

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28479
Docket No. 48253
16-1-NRAB-00001-140283**

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

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

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Locomotive Engineers and Trainmen on the BNSF Railway Company:

It is hereby requested that Engineer A. T. Armstrong's discipline be reversed with seniority unimpaired, requesting pay for all lost time, with no offset for outside earnings, including the day(s) for investigation with restoration of full benefits and that the notation of Dismissal be removed from his personal record, resulting from the investigation held on June 17, 2013.”

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 Claimant commenced employment with the Carrier in February of 2001 as a Trainman. He became an Engineer in June of 2004 and was working in that capacity at all times relevant to the instant Claim.

In February of 2011, the Claimant suffered an injury (a kidney stone which perforated his urethra) which caused him to take a leave of absence in March and which caused him to be absent at times throughout the year. In October of 2011, the Claimant was coached and counseled concerning his “low performance” in September of 2011, in which he worked only 54 percent of the average time his peers worked. The Claimant was identified under the Carrier’s Low Performance Review Process (“LPRP”), which identifies employees who sharp shoot or game the system by laying off at strategic times in order to avoid accepting assignments. The Claimant had engaged in a pattern of timed mark-offs which reduced the necessity to actually report for work. The counselling instructed the Claimant to improve his performance or face discipline. A follow-on letter instructed him to better manage his performance to improve his attendance to a full-time level. It warned him that failure to comply with the instructions would be a Level S violation under the Carrier’s Policy for Employee Performance Accountability (PEPA).

Claimant’s attendance thereafter was marked by a Level S 30-day record suspension with a three-year review period issued on August of 2012 for violations of the same instructions as the October 2011 coaching and counseling. In January of 2013, during the pendency of the review period, the Claimant worked zero hours on the Galveston, Texas pool freight job to which he was assigned. The Claimant would ride the pool until he was first or second out, then lay off sick. That occurred eight times during the month. The evidence establishes that during this period, the Claimant was suffering from a Major Depressive Disorder which contributed to his absenteeism. However, he failed during that period to take action, e.g. application for Family Medical Leave Act (FMLA), or for a leave of absence which might have protected his absences and avoided discipline.

The Carrier convened an Investigation at which the foregoing evidence was adduced. During the pendency of the Investigation, the Claimant contacted the Employee Assistance Program, which referred him to a psychiatrist, who caused him to be hospitalized for nine weeks. Notwithstanding the reason for the Claimant’s low hours, but based on the fact that this was the Claimant’s second such Level S offense under PEPA, the Carrier dismissed him from service. The Organization protested the Carrier’s action, which the Carrier denied. The Organization appealed the Claim in

the usual manner up to and including the highest designated official, but without resolution. The matter was referred to the Board for resolution.

The positions of the Parties were set forth in their submissions and at hearing. They are summarized as follows:

“The Carrier argues that Claimant clearly and willfully violated the LPRP by working zero hours in January of 2013; and, since the violation was his second serious violation under PEPA and he was still on probation from the first, dismissal was the appropriate penalty.”

The Carrier asserts that the Claimant timed his layoffs to avoid work, in violation of the Carrier’s expectation that he would provide full-time availability and in violation of the prior instruction and warning to him to improve his attendance and stop timing his layoffs. The Carrier points out that the Claimant’s asserted abuse of the system placed extra burdens on other employees.

The Carrier argues that the Organization’s procedural arguments that the Hearing Officer should not have been utilized because he was also a Manager of the LPRP and therefore had a stake in enforcing its terms and that he was improperly used to impose discipline, are all without merit. It asserts that none of the matters protested are proven to have denied the Claimant due process and a fair Investigation.

The Carrier urges that the Claim be denied.

The Organization argues that the Carrier failed to meet its burdens of proof. It asserts, in the first instance, that the Carrier violated the Claimant’s right to a fair and impartial Investigation. The Organization protests that the Hearing Officer was improperly designated because of his responsibilities in the LPRP process and because he also imposed the discipline. It asserts that he had a strong interest in ensuring that the Claimant was found guilty and had therefore prejudged him. It also maintains that someone other than the Hearing Officer should have reviewed the transcript and determined the discipline.

The Organization argues that the previous coaching and counselling session was non-disciplinary and pro forma, constituting an insufficient basis to justify the Claimant’s termination after 16 intervening months without attendance or LPRP

violations. Its arguments do not address the Claimant's August 2012 30-day record suspension.

The Organization also protests that the Carrier based its disciplinary determination on numbers alone, without consideration of the reasons for the absences, which has been found to be insufficient. It contends that the circumstances of the charges and hearing establish an unjust system, calculated to produce a guilty verdict.

The Organization argues with respect to the merits that the Carrier failed to prove the Claimant's violations of the Rules charged. The Organization also asserts that the Carrier published Attendance Guidelines, which provides for four-step progressive discipline. It asserts that the Carrier unilaterally and unreasonably changed the LPRP, providing now that a violation of that process is a violation of PEPA and subjecting an offending employee to termination for a second such violation and to a three-year review (probationary) period. The Organization protests that the Carrier's changes in its discipline penalties are unreasonable.

The Organization argues that, although characterized by the Carrier as a "failure to follow instructions," the Claimant's violation is, in fact, an attendance violation, for which termination for a second offense is improper. Moreover, contends the Organization, the Carrier acted in violation of its own assurances that the Carrier's policies regarding attendance would not be applied in a wooden or rigid fashion.

The Organization also maintains that the Carrier's comparison of the Claimant with his peers fails to take into account that the Claimant, unlike his peers, was suffering from a dangerous medical condition – a Major Depressive Disorder- of which the Carrier was aware and which later caused the Claimant to spend nine weeks in the hospital. It maintains that the Claimant's medical condition interfered with his ability to request a leave of absence or take other steps to avoid discipline; only the threat of losing his job prompted him to get help. It asserts that the Carrier improperly ignores that evidence of record, thereby denying the Claimant opportunity to be rehabilitated prior to terminating him. The Organization contends that mental conditions are progressive but subject to correction. The Carrier's course of action and application of its own policies are unreasonable and cannot be upheld, it maintains.

The Organization argues that the discipline was not commensurate with the alleged offense, particularly considering the Claimant's length of service. It asserts that his reinstatement, with an award of wages and benefits lost, with no offset for outside earnings, to cover the period of his absence, is appropriate.

The Organization urges that the Claim be sustained as written.

It was the burden of the Carrier to prove, by substantial evidence considered on the record as a whole, that the Claimant violated the instructions given to him pursuant to the LPRP, as charged, and that the penalty of dismissal was appropriate. The Board is persuaded that the Carrier carried its burden to prove Claimant's violation of the Process, but that the penalty of dismissal was excessive. The Claim is sustained in part and denied in part.

The Carrier operates on schedules. It is entitled to employees who are able to work on a reasonably full time basis and to counsel and discipline employees who are not able to do so for reasons which are not contractually or statutorily protected. It has the right to promulgate and enforce reasonable attendance policies and guidelines to promote that result. LPRP is an initiative to ensure that employees are not allowed to escape their attendance obligations by sharp shooting or gaming the system. The process has been upheld in the face of challenges to it. See, e.g., Public Law Board No. 6721, Case 121. **However, while the unilateral LPRP is instructive as to the Carrier's expectations, it is not a substitute for just cause and must be applied in a reasonable manner.**

The Board is persuaded that the Carrier in this case applied LPRP in a reasonable manner. The conduct for which the Claimant was disciplined is not absenteeism, but is, instead, the intentional manipulation of the system to avoid work. Here, the Claimant was instructed what was expected of him and notice of the consequences of any future violation. However, the Claimant's manipulation of the scheduling system continued, leading to a further LPRP violation, for which he was issued a 30-day record suspension and three-year review period. The record establishes that the Carrier raised and preserved the August 2012 record suspension in its on-property handling of the case. The Carrier's termination after that second Level S violation satisfied the Carrier's obligation to apply LPRP in a reasonable manner.

The Board is not persuaded that classifying the Claimant's violation as a "failure to follow instructions," thereby making it a Level S violation under PEPA, rather than as an attendance violation, subverts the intent of the attendance policy and of PEPA. As indicated, the instruction to the Claimant was simply to cease gaming the system and avoid pattern absences. Those instructions were unavailing, as witnessed by his August 2012 violation. The second Level S within the review period from the first gave the Carrier authorization under PEPA to terminate the Claimant's employment.

That having been said, the evidence persuades the Board that the Claimant was suffering in January of 2013 from Major Depression and that the Carrier was aware of that condition prior to dismissing him. The condition interfered with the Claimant's ability to function, including his ability to take steps to avoid discipline. He took action to treat his medical condition after having been charged but before he was terminated. The Board concludes that the Carrier failed to apply LPRP to the Claimant in a reasonable and appropriate way by ignoring the apparent cause of the Claimant's failures to meet his LPRP obligations.

The Claim will be sustained in part. Based on the cause of the Claimant's violations, the Board concludes that, while he violated LPRP, the penalty of termination was excessive. His termination shall be rescinded and he shall be reinstated to service, with seniority unimpaired, but shall not receive wages and benefits lost as a result of his termination.

The Board's conclusions with respect to the Claim also respond to and subsume the procedural challenges to the discipline. They are not separately addressed.

Claimant's reinstatement is not an endorsement of his pattern of attendance. Indeed, the best predictor of an employee's future attendance is his past attendance. If the Claimant continues his prior patterns, without contractual or statutory protections, he will certainly be terminated again, with far less likelihood of obtaining reinstatement.

The Board, after consideration of the dispute identified above, hereby orders that an Award partly favorable to Claimant be made. Claimant's termination shall be rescinded and he shall be returned to service, with seniority unimpaired but without pay or benefits for the period he was out of service. The period of Claimant's absence in which he was not medically fit shall be treated as an unpaid leave of absence. The

period, if any, after he became medically fit and until his reinstatement shall be an unpaid, time-served disciplinary suspension. His records shall be amended to reflect this Order. Claimant's reinstatement to service is subject to his taking and passing a medical examination to ensure that he is fit for duty. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the Parties.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division**

Dated at Chicago, Illinois, this 20th day of December 2016.