

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28513
Docket No. 48262
16-1-NRAB-00001-140292**

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 Engineer and Trainmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“It is hereby requested that Engineer M. B. Ferra'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 September 10, 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 June 28, 1993. He began as a Brakeman. He became an Engineer in April 1994 and was employed in such service at the time of the incident at issue herein.

Claimant is subject to the Carrier's Attendance Guidelines, which require employees to be regular in attendance and set maximum allowable weekday and weekend thresholds for laying off. For the three-month rolling period May, June and July 2013, the Claimant, while working a five-day assignment had an established layoff threshold of three "any" days. However, during the May-July 2013, time frame, the Claimant used unpaid layoffs on a total of 6.0 week days, placing him 3.0 days over his layoff threshold.

The Carrier scheduled an Investigation at which the foregoing evidence was adduced and, based thereon, dismissed the Claimant for violating Rules 1.3.3 (Circulars, Instructions, and Notices) and 1.4 (Carrying out Rules and Reporting Violations, General Notice 37 and the Attendance Guidelines. 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 violation of the Rules and the appropriateness of the penalty. It asserts that the evidence presented at the Investigation make it clear that the Claimant failed to comply with the Attendance Guidelines and, therefore, violated its Rules. The Carrier urges that the penalty of dismissal was appropriate to the violations.

The Carrier maintains that the Claimant violated Train Yard Engine Attendance Guidelines for the three-month rolling period of May, June and July 2013. It contends that the Claimant's 6.0 "any" days placed him 3.0 days over his layoff threshold. It asserts that, had the Claimant not randomly laid off three times before his alleged illness starting July 15 for which he produced doctor's excuses, he would have had the days to take and not violated the Attendance Guidelines. It points out that there is no documentation supporting any reason for the Claimant's taking those first three days.

As to the Organization's argument that the Claimant's medical issues, on top of the care which he was providing for his mother, created an unavoidable situation and, therefore, his absences should be excused, the Carrier maintains that it is without merit. It contends that the Claimant had been extended leniency several times and that the Claimant did not bring up his claim of illness until after the three-month period ended. The Carrier asserts that the Organization is, in essence, requesting that

this Board grant the Claimant leniency again but that it is undisputed that leniency is a management prerogative. It maintains that the record demonstrates that the Carrier worked with the Claimant in the past but that he failed to correct his absenteeism despite numerous opportunities to do so. It contends that the Claimant has an atrocious attendance record and has struggled with providing full-time service since 2003.

As to the penalty, the Carrier argues that, prior to the instant Investigation, the Claimant had been disciplined nine times for attendance-related violations. It points out that the Claimant signed a waiver for a formal reprimand in May 2012, that he signed a waiver for a 10-day record suspension in November 2012 and that he signed a 20-day waiver in February 2013, all for violation of the Attendance Guidelines. BNSF asserts that, because this was the Claimant's fourth active attendance violation, he stood for dismissal.

The Carrier urges that the Claim be denied and the Claimant's dismissal upheld. It maintains that, in the unlikely event that the Board determines otherwise, any award for lost wages should be offset with outside earnings and job insurance payments.

The Organization argues that the Carrier's Policy, as implemented in the instant matter, does not meet the test of reasonableness. It contends that the Carrier applied the policy mechanistically without considering the Claimant's individual circumstances and that this violates the language of the Policy. It asserts that the Carrier was required to excuse the Claimant's absences in mid-July, when he was off sick for three days, because he provided documentation to validate his illness for the period and he was following the treatment plan laid out by his physician.

The Organization maintains that the Claimant used his threshold layoff time for exactly what it was meant to be used, being off for two days dealing with family-related illness and one day for his own illness. It contends that the Claimant had no possible way of knowing that he was going to fall ill after using the threshold time allowed under the Attendance Guidelines. It asserts that, since the Claimant provided medical documentation for his illness, the Carrier knew both of the illness and his need to miss work. It maintains, citing a prior Award, that the Carrier would not expect the Claimant to be in attendance at work while ill and should not dismiss him from service for being absent.

The Organization asserts that the Carrier failed to prove just cause for its action and urges that the Claim be sustained as written. It contends that the Claimant's backpay award should not be reduced based on any outside income, arguing that the common law of damages shows that damages should be based on the compensable loss that the Claimant suffered and should not be mitigated.

It was the burden of the Carrier to prove the Claimant's violation of the Rules charged by substantial evidence considered on the record as a whole and to establish the appropriateness of the penalty of dismissal. For the reasons which follow, the Board concludes that the Carrier proved the violations but that the evidence falls short of establishing the appropriateness of the penalty.

It is well established that the Carrier is entitled to have its employees available on a reasonably full-time basis, less absences which are contractually or statutorily allowed and a reasonable number of allowed, unexcused absences. Although not a substitute for just cause, the Attendance Guidelines provide a legitimate way for the Carrier to monitor and enforce attendance. Employees who do not meet the guidelines are subject to progressive discipline, up to and including dismissal.

In the instant case, the evidence establishes the Claimant's unscheduled, unpaid absences in excess of the number allowed during the three-month period. However, the Carrier was obligated to consider Claimant's mitigating circumstances: the role of the Claimant's illness in his violation of the Guidelines. Moreover, the Claimant was entitled to the benefit of progressive discipline and clear warning before the carrier assessed the most severe penalty of dismissal. The evidence is that the Claimant's last, pre-termination discipline was a 20-day waiver in 2013. To be sure, the Board notes that the Claimant had attendance problems over an extended period of time, which reduces the positive impact of his length of service. Ultimately, the Board is not persuaded that the Claimant's dismissal should stand or that reduction of the penalty contributes an exercise of leniency.

The Carrier shall rescind the Claimant's dismissal and reinstate him to service, but without backpay and benefits for the period of his absence, the period being deemed a time-served suspension. The Award so reflects.

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 12th day of January 2017.