Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 28510
Docket No. 48259
16-1-NRAB-00001-140289

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

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

STATEMENT OF CLAIM:

> **"It is hereby requested that Engineer M. A. McCalister'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 July 31, 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 was first employed by the Carrier on August 28, 2000. He began as a Trainman and became an Engineer in January 2004. He was employed in such service at the time of the incident at issue herein.

In May 2013, the Claimant was working in unassigned service at Fort Madison, Iowa. The next month, the Transportation Process specialist ("TPS") team identified the Claimant as an employee who was not performing a comparable amount of service in comparison to his peers. The Claimant had previously met with Carrier Officers, on June 19, 2012, was "coached and counseled" regarding his Low Performance during May 2012 and was instructed that his working performance needed to improve. By a letter dated June 20, 2012, the Claimant was told that he only worked 92.1 hours in May 2012, had not met the expectations of full-time employment and had maximized his unavailable time by maximizing time off and minimizing work opportunities. He was also informed that his failure to comply with the letter's instructions would be considered a Level S violation under the Carrier's Policy and a violation of the Rules.

In June 2013, the Claimant was again identified by the TPS team as an employee who was not performing an amount of service comparable as his peers. The Claimant worked 98.5 hours in May 2013, as compared to other employees at Fort Madison who averaged 174.4 hours, a slightly higher percentage than his May, 2012 hours.

The Carrier scheduled an Investigation at which the foregoing evidence was adduced and, based thereon, the Claimant was found in violation of Carrier Rules 1.13 (Reporting and Complying with Instructions), 1.15 (Reporting or Absence) and 1.6 (Conduct - Indifference to Duty) and dismissed from service. The Organization protested the discipline, which the Carrier denied. The Organization appealed the discipline in the usual manner, up through and including the Carrier's highest designated official, but without resolution. The dispute was referred to the Board for adjudication.

The Carrier argues that it met its burden to prove the Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the evidence presented at the Investigation made it clear that the Claimant violated its Rules. It maintains that the Claimant failed to comply with instructions and demonstrated indifference to duty in the form of failure to perform as a full-time employee.

The Carrier maintains, citing numerous Boards of Arbitration that the Claimant failed to fulfill its reasonable expectations of a full-time employee, subjecting him to discipline for Low Performance. It contends that the Claimant was warned in June 2012, that his working/layoff calendar revealed a pattern of timing layoffs in

order to maximize time off, thereby minimizing the work he performed. It asserts that the Claimant's May 2013 working/layoff calendar, as demonstrated at the Investigation, revealed that the Claimant had continued that pattern.

The Carrier maintains that the Claimant had been instructed to improve to that of his peers but that it is clear that he did not, directly violating Rule 1.13. The Carrier contends that Claimant was hired for full-time employment, but that he only worked 98.5 hours in May 2013, thus failing to protect his full-time position and proving that he violated Rule 1.15, which clearly states that this type of failure will be cause for dismissal. It asserts, in addition, that the Claimant ignored instructions, both written and verbal, and timed his layoffs to avoid work, demonstrating an indifference to duty and directly violating Rule 1.6.

The Carrier maintains that the Organization's arguments – both procedural and on the merits – are without merit. It contends that the fact that the Hearing Officer performed multiple roles was not improper, since he was not involved in the identification process for Low Performance. The Carrier asserts, in addition, that there is broad arbitral support for witnesses – such as the Transportation Manager – testifying via telephone, so long as the Claimant does not suffer prejudice, which he did not. It maintains that there is no contractual provision that requires information to be shared prior to the Investigation, that the records introduced were prepared in the normal course of business and, thus, supporting documentation for them was not necessary, that the Transportation Manager answered all questions about the data, the process and anything else relating to the Claimant's low performance and, finally, that the Hearing Officer was fair, impartial and conducted himself appropriately.

As to the merits, BNSF contends that Fort Madison did not constitute a skewed work environment and that, although the Claimant cannot count the hours worked by his peers as they were worked, he certainly could have stopped chaining layoffs or strategically moving to avoid work. It asserts, moreover, that working slightly more hours than when he was first coached and counseled does not mean that he "improved," especially because his coaching and counseling included instructions to improve to be more in line with his peers and provide full-time availability, which did not occur. The Carrier maintains that, even if the Claimant was absent due to his being sick on some occasions, he was unavailable in such a way that he avoided work and, in any case, there is arbitral precedent that sickness, even for a bona fide reason, can be excessive. It contends, as well, that the Claimant used the "foot-of the-board" option on several occasions attached to marking off sick, which allowed him to miss

even more work. The Carrier concedes that the Claimant may use contractually and authorized absences, but argues that does not prevent it from requiring full-time availability. It asserts, as well, that the Attendance Guidelines specifically state that means, other than bunching of days, to ensure full-time employment may be pursued and that discipline for low performance is necessary and appropriate when it is obvious employees are gaming the system.

Finally, as to the level of discipline, BNSF argues that the violation was serious and that the discipline was not excessive. It maintains that, based on the Claimant's record, dismissal was appropriate.

The Carrier urges that the Claim be denied and the Claimant's dismissal upheld.

The Organization argues that the Claimant was not afforded a fair and impartial Investigation. It contends, in addition, that the Carrier failed to prove that the Claimant violated the Rules for which he was charged.

As to procedure, the Organization argues that the Hearing Officer improperly performed multiple roles, playing an integral part in the Low Performance Review Process, in addition to acting as the Hearing Officer and issuing the discipline. It asserts that it is inherently unfair that the same Carrier Officer under whom data is produced should act as the Hearing Officer and issue the discipline because that person has a vested interest in seeing that employees who are charged under the program are ultimately disciplined. The Organization maintains, in addition, that, although each coaching and counseling session is varied and unique, the letters on which discipline is premised are identical except for the dates and names. It contends, in addition, that the Claimant testified that he never received that letter but that, even if he had, there is no avenue for appealing the "lifetime" probationary period that is assessed as a result of this "counseling." The Organization asserts, as well, that its request for documents to be used at the Investigation was not answered and, when the documents were presented during the Investigation, it only received a recess of 10-20 minutes to examine them which was not enough, that its request for the underlying information used to compile the Performance Report was rejected, and that the Hearing Officer ignored the Claimant's evidence.

As to the merits, the Organization maintains that, although the Carrier based the Claimant's discipline on eight absences that occurred in May 2013, he was ill and

unable to work on each occasion and, if the Carrier had any doubts about the veracity of his assertions of illness, it could have required him to provide documentation, which it did not do. It contends that the Parties have a long history of not dealing with sickness as a disciplinary matter and the Carrier's Attendance Policy requires that managers consider *all relevant information* and to refrain from acting in a wooden or rigid manner when determining whether a violation has occurred.

The Organization asserts, as well, that the use of a "shop average" or "peer comparison" to gauge an employee's attendance is especially inappropriate. It points out that it is not possible for one employee to track the hours worked by other employees in the pool. It points out, in addition, that the Claimant was advised in June 2012, that he should improve his performance and that he subsequently did just that, working more hours than he had worked during the so-called "benchmark" month. It maintains that the Carrier cannot set a benchmark and then discipline an employee after he exceeds that expectation.

Finally, the Organization argues that, even if some discipline is appropriate, dismissal is not commensurate with the alleged offense, especially considering the Claimant's years of service. It contends that, given the circumstances, dismissal is arbitrary and harsh.

The Organization urges that the Claim be sustained and the penalty revoked.

It was the burden of the Carrier to prove the Claimant's violation of the Rule cited by substantial evidence considered on the record as a whole, to establish the appropriateness of the penalty of dismissal and to establish, when challenged, that it provided the Claimant with due process and a fair Investigation. The evidence does not support the Claimant's dismissal.

The Carrier operates on demanding schedules. It is entitled to full-time availability from employees holding full-time jobs, less statutory and contractual entitlements and a reasonable number of other, non-scheduled absences. The Carrier is entitled to subject employees who do not meet its Attendance Guidelines to counselling and, if that is not successful, to progressive discipline. Employees who game the system, minimizing exposure under the Guidelines, but working to where their attendance falls far below their peers can nevertheless be subject to counselling and discipline based on significant disparities between their hours worked and those of

their peers. Discipline based on such Low Performance has been sustained in a number of awards involving the Carrier.

However, in such situations employees are entitled to be advised in advance as to the standard of attendance to which they are to be held and, where the discipline is based on a comparison of average hours, to be made aware of the average. Indeed, prior Awards upholding discipline for Low Performance have involved employees whose low work hours are extreme and unreasonable on their face (e.g. lowest hours on the pool). Those Awards have included cautions as to the ability of the Carrier to rely solely on comparative hours as a basis for discipline less extreme.

Moreover, it is also basic to due process and a fair hearing that a Claimant and the Organization are entitled to examine and understand the Carrier's evidence. In this situation, the Carrier refused to provide its evidence to the Organization in advance of the hearing and, when it did provide reports at the hearing, presented detailed and voluminous data about the Claimant and the employees to whom he was being compared, but the Hearing Officer gave the Organization no more than 20 minutes to examine the data. The Carrier has a sophisticated team to compile and analyze the data, but gave the Organization time for only a perfunctory review. That does not meet the Carrier's obligations. The Board notes that the Hearing Officer was the official in charge of the program which was applied to trigger the discipline. The premise that the hearing officer had no stake in the program and could be fair and impartial in its application does not pass muster. The refusal to provide the data in advance or sufficient time to examine it exemplifies the problem.

Moreover, the Low Performance assessment is a unilateral program. While it serves legitimate purposes, it is not a substitute for just cause. The determination of just cause requires consideration of mitigating circumstances – such as absence caused by illness – as well as ensuring that employees are reasonably aware of the standards against which they are to be judged. The discipline assessed against the Claimant does not meet those tests.

All of this is not to say that the principle of ensuring reasonable full-time availability from employees and disciplining those who game the system to evade their obligations is not sound. It is to say that the Carrier may not short-cut its obligations – as described herein – to get there.

Claimant's dismissal shall be rescinded and expunged. He shall be reinstated to service and made whole for wages and benefits lost during the period he was off the rolls.

AWARD

Claim sustained.

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 12th day of January 2017.