrier lacked just cause to bring discipline under the Availability Policy. Thus, the Carrier failed to prove the Claimant guilty of any attendance infraction in the instant case given his clear compliance with Article XII(h).

Moreover, the Organization argues that, according to testimony given by the Carrier's witness, Crew Availability Specialist Tingley, the Claimant was subject to an eight-week review of his work record. However, as noted above, the charge letter specified the four-week period from October 3, 2005 through October 30, 2005. In the Organization's view, the Board must sustain the appeal given the clear due process breach resulting from the discrepancy between the four-week standard specified in the charge and the eight-week standard which admittedly was controlling in this matter.

It is the Carrier's position that the Claimant failed to meet the minimum requirements for weekend availability between the dates of October 3 through 30, 2005. According to the Carrier, the Claimant was unavailable for all or part of seven of the 12 weekend days encompassed by the above four-week review period. Therefore, it is clear that he failed to work or be available to work a minimum of 10 weekend starts during the four-week period specified in the charge.

Additionally, the Carrier submits that the Claimant was not disciplined for any failure to exercise seniority under Article XII(h). It emphasizes that the progressive discipline in this matter stemmed from the Claimant's failure to meet the Carrier's minimum availability standard, as properly promulgated in the Availability Policy, as opposed to any violation of the displacement rule contained in the parties' Collective Bargaining Agreement. See Award 510 of Special Board of Adjustment No. 955.

The Board has carefully reviewed the investigation transcript, evidence and the parties' on-property submissions in this matter. We find that, for the reasons explained below, the claim must be sustained.

First, we find that the inconsistency between the review period specified in the charge notice and the eight-week period apparently applicable in this matter, as the testimonial evidence established, constitutes a due process error warranting a

CARRIER'S EXHIBIT K
PAGE 2 OF 4

reversal of Carrier's disciplinary action. The Carrier's failure to specify the correct review period (again, eight-weeks) was fundamentally unfair to the Claimant. As the moving party in disciplinary matters, the Carrier must be held to the standard of framing an accurate charge in order to obviate the element of surprise and thereby convey proper notice. Under the circumstances, the error in the notice cannot be dismissed as a typographical or other harmless error, we hold.

Second, even if the correct standard had been cited, and the Claimant and Organization had, in turn, been duly apprised of the charge of allegedly violating the eight-week availability standard, the record makes plain that the Carrier's findings of guilt and assessment of discipline were based on the Claimant's work record for the 28-day period from October 3, 2005 through October 30, 2005, CSX Exhibit #3. The record is devoid of any proof that the Claimant "failed to work or be available to work the 20 weekend starts required in an eight-week period," we emphasize.

Crew Availability Specialist Tingley's testimony that the Carrier did not err in its application of the 28-day standard because by the end of that period the Claimant already had been unavailable on seven weekend dates and, thus, could not have satisfied the eight-week criteria, cannot be supported in light of the policy provisions as written. We find no provision in the policy that supports subjecting employees to reviews of their records for time periods that are less than those prescribed in the established standards, i.e., eight weeks and four weeks, depending on whether the employee had an "attendance handling" in the past six months.

Third, from an evidentiary standpoint, we find that the Carrier's position that the Claimant had been notified of his displacement on an hourly basis, via the computerized "IVR Phone Log," is not supported by substantial proof. For example, with respect to the date of Friday, October 7, 2005, as the Organization pointed out, the Board finds no evidence which refuted the Claimant's affirmative defense that he did not receive notification until 7:11 p.m., when he checked his standing via the Internet.

In response to the Organization's position regarding Article XII(h), we find that, in this case, the Carrier's right to evaluate the Claimant's weekend availability record under the terms of the properly promulgated Availability Policy was not abridged by the displacement provision, Article XII. As the Carrier argued, "negotiated limitations on time in displaced status have no connection with employee accountability for attendance." The Board thus concurs with the Carrier's position that employees who fail to make themselves available by delaying their exercises of seniority when junior employees are available for displacement may subject themselves to scrutiny under the Availability Policy. See Award 510 of

Special Board of Adjustment No. 955. Conversely, on dates on which the Claimant was in displaced status, with no seniority moves available to him under Article XII or some other pertinent Agreement rule, the Carrier would have no cause to find him in violation of the Availability Policy, we reason.

For the foregoing reasons, the Board rules that the instant claim must be sustained. The Claimant is reminded, however, that the Carrier maintains the right to enforce the properly promulgated Availability Policy as regards the standards for weekend availability. In situations where an employee's attendance has been shown to fall short of the promulgated minimum availability standards, the Carrier may convene an investigation and impose progressive and corrective discipline, if the facts so warrant, we emphasize.

The instant claim is sustained in its entirety. Accordingly, the discipline will be expunged from the Claimant's record.

AWARD:

Claim sustained. The Carrier is ordered to comply with this Award within 30 days of its date.

Lynette A. Ross
Lynette A. Ross, Neutral Member

H. Joseph Garcia,
Carrier Member

Roy G. Boling
Roy G. Boling,
Employee Member

Dated: 1/23/07

CARRIER'S EXHIBIT K
PAGE 4 OF 4

AWARD NO. 48
Case No. 48

Organization File No.
Carrier File No. OY-LAF-15-121

PUBLIC LAW BOARD NO. 7717

PARTIES) BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN
)
TO)
)
DISPUTE) NORFOLK SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Appeal of discipline assessed Conductor Joshua T. Stephens of "dismissed from all service." On behalf of Conductor Stephens we ask that (1) the discipline assessed be rescinded and he be restored to service, (2) his record be completely cleared of any wrongdoing in connection with the charges lodged, (3) he be paid for all time lost for being withheld from service, for being dismissed, for attending the investigation and for attending any subsequent appeal hearings and arbitration proceedings without consideration of any earnings derived from alternative employment during this period of absence, (4) such reimbursement and compensation be properly credited and distributed so that retirement taxes and credits are properly withheld and credited for each day of service he would have worked had he not been assessed discipline and required to attend the investigation, (5) his T&E Vacation and Thoroughbred Bonus Credit bank be increased to reflect days he would have worked had he not been assessed discipline and required to attend the investigation, (6) he be reimbursed for all expenses incurred as a result of his attending the investigation and any subsequent appeal proceedings, (7) he be reimbursed for any medical, dental or vision care expenses and/or premium payments incurred should his Health/Welfare coverage have lapsed as a consequence of this absence, (8) he be reimbursed for expenses incurred in seeking and working alternative employment during this period of absence and (9) he be paid on an earnings lost basis to re-qualify on any operating rules and instructions as well as the physical characteristics of any territory lost as a result of this absence from duty.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this

CARRIER'S EXHIBIT M
PAGE 1 OF 4

Board is duly constituted by Agreement dated November 3, 2014, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

At all times relevant to this dispute, Claimant was regularly assigned to yard service at the Lafayette, Indiana Terminal. He was first hired by the Carrier on September 5, 2010. During the 30-day period from July 23 to August 21, 2015, the Carrier says Claimant worked only fourteen assignments. In addition to his two regular rest days each week, the Carrier says he made himself unavailable for service for all or part of eight days. Claimant was consequently directed to attend a formal investigation at which he was charged with his failure to maintain a regular work schedule. Following the investigation, Claimant was dismissed from service.

The record reflects that some of the time that Claimant was unavailable from service was due to his delay in exercising his seniority after he had been displaced. The Carrier contends he manipulated his displacements in order to obtain more time off. The Organization argues that such time should not be chargeable against him because he was entitled to take the time pursuant to the Agreement. This issue was addressed in Award No. 42 of Public Law Board No. 7244 between this Carrier and the United Transportation Union. That Board held:

> . . . Claimant's records revealed that after he was displaced from an assignment, he would avoid notification that he had been displaced and when notified, he took the maximum allowable time to place himself on an assignment. Claimant often placed himself on assignments that were on rest days, would go on a rest day within a few days, or had already gone to work that day. As a result, a hearing was scheduled, and based on the evidence, Claimant was dismissed from service.
>
> Claimant contends that the time it took Carrier to notify him he had been displaced and the time he took to place himself could not be considered as time unavailable because the Agreement provides for a specified period of time to place oneself on an assignment following displacement. The Board does not agree. Employees have an obligation to maintain an acceptable level of attendance. There is substantial evidence that Claimant did not maintain this level of attendance.

CARRIER'S EXHIBIT
PAGE 2 OF 4

In addition to the above decision resolving the issue, we note that the Carrier's Attendance Policy specifically states, "Employees who fail to work full-time may be identified by one or more of the following criteria: . . . (e) Frequent, or pattern of, unavailability due to manipulation of bid and bump rules; . . ." We find, therefore, that these absences were chargeable against Claimant's attendance record and, furthermore, that Claimant was on notice of this fact inasmuch as the Attendance Policy was published as a Special Instruction in the Illinois Division Timetable No. 1.

We also disagree with the Organization's position that absences for which an employee has received permission should not be chargeable. Throughout the history of this industry, arbitral panels have recognized that an employee may be guilty of excessive absenteeism even though the absences have been authorized by the Carrier. In Award No. 19, this Board held:

> The Organization does not refute Claimant's attendance record, but questions why he was held accountable for absences for which the Carrier had given him permission. It is well recognized that whether or not an employee has been given permission to be absent, or has good reason to be absent, becomes irrelevant when the extent of the employee's absences become excessive. Unless the employee has obtained a proper leave of absence or is protected by the Family and Medical Leave Act, the Carrier has the right to discipline or discharge an employee who is not capable of working on a full-time basis.

We find that the Carrier had substantial evidence to support its charge against Claimant. His record showed that he had not maintained an acceptable work record for the period in question. The Carrier's Attendance Policy defines the attendance expectations and sets out a plan of progressive discipline. We note that Claimant was counseled regarding his attendance on March 12, 2013 and was issued a Letter of Caution. He subsequently received a Letter of Reprimand on December 10, 2013, a 15-Day Deferred Suspension on November 19, 2014 and a 30-Day Deferred Suspension on April 15, 2015, all for his failure to maintain an acceptable work record. These are the first four steps in the Attendance Policy's progression. The fifth step in the progression calls for dismissal.

CARRIER'S EXHIBIT M
PAGE 3 OF 4

In Award No. 19, quoted above, we upheld the dismissal of an employee where the Carrier followed the same path of progressive discipline, finding that the claimant therein had "demonstrated that he is incapable of improving his attendance performance." We reach the same conclusion in this case. Inasmuch as this was the second time Claimant was dismissed from service, the first having been on May 2, 2013 due to damage to company property and failing to comply with instructions of the footboard yardmaster, we cannot find that the discipline imposed in this instance was either arbitrary or excessive. In reaching this decision, we have considered the various arguments advanced by the Organization and find them to be unpersuasive in this case.

AWARD: Claim denied.

Barry E. Simon
Chairman and Neutral Member

R. C. Gibbons
Employee Member

3/5/17
J. J. Muskovac, IV
Carrier Member

Dated: February 26, 2017
Arlington Heights, Illinois

CARRIER'S EXHIBIT M
PAGE 4 OF 4

Award No. 27
Case No. 27

PUBLIC LAW BOARD NO. 6753

PARTIES) Union Pacific Railroad Company
TO)
DISPUTE) United Transportation Union (UP ~~Western~~ Lines)

COMPANY FILE: 1410437

UTU File No.

STATEMENT OF CLAIM:

Request that the record of Switchman J.J. Moore be cleared of the "third offense" discipline, permanent dismissal, assessed on November 3,2004, and that he be paid for all time lost, seniority rights and vacation unimpaired.

OPINION OF BOARD:

Claimant J.J. Moore was found to be in violation of the Carrier's TE&Y Attendance Policy. Claimant was also found guilty of violating Operating rules 1.13 and 1.15 for his failure to work on a regular basis during the period July 2, 2004 through October 1, 2004. For these violations the claimant was assessed a "third offense", permanent dismissal, under the TE&Y Attendance Policy.

During the period July 2,2004 through October 1,2004 the claimant was working yard assignments that work five days per week with two scheduled off days. In addition to his twenty-one off days in this period, the claimant was off all or part of an additional 27 days. During this period the claimant worked only 27 days or less than 33% of the available time. The claimant clearly had an attendance problem.

The Organization argued that the claimant was utilizing time to place himself after being bumped. While the agreement does allow the claimant time to place himself, it does not allow the

CARRIER'S EXHIBIT N
PAGE 1 OF 3

claimant to use it has a vehicle to avoid work. The record showed that from August 25 through September 9,2004 the claimant did not work as he was on the bump board. These absences can and will be counted against the claimant's work record.

The claimant and the Organization also stated that the claimant had a pre existing medical condition. While the claimant did present medical evidence at the investigation, he did not inform the Carrier of this condition at the time of his marking off nor did he present any documentation when he returned to work. The documentation is also general in nature and does not cover any specific period. The claimant had been disciplined on two previous occasions under the Carrier's Attendance Policy. In the letter assessing the "second offense" under the policy, the claimant agreed to provide medical documentation for any illness that prevented him from working. There is no evidence in the record that showed that the claimant followed these instructions.

The Board finds that the record contained substantial evidence to support the charges against the claimant. The record, as discussed above, also showed that the claimant had been previously disciplined for violation of the Attendance Policy. The claimant did not improve his attendance and the Board sees no reason to overturn the discipline imposed.

Findings: Claim denied.

John R. Binau
Neutral Member

R B. Weiss
Carrier Member
June 24, 2005

M.B. Futhey, Jr.
Organization Member

CARRIER'S EXHIBIT N
PAGE 3 OF 3

CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 28224
Docket No. 48103
16-1-NRAB-00001-140124

The First Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union
(
(CSX Transportation, Inc. (Former Baltimore &
(Ohio Railroad Company)

STATEMENT OF CLAIM:

"Reference to, File number 248017. Appeal claim of Foreman, J. A. Habel, ID XXXXXXX, for two (2) days overhead for a period of six months, that his record be cleared of the event, and he be compensated for all lost earnings including pay for attending the investigation and wage equivalent of fringe benefits, including health and welfare expenses, in accord with Rule 17 of the governing agreement."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

CARRIER'S EXHIBIT F
PAGE 1 OF 11

EXHIBIT A

EXHIBIT E

By letter dated January 15, 2013, the Claimant was instructed to attend an Investigation with the stated purpose:

> ". . . to develop the facts and place your responsibility, if any, in connection with information received on January 15, 2013, that you did not meet the minimum availability requirements as outlined in System Notice 108, originally issued on July 30, 2010 and any subsequent minimum availability re-issue notices, for the period of December 17, 2012 through January 13, 2013, and all circumstances relating thereto."

The formal Investigation was held on January 29, 2013. By letter dated February 28, 2013, the Claimant was notified that the Carrier had found him culpable for violation of CSX Transportation Bulletins & Notices, System Notice 108, originally issued on July 30, 2010 and Re-issue Notice 100 effective June 26, 2012, and assessed him two days overhead for a period of six months. The Organization filed a timely appeal, and the matter was appealed up to and including the highest designated officer of the Carrier, whereupon the dispute was duly submitted to the First Division for resolution.

The record reflects that the Claimant was displaced from his previous assignment by a senior employee on January 8, 2013 at 1614 (CSX time). He was notified of his displaced status via the internet on January 9, 2013, at 0205, and exercised his seniority to another assignment on January 10, 2013 at 2359 - 45 hours and 54 minutes after notification. The Claimant could have exercised his seniority sooner, because junior employees were working throughout the period that he was displaced. The Carrier classified the Claimant as unavailable for the entire time he was displaced for minimum availability purposes, reasoning that work had been available to him but he chose to forgo that work pending exercise of his seniority to the new assignment he ultimately took at the end of the day on January 10. The Carrier concluded that the Claimant failed to meet the minimum availability standard of System Notice 108 based on this determination, and asserts that the Claimant was properly assessed a two-day overhead suspension for a period of six months pursuant to that policy.

The Organization objects that the Carrier violated the Claimant's rights under B&O Rule 8(d)(2) and Article XII (Displacement) of the 1996 UTU National

CARRIER'S EXHIBIT F
PAGE 2 OF 14

Agreement, to take up to 48 hours after proper notification of displacement to exercise his seniority rights to a new assignment.[1] At no time was he voluntarily unavailable. The Claimant exercised his rights within the period specified by Article XII, the Organization observes, and therefore cannot be penalized for being "unavailable" during that time. Employees may make their displacement choices based on a variety of factors, such as earnings, board standing, on-duty times, off-duty days, on-duty location and potential co-workers. They are entitled to take up to 48 hours to consider their alternatives and make that choice, and should not be penalized for doing so. In holding the Claimant (and other employees) in violation of the availability policy merely for invoking their contractual right to take up to 48 hours to exercise their displacement rights, the Carrier is attempting to promulgate a material change to UTU Agreement Rules on the property represented by the UTU B&O General Committee, the Organization contends.

According to the Organization, this effort by the Carrier follows and is the result of failed voluntary negotiations over the Electronic Bid System (EBS), which might have eliminated mid-week seniority moves and displacement on this property;

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[1] B&O Rule 8(d)(2) states:

> Road or yard men who have displacement rights and can hold a turn at the terminal where displacement occurred must either exercise their displacement rights or obtain a leave of absence within thirty (30) days or their service record will be marked VUA (Voluntary Unexplained Absence.)

In relevant part, Section 1 of Article XII states:

> (a) Where agreements that provide for the exercise of displacement rights within a shorter time period are not in effect, existing rules, excluding crew consist agreements, are amended to provide that an employee who has a displacement right on any position (including extra boards) within a terminal or within 30 miles of such employee's current reporting point, whichever is greater, must, from the time of proper notification under the applicable agreement or practice, exercise that displacement right within forty-eight (48) hours.
>
> (b) Failure of an employee to exercise displacement rights, as provided in (a) above, will result in said employee being assigned to the applicable extra board, seniority permitting . . . .

CARRIER'S EXHIBIT F
PAGE 3 OF 11

the Carrier is attempting to accomplish a similar result by unilaterally imposing a policy that it could not gain through negotiation.

The Organization also notes that while the Carrier has previously disciplined employees failing to meet the Carrier's availability standard due to a combination of sick mark-offs or mark-offs for some other non-contractual reason, as well as being in displaced status during the availability period, this and the trailing cases (First Division Awards 28225 through 28233) are the first cases to be adjudicated where an employee on this property has been disciplined based solely on contractually-entitled displacement time under UTU 1996 National Agreement Article XII.

Citing the negotiated Q & As pertaining to Article XII, the Organization notes that the Parties specifically agreed that discipline shall not result if an employee fails to exercise seniority rights within the 48-hour period; instead the employee is merely assigned to an extra board.[2] The Organization also cites the July 28, 2000 letter of CSXT Director Labor Relations R. D. Hiel to UTU General Chairman J. T. Reed, wherein Director Hiel stated:

> "It is clear that the intention of Article XII was to make the employee responsible for exercising his displacement rights within 48 hours; and subjecting him to sanctions in the event that he chose not to do so . . . .

[2] The relevant Q&As are Nos. 3 and 7:

> Q-3: How is an employee covered by this Article handled who fails to exercise seniority placement within 48 hours?
> A-3: Such employee is assigned to the applicable extra board, seniority permitting, pursuant to Section 1 (b) and subsequently governed by existing rules and/or practices.
> * * * * *
>
> (Cont'd next page)
>
> Q-7: Is it the intent of Article XII to impose discipline on employees who fail to exercise seniority within 48 hours?
> A-7: No, Section 1(b) provides that in these circumstances the employee will be assigned to the applicable extra board, seniority permitting. The employee will then be subject to existing rules and practices governing service on such extra board.

CARRIER'S EXHIBIT F
PAGE 4 OF 11

> Commencing on [September 1, 2000], should an employee choose not to exercise his displacement rights within 48 hours, he may immediately be 'assigned' to any open position that exists at the supply point where displaced (or protected by the supply point) upon proper notification by CMC.[3] (emphasis added)

In addition, the Organization observes, Section 10 of Rule 64 of the Schedule Agreement provides:

> "A trainman who has displacement rights but has not placed himself will not be used to fill a vacancy except in an emergency or when no other employee is available." (emphasis added)

The Organization also notes that after issuing its Simplified Availability Policy in System Notice No. 108, the Carrier specifically informed the Organization that displacement rights would continue to be respected under the Policy.[4]

The Organization concludes that this history and these Agreements demonstrate that the Carrier's decision to treat an employee's contractually-authorized displacement time of up to 48 hours as a violation of the Availability Policy

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[3] The purpose of the July 28, 2000 letter was to remove the previous option of an employee to delay exercising his displacement right beyond 48 hours if he intended to exercise seniority beyond 30 miles from his last reporting point if an open position existed at his home supply point. Thereafter, if such a position existed and the employee failed to exercise his seniority within 48 hours, the Carrier could assign the employee to any such open position.

[4] That assurance came in an undated letter from AVP Labor Relations David Ingoldsby and AVP Crew Management Thomas Flanley to UTU General Chairperson Lesniewski and other Organization officers, in response to a letter from Lesniewski dated November 12, 2010, asking the Carrier to respond to 22 questions about the Carrier's intended application of the Availability Policy issued July 30, 2010. Ingoldsby and Flanley restated Question 3 and answered as follows:

> Q3 – Will the revised standards violate schedule agreement displacement rules?
> A3 – No. Contractual displacement rules will be respected.

CARRIER'S EXHIBIT F
PAGE 5 OF 11

violates the applicable UTU Agreement Rules, and that the discipline imposed on the Claimant for his exercise of his displacement rights cannot be sustained. A variety of arbitral authority is cited in its Submission to support the claim.

The Carrier responds that the Claimant made himself unavailable for work on two days during the review period, even though work was available to him, and thereby violated his fundamental duty to be available for work. The Carrier has a long-recognized prerogative to set guidelines on attendance to balance the manpower needs of its operations and the employees' needs and desires for quality time off, and the Availability Policy pursuant to which the Claimant was disciplined has repeatedly been upheld as an appropriate exercise of its managerial discretion in this regard. The Carrier further notes that Arbitrators have repeatedly found that an employee's choice to delay exercising seniority after displacement, even though work was available, can be counted appropriately as time unavailable, when applying an availability standard. Neither Article XII of the UTU National Agreement, nor Rule 64 of the Schedule Agreement restricts the Carrier's right to adopt an attendance policy; Section 2 of Article XII states that the Article ". . . is not intended to restrict any of the existing rights of a carrier."

The Carrier also asserts that arbitral precedent cannot be ignored merely because the Claimant's unavailability here consisted exclusively of displacement time. Arbitrators have addressed displacement time as time unavailable independent of sick time even when both sick time and displacement were the basis for discipline. Moreover, the Carrier reasons, Article XII, Q&A 7 to Article XII, and Rule 64 say nothing that relieves the Claimant from his duty to be available for work. Nothing in the Agreements creating the 48-hour period for exercising seniority to another assignment also created the right to be unavailable for work during that period. Finally, the Carrier contends that the Claimant's responsibility for failing to meet the availability standard in the Policy is not mitigated by the Organization's representation that the Claimant would have accepted a call for work had he received one. Because the negotiated decision tables for calling employees assigned to pools or extra boards or regularly scheduled jobs exclude employees in displaced status, employees in such status know that they are shielded from penalty for missing a call for work. The Carrier accordingly urges that the claim be denied.

CARRIER'S EXHIBIT F
PAGE 6 OF 11

The Board considered the record in full, including the Parties' Submissions, arguments, and authorities, which are summarized only briefly above. After due consideration, we find that the claim must be denied. The Carrier has established that there was substantial evidence to support its determination of the Claimant's culpability under its Availability Policy, that this application of the Availability Policy does not violate the Parties' Agreements, and that the quantum of discipline assessed is appropriate under all the circumstances.

It is well-established that as part of its right to adopt guidelines to promote safe and efficient business operations, the Carrier has the right to promulgate, implement and enforce Rules and Policies governing employee attendance. See, e.g., Third Division Award 36544 (Kenis); Public Law Board No. 6610, Award 4 (Goldstein). Nonetheless, that right is not unlimited. The Rules established cannot be inconsistent with law or applicable collective bargaining agreements. See, Third Division Award 36544. ("[T]here is a long line of precedent Awards in this industry which have recognized that the Carrier may establish reasonable policies with respect to employee attendance, so long as the policies do not conflict with the provisions of the Agreement.") (emphasis added)

The Carrier also asserts that Arbitrators have repeatedly rejected the Organization's position that the Schedule Agreement excludes employees from being deemed unavailable during the 48-hour displacement period. In Public Law Board No. 7040, Awards 24 and 26, Neutral Wallin specifically held that delay time in exercising seniority could be counted against an employee's availability for work under the Carrier's Attendance Policy. See also Public Law Board No. 7180, Award 2 (Wallin) ("On the merits, the record established that Claimant's sick day and day in displacement status caused him to fail to meet the applicable attendance standard. There were three junior employees he could have displaced immediately to avoid being counted as unavailable under the attendance policy.") Indeed, in Public Law Board No. 6753, Award 27, Neutral Binau observed, under Article XII of the 1996 UTU National Agreement:

> "The Organization argued that the claimant was utilizing time to place himself after being bumped. While the agreement does allow the claimant time to place himself, it does not allow the claimant to use it as a vehicle to avoid work."

CARRIER'S EXHIBIT F
PAGE 7 OF 11

In Public Law Board No. 6823, Award 36, Neutral Ross was explicit about the relationship between the right to displace and the obligation to be available for work:

> "As the Carrier argued, 'negotiated limitations on time in displaced status have no connection with employee accountability for attendance.' The Board thus concurs with the Carrier's position that employees who fail to make themselves available by delaying their exercises of seniority when junior employees are available for displacement may subject themselves to scrutiny under the Availability Policy."

More significantly, on this property, Neutral Wallin observed, in Public Law Board No. 7180, Award 1, upholding the Carrier's position:

> ". . . The fact that he had reasons for his seven days of unavailability during the review period does not turn that unavailability into credit days. Having reasons merely prevents claimant from being charged for absence without a proper reason. Similar logic applied to claimant's unavailability due to being displaced. While it is true the Agreement permits up to 48 hours for the purpose of exercising seniority without losing exercise rights, it does not excuse voluntary unavailability for attendance purposes. If a displaced employee can immediately exercise seniority against a junior employee to avoid losing work time, the employee makes himself voluntarily unavailable for attendance purposes if he chooses to delay his exercise of seniority."

The Organization objects that none of these decisions, nor others cited by the Carrier, control the decision in the instant case, either because different Organizations, Properties, or Agreements were involved, or because the Awards fail to demonstrate consideration of the relevant Agreements, or because the discipline under review was for a combination of displacement time and sick mark-offs or other time off, so that no Award has squarely addressed the interplay between the Availability Policy, on the one hand, and Article XII of the 1996 National Agreement, the Q&As to Article XII, or Rule 64 of the B&O Collective Bargaining Agreement.

CARRIER'S EXHIBIT F
PAGE 8 OF 11

However, a return to these underlying Agreements leads to the same conclusion as that of the Awards referred to above. We see that Section 1(a) of Article XII does not merely create or modify a right; it imposes an obligation on "an employee who has a displacement right . . . ." That employee "must, from the time of proper notification under the applicable agreement or practice, exercise that displacement right within forty-eight (48) hours." Section 1(b) then provides that if the employee fails to exercise that displacement right within 48 hours, the employee will be assigned to the applicable extra board, seniority permitting. Thus, Section 1 of Article XII addresses only what happens after 48 hours if the employee has failed to exercise seniority to his next assignment during that time. Section 1 says nothing about the implications of delaying his selection, and thereby making himself unavailable, while work is otherwise available to him.

Indeed, as the Carrier observes, Section 2 of Article XII states that the Article "is not intended to restrict any of the existing rights of a carrier," and thus the new procedure of Section 1 did not reduce the Carrier's long-standing right to discipline employees who fail to maintain appropriate attendance levels. The Organization objects that the "existing rights" referred to must be read in light of the employees' prior right to take up to 30 days to exercise their seniority when displaced. But while the Organization asserts that the Carrier lacked the right to discipline for attendance violations under the prior displacement provisions, no authority has been cited. Upon a close reading of the history of these provisions, the Board concludes that it is the Carrier's interpretation that was intended – Article XII does not alter the Carrier's generally accepted right to promulgate, implement and enforce attendance guidelines that do not conflict with law or collective bargaining agreements.

The Organization also cites Q&A 7 pertaining to Article XII in support of the claim. The wording of the question and answer is critical:

> "Q 7. Is it the intent of Article XII to impose discipline on employees who fail to exercise seniority within 48 hours?
>
> A 7. No, Section 1(b) provides that in these circumstances the employee will be assigned to the applicable extra board, seniority permitting . . . ."

CARRIER'S EXHIBIT F
PAGE 9 OF 11

The Organization asserts from this that ". . . the framers were explicit in that the reduction of displacement time from thirty (30) days to forty-eight (48) hours was not intended to impose disciplinary sanctions upon an employee failing to exercise seniority to a new position within forty-eight (48) hours; let alone less than forty-eight (48) hours." However, this goes too far. The Parties did not grant blanket immunity from discipline to employees being displaced. From the history of Article XII and the change in the displacement procedure it represents, it is clear that the Parties' concern in framing the question and answer was the adjustment that employees would be required to make from a maximum of 30 days, to a maximum of 48 hours, to exercise seniority. The Q&A clarifies that if those employees failed to exercise seniority fast enough, they would not be disciplined; they would merely be assigned to an extra board. The Organization failed to demonstrate that the Parties intended in formulating this Q&A to immunize employees from discipline for availability or attendance issues.

The Organization also contends that the Carrier violated the premise of paragraph 10 of Rule 64 of the 1994 CSXT and UTU B&O Agreement by considering the Claimant to be unavailable to work during his displacement time. Under Rule 64 (10), "A trainman who has displacement rights but has not placed himself will not be used to fill a vacancy except in an emergency or when no other employee is available." However, Rule 64 sets out the Rules whereby "[e]mployees working within their prior right and/or consolidated seniority districts in road freight, yard and passenger service will be permitted to exercise seniority by displacing any junior employee within their prior right and/or consolidated seniority district . . . ." Thus, Rule 64 does not address the 48-hour displacement Rule of Article XII. The Organization failed to show on this record how the discipline of the Claimant in this case violated any rights he might have under paragraph 10 of Rule 64.

Finally, the Organization contends that the Carrier cannot contend that the Claimant was "unavailable" because he was placed in the displaced status involuntarily; he never voluntarily marked himself off as unavailable either during the displacement period or during the entire period of review cited in the charge letter; he was never called for duty on the dates in question, but would have performed service if needed. According to the Organization, the Claimant's status was always a matter of Contract operation rather than voluntary action on his part. However, the record reflects that there were junior employees working throughout the displacement period

whose jobs the Claimant could have taken by exercise of his seniority in less than 45 hours and 54 minutes from notification of displacement. Thus, although the Claimant was displaced involuntarily, there is substantial evidence that he remained in that status for almost 46 hours through his own choice.[5]

In sum, the Carrier presented substantial evidence to show that the Claimant was unavailable for work on two days out of the review period and that the discipline assessed was warranted pursuant to the minimum availability guidelines of System Notice 108, originally issued on July 30, 2010, and Re-issue Notice 100 effective June 26, 2012. The Board finds that this application of the minimum availability guidelines is not barred by Article XII of the 1996 UTU-CSXT (B&O) Agreement, or any other Agreement between the Carrier and the Organization.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 26th day of April 2016.

[5] The Organization cites a number of circumstances listed in Rule 64 where junior employees cannot be bumped by displaced employees; however, there is no evidence that any of these were applicable while the Claimant was displaced.

CARRIER'S EXHIBIT f
PAGE 11 OF 11

Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
FIRST DIVISION

Award No. 28686
Docket No. 48113
18-1-NRAB-00001-140134

The First Division consisted of the regular members and in addition Referee Jim Nash when award was rendered.

PARTIES TO DISPUTE: **(SMART – TD (UTU)**
(
(CSX Transportation, Inc. (Formerly Baltimore & Ohio
(Railroad Company)

STATEMENT OF CLAIM:

"Reference to file number XXXXXX. Appeal claim of Switchman J. T. Kopko, ID XXXXXX, for Two (2) days overhead for a period of six months, that his record be cleared of the event, and he be compensated for all lost earnings including pay for attending the investigation and wage equivalent of fringe benefits, including health and welfare expenses, in accord with Rule 17 of the governing Agreement."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The resolution of this dispute turns on the correct interpretation of ARTICLE XII – DISPLACEMENT of the 1996 UTU National Agreement. The

CARRIER'S EXHIBIT G
PAGE 1 OF 4

central issue, here, is whether the Carrier – in ARTICLE XII – DISPLACEMENT – abdicated its right to assess discipline where the employee failed to fulfill the Carrier's minimum availability requirement. Under the minimum availability standard, the employee might be subject to discipline if – during a rolling four-week period – the employee was unavailable for work two or more days. For purposes of the minimum availability policy, the employee must displace a junior employee – if seniority and qualifications allow –after having been notified of his own displacement and having been fully rested, plus 12 hours and 1 minute. In the dispute at bar, the employee was charged with failure to satisfy the minimum availability standard during the period May 28, 2012 through June 24, 2012.

The Organization complained that the Carrier, unilaterally, altered the CBA when it changed the time allowed for displacement from 48 hours to 12 hours. In support of its argument, the Organization cited to ARTICLE XII – DISPLACEMENT. The rule reads in pertinent part:

"ARTICLE XII – DISPLACEMENT
Section 1

> **(a)Where agreements that provide for the exercise of displacement rights within a shorter time period are not in effect, existing rules, excluding crew consist agreements, are amended to provide that an employee who has a displacement right n any position (including extra boards) within a terminal or within 30 miles of such employee's current reporting point, whichever is greater, must from the time of proper notification under the applicable agreement or practice, exercise that displacement right with forty-eight (48) hours."**

The Organization made the supplementary argument that the employee is insulated from discipline due to failure to satisfy the minimum availability rule where the employee is exercising his right to displace a junior employee within the 48 hours allowed in the original rule as instituted in the language found in Question and Answer 7 to Article XII of the Agreement. Question and Answer 7 reads in pertinent part:

CARRIER'S EXHIBIT G
PAGE 2 OF 4

"Q-7: Is it the intent of Article XII to impose discipline on employees who fail to exercise seniority within 48 hours?

A-7: No, Section 1(b) provides that in these circumstances the employee will be assigned to the applicable extra board, seniority permitting. The employee will then be subject to existing rules and practices governing service on such extra board."

The Carrier maintains that while it is not its intent to impose further discipline on its employees, neither is it resolved to renunciation of rights it, already, enjoys – among which are its expectation that its employees will work full time, and its responsibility to enforce a reasonable attendance policy in furtherance of that expectancy. The Carrier took the position that ARTICLE XII – DISPLACEMENT, and the Minimum Availability Policy are separate and discrete, and that the Displacement rule does not diminish any prerogatives not expressly relinquished through negotiation.

Upon full consideration of the entire record of evidence, the Board feels suitably acquainted with this dispute to offer an opinion.

It was apparent from the outset that the Organization's intent was to rest its argument in chief on the foundation of Question and Answer 7 – mentioned above – in the Question and Answer section of the Agreement. While the Board understands the Organization's point of view, the language on which it relies – even if viewed in the light most favorable to its position – simply, lacks the clarity and potency to reach the threshold required to overcome its burden of proof: that Question and Answer 7 shields the employee from discipline imposed as a consequence to violation of the Carrier's Minimum Availability Policy where the employee does not displace a junior employee where work is available and seniority and qualifications allow.

AWARD

Claim denied.

CARRIER'S EXHIBIT G
PAGE 3 OF 4

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 11th day of January 2018.

CARRIER'S EXHIBIT G
PAGE 4 OF 4

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 28687
Docket No. 48114
18-1-NRAB-00001-140135

The First Division consisted of the regular members and in addition Referee Jim Nash when award was rendered.

PARTIES TO DISPUTE: (SMART – TD (UTU)
(
(CSX Transportation, Inc. (Formerly Baltimore & Ohio
(Railroad Company)

STATEMENT OF CLAIM:

"Reference to file number XXXXXX. Appeal claim of Switchman D. D. Booker ID XXXXXX, for Two (2) days overhead for a period of six months, that his record be cleared of the event, and he be compensated for all lost earnings including pay for attending the investigation and wage equivalent of fringe benefits, including health and welfare expenses, in accord with Rule 17 of the governing Agreement.

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The resolution of this dispute turns on the correct interpretation of ARTICLE XII – DISPLACEMENT of the 1996 UTU National Agreement. The

CARRIER'S EXHIBIT H
PAGE 1 OF 4

central issue, here, is whether the Carrier – in ARTICLE XII – DISPLACEMENT – abdicated its right to assess discipline where the employee failed to fulfill the Carrier's minimum availability requirement. Under the minimum availability standard, the employee might be subject to discipline if – during a rolling four-week period – the employee was unavailable for work two or more days. For purposes of the minimum availability policy, the employee must displace a junior employee – if seniority and qualifications allow –after having been notified of his own displacement and having been fully rested, plus 12 hours and 1 minute. In the dispute at bar, the employee was charged with failure to satisfy the minimum availability standard during the period May 7, 2012 through June 3, 2012.

The Organization complained that the Carrier, unilaterally, altered the CBA when it changed the time allowed for displacement from 48 hours to 12 hours. In support of its argument, the Organization cited to ARTICLE XII – DISPLACEMENT. The rule reads in pertinent part:

> **"ARTICLE XII – DISPLACEMENT**
> **Section 1**
> **(a) Where agreements that provide for the exercise of displacement rights within a shorter time period are not in effect, existing rules, excluding crew consist agreements, are amended to provide that an employee who has a displacement right n any position (including extra boards) within a terminal or within 30 miles of such employee's current reporting point, whichever is greater, must from the time of proper notification under the applicable agreement or practice, exercise that displacement right with forty-eight (48) hours."**

The Organization made the supplementary argument that the employee is insulated from discipline due to failure to satisfy the minimum availability rule where the employee is exercising his right to displace a junior employee within the48 hours allowed in the original rule as instituted in the language found in Question and Answer 7 to Article XII of the Agreement. Question and Answer 7 reads in pertinent part:

CARRIER'S EXHIBIT H
PAGE 2 OF 4

"Q-7: Is it the intent of Article XII to impose discipline on employees who fail to exercise seniority within 48 hours?

A-7: No, Section 1(b) provides that in these circumstances the employee will be assigned to the applicable extra board, seniority permitting. The employee will then be subject to existing rules and practices governing service on such extra board."

The Carrier maintains that while it is not its intent to impose further discipline on its employees, neither is it resolved to renunciation of rights it, already, enjoys – among which are its expectation that its employees will work full time, and its responsibility to enforce a reasonable attendance policy in furtherance of that expectancy. The Carrier took the position that ARTICLE XII – DISPLACEMENT, and the Minimum Availability Policy are separate and discrete, and that the Displacement rule does not diminish any prerogatives not expressly relinquished through negotiation.

Upon full consideration of the entire record of evidence, the Board feels suitably acquainted with this dispute to offer an opinion.

It was apparent from the outset that the Organization's intent was to rest its argument in chief on the foundation of Question and Answer 7 – mentioned above – in the Question and Answer section of the Agreement. While the Board understands the Organization's point of view, the language on which it relies – even if viewed in the light most favorable to its position – simply, lacks the clarity and potency to reach the threshold required to overcome its burden of proof: that Question and Answer 7 shields the employee from discipline imposed as a consequence to violation of the Carrier's Minimum Availability Policy where the employee does not displace a junior employee where work is available and seniority and qualifications allow.

AWARD

Claim denied.

CARRIER'S EXHIBIT H
PAGE 3 OF 4

Award No. 28687
Docket No. 48114
18-1-NRAB-00001-140135

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 11th day of January 2018.

CARRIER'S EXHIBIT H
PAGE 4 OF 4

Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
FIRST DIVISION

Award No. 28688
Docket No. 48115
18-1-NRAB-00001-140136

The First Division consisted of the regular members and in addition Referee Jim Nash when award was rendered.

PARTIES TO DISPUTE: **(SMART – TD (UTU)**
(
(CSX Transportation (Formerly Baltimore & Ohio
(Railroad Company)

STATEMENT OF CLAIM:

"Reference to file number XXXXXX. Appeal claim of Conductor E. J. Cinniger, ID XXXXXX, for Two (2) days overhead for a period of six months, that his record be cleared of the event, and he be compensated for all lost earnings including pay for attending the investigation and wage equivalent of fringe benefits, including health and welfare expenses, in accord with Rule 17 of the governing Agreement.

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The resolution of this dispute turns on the correct interpretation of ARTICLE XII – DISPLACEMENT of the 1996 UTU National Agreement. The

CARRIER'S EXHIBIT I
PAGE 1 OF 5

central issue, here, is whether the Carrier – in ARTICLE XII – DISPLACEMENT – abdicated its right to assess discipline where the employee failed to fulfill the Carrier's minimum availability requirement. Under the minimum availability standard, the employee might be subject to discipline if – during a rolling four-week period – the employee was unavailable for work two or more days. For purposes of the minimum availability policy, the employee must displace a junior employee – if seniority and qualifications allow – after having been notified of his own displacement and having been fully rested, plus 12 hours and 1 minute. In the dispute at bar, the employee was charged with failure to satisfy the minimum availability standard during the period May 14, 2012 through June 10, 2012.

The Organization complained that the Carrier, unilaterally, altered the CBA when it changed the time allowed for displacement from 48 hours to12 hours. In support of its argument, the Organization cited to ARTICLE XII – DISPLACEMENT. The rule reads in pertinent part:

> **"ARTICLE XII – DISPLACEMENT**
> **Section 1**
> **(a) Where agreements that provide for the exercise of displacement rights within a shorter time period are not in effect, existing rules, excluding crew consist agreements, are amended to provide that an employee who has a displacement right n any position (including extra boards) within a terminal or within 30 miles of such employee's current reporting point, whichever is greater, must from the time of proper notification under the applicable agreement or practice, exercise that displacement right with forty-eight (48) hours."**

The Organization made the supplementary argument that the employee is insulated from discipline due to failure to satisfy the minimum availability rule where the employee is exercising his right to displace a junior employee within the 48 hours allowed in the original rule as instituted in the language found in Question and Answer 7 to Article XII of the Agreement. Question and Answer 7 reads in pertinent part:

CARRIER'S EXHIBIT F
PAGE 2 OF 5

"Q-7: Is it the intent of Article XII to impose discipline on employees who fail to exercise seniority within 48 hours?

A-7: No, Section 1(b) provides that in these circumstances the employee will be assigned to the applicable extra board, seniority permitting. The employee will then be subject to existing rules and practices governing service on such extra board."

The Carrier maintains that while it is not its intent to impose further discipline on its employees, neither is it resolved to renunciation of rights it, already, enjoys – among which are its expectation that its employees will work full time, and its responsibility to enforce a reasonable attendance policy in furtherance of that expectancy. The Carrier took the position that ARTICLE XII – DISPLACEMENT, and the Minimum Availability Policy are separate and discrete, and that the Displacement rule does not diminish any prerogatives not expressly relinquished through negotiation.

Upon full consideration of the entire record of evidence, the Board feels suitably acquainted with this dispute to offer an opinion.

It was apparent from the outset that the Organization's intent was to rest its argument in chief on the foundation of Question and Answer 7 – mentioned above – in the Question and Answer section of the Agreement. While the Board understands the Organization's point of view, the language on which it relies – even if viewed in the light most favorable to its position – simply, lacks the clarity and potency to reach the threshold required to overcome its burden of proof: that Question and Answer 7 shields the employee from discipline imposed as a consequence to violation of the Carrier's Minimum Availability Policy where the employee does not displace a junior employee where work is available and seniority and qualifications allow.

AWARD

Claim denied.

CARRIER'S EXHIBIT I
PAGE 3 OF 5

Award No. 28688
Docket No. 48115
18-1-NRAB-00001-140136

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 11th day of January 2018.

CARRIER'S EXHIBIT I
PAGE 4 OF 5

PUBLIC LAW BOARD 7244

PARTIES UNITED TRANSPORTATION UNION — AWARD NO. 42
CASE NO. 42
TO — NSC/BLE FILE: XC-ATLN-09-29

DISPUTE NORFOLK SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Georgia Division, Atlanta North District Yardman D. L. Harrow for restoration to the service with seniority unimpaired, payment for all time lost, including holiday and vacation pay, health and welfare benefits, and all notations of this incident removed from his personal service record. The Claimant was dismissed from service on October 30, 2009 for his alleged failure to maintain an acceptable work record between September 13, 2009 and October 13, 2009.

FINDINGS AND OPINION: This Board finds the parties herein are the Carrier and Employee, respectively, within the meaning of the Railway Labor Act, as amended: this Board has jurisdiction over this dispute; and the parties were given due notice of the hearing.

Claimant established seniority as conductor on October 30, 2006. Carrier reviewed Claimant's attendance for the period of September 13, 2009, through October 31, 2009. During this period, Claimant worked only eight times and was unavailable for work 13 days. Claimant's records revealed that after he was displaced from an assignment, he would avoid notification that he had been displaced and when notified, he took the maximum allowable time to place himself on an assignment. Claimant often placed himself on assignments that were on rest days, would go on a rest day within a few days, or had already gone to work that day. As a result, a hearing was scheduled, and based on the evidence, Claimant was dismissed from service.

Claimant contends that the time it took Carrier to notify him he had been displaced and the time he took to place himself could not be consider as time unavailable because the Agreement provides for a specified period of time to place oneself on an assignment following displacement. The Board does not agree. Employees have an obligation to maintain an acceptable level of attendance. There is substantial evidence that Claimant did not maintain this level of attendance. Although Claimant has been warned in the past regarding the penalty for poor attendance, it is the Board's decision that Claimant be given a final opportunity to show he is committed to maintaining an acceptable level of attendance and returns him to service with seniority rights unimpaired, but without pay for time lost.

AWARD: Claim sustained, in part, in accordance with Findings.

CARRIER'S EXHIBIT L
PAGE 1 OF 1

David N. Ray
David N. Ray, Chairman

Andrew J. Shepard, Carrier Member 7/6/10

Paul E. Emert
Paul E. Emert, Employee Member

Signed at Estero, Florida on June 15, 2010.

PUBLIC LAW BOARD NO. 7180

AWARD NO. 1

CASE NO. 1

Carrier File: 137915

UTU File: 82577/1373

PARTIES TO THE DISPUTE: United Transportation Union

vs.

CSX Transportation, Inc.
(Former Baltimore & Ohio Railroad)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim Denied

STATEMENT OF CLAIM:

"On behalf of Brother Tommy Dudley, ID 211123, the UTU Local 1373 Committee of Adjustment would like to appeal the two days overhead suspension assessed on September 21, 2007 by CSX Baltimore Division Manager Don Jones, and request 1 day's pay for lost time attending company investigation, as well as removal of any unfavorable entries on his employee record for his alleged failure to meet the CSX minimum availability policy. Investigation date: 8/29/07."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was assessed a two-day overhead suspension for a period of six months in accordance with the Carrier's attendance reliability policy. At the time of the action, claimant had over five years of service with the Carrier. He had no prior similar discipline.

Our review of the record does not disclose any procedural irregularities of significance. On the merits, the record establishes that Carrier notified employees of the attendance policy via System Notice 102 in September of 2005. It established attendance standards to be maintained by employees depending on the nature of their assignment. Those standards remained in effect during the period for which claimant's attendance was reviewed: June 18 through August 12, 2007. Claimant's assignments placed him in somewhat of a hybrid category. He held a 5-day assignment for 25 days and a 6-day assignment for the remaining 31 days of the review period. According to the Carrier, this required him to either work or be compensated for being available no less than 44 days. The record establishes that claimant was only available for 40 days.

Even if the standards for 5-day and 6-day assignments was blended for his hybrid situation, he still would have fallen short of a blended 41-day requirement. The fact that he had reasons for

CARRIER'S EXHIBIT J
PAGE 1 OF 2

his seven days of unavailability during the review period does not turn that unavailability into credited days. Having reasons merely prevents claimant from being charged for absence without a proper reason. Similar logic applies to claimant's unavailability due to being displaced. While it is true the Agreement permits up to 48 hours for the purpose of exercising seniority without losing exercise rights, it does not excuse voluntary unavailability for attendance purposes. If a displaced employee can immediately exercise seniority against a junior employee to avoid losing work time, the employee makes himself voluntarily unavailable for attendance purposes if he chooses to delay his exercise of seniority.

On the record before us, the Carrier's attendance standards for the type of assignments that claimant held has not been shown to be unreasonable or unattainable for the average employee. Given these considerations, we must deny the claim.

AWARD:

The Claim is denied.

Gerald E. Wallin, Chairman
and Neutral Member

J. E. Lesniewski, "Dissenting"
Organization Member

R. D. Hiel,
Carrier Member

Date: 10-14-08

CARRIER'S EXHIBIT J
PAGE 2 OF 2