

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 29706
Docket No. 49492
19-1- NRAB-00001-180236**

The First Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

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

STATEMENT OF CLAIM:

“It is hereby requested that Engineer N. D. Gomez’s discipline be reversed with seniority unimpaired, requesting pay for all lost time, with no offset for outside earnings, including the days(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 October 4, 2016.”

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 on July 5, 1994 as a Trainman. He was subsequently promoted to Engineer in May 1997. The Claimant was the regularly assigned Engineer on the Y-WIC1011-20A with an on-duty time of 06:30 hours. On September 20, 2016, the Claimant was to report for duty at 06:30 hours to begin his

regular shift. The Claimant realized he would be late and made one attempt to contact the Sand Creek Office, but no one answered and there was no voice mail to leave a message. The Claimant did not call the crew office where calls are automatically logged into the system. The Claimant then stated that he texted his Foreman. Since the Claimant had not reported, the Carrier showed the Claimant as a no-show and called another Engineer to work. The Claimant arrived on property at 07:00 hours. The Claimant was 30 minutes late. The Claimant explained that his wife, who is an RN at a nursing home, had an emergency at work. She was late returning home and he could not leave the children home alone.

The Carrier issued a Notice of Investigation letter dated September 13, 2016, which stated as follows:

“...for the purpose of ascertaining the facts and determining your responsibility, if any in connection with your alleged violation of the BNSF Attendance Guidelines specifically, absence from duty in excess of the Attendance Guidelines for the three-month period ending August 2016...”

After some postponement, the Investigation was held on October 4, 2016. Following the Investigation, the Claimant received a Discipline Notice dated October 27, 2016, finding a violation of GCOR 1.15 Duty-Reporting or Absence and GCOR 1.6 Conduct. The Organization appealed the Carrier’s decision by letter dated November 17, 2016 and the Carrier denied the same on December 1, 2016. The Organization advanced the claim to the Highest Designated Officer by letter dated January 27, 2017, and the same was denied on March 23, 2017. A formal conference was held with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property and considered evidence related to the following to make its determination of this claim:

- 1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?

- 2) If so, did the Carrier establish by substantial evidence that the Claimant was culpable of the charged misconduct or dereliction of duty?
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?

The Carrier contends that the Claimant was afforded a fair and impartial Investigation. The Hearing Officer only had two roles: conducting the hearing and issuing the decision. The Carrier asserts that the Claimant was not prejudiced by having two other Investigations on the same day. The Carrier contends that employees are required to report to work as scheduled, and by not reporting to work, the Carrier's ability to switch customer's traffic was impacted. Additional costs were also incurred when the Carrier had to call someone else to fill his position. The Carrier asserts that the Claimant failed to protect his assignment and was absent without authority. Based thereon, the Carrier has met its burden of proof that the Claimant violated the rules. Moreover, the Carrier contends that the discipline was commensurate with the nature of the offense. The Claimant has a long history of attendance violations. The Claimant had seven rule violations in fewer than 12 months. The Carrier's review of his record for assessment of discipline indicated that the Claimant had incurred 15 separate violations (six of which were through waivers) in the assessment of discipline. Further, the Carrier argues that the Claimant's medical documentation was not timely submitted. It is the position of the Carrier that the claim should be denied.

The Organization contends that the Claimant was not afforded a fair and impartial Investigation. The Organization contends that there was no evidence that his tardiness resulted in any delay to the job or delay in servicing the Carrier's customers. Moreover, the Organization contends that the discipline assessed was unwarranted and the Carrier failed to recognize the mitigating circumstances which caused the Claimant to be late to work. The Claimant has 22 years of service with the Carrier. The Organization further contends that the Claimant explained that his tardiness was due to his wife was getting home late from an emergency at work, and he could not leave the children home alone. The Claimant also reported that his oldest son had committed suicide after returning from Afghanistan, his younger son attempted suicide 35 days prior to the Investigation and was currently hospitalized. The Claimant

himself was diagnosed with post-traumatic stress disorder. It is the position of the Organization that the claim should be sustained.

The Carrier charged the Claimant with violation of GCOR 1.15 and GCOR 1.6 which read:

“GCOR 1.15:

Duty - Reporting or Absence

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal.

Rule 1.6 Conduct:

Employees must not be:

1. Careless of the safety of themselves or others.
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- Or
7. Discourteous

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.”

The Board has reviewed the record, and finds no material procedural error in this case. A review of GCOR 1.:15 Duty Reporting or Absence does not regulate by rule tardiness; the rule simply states that “employees must report for duty at the designated time and place with the necessary equipment to perform their duties.” It is not disputed that the Claimant was tardy for his regular shift. The Board finds that the Claimant violated GCOR 1.15.

Tardiness does occur in the workplace and when it does, the employee must be responsible to report the same in a timely manner. Here, the Claimant made one phone call with no answer, and then texted his Foreman. The Carrier argues that the Claimant did not produce any verification of the contact. Yet, the record reflects that the Hearing Officer did not ask but simply moved on to a new line of questioning regarding Rule examination. The Hearing Officer is a fact finder. The Carrier could have elicited more testimony through examination or rebuttal to refute this fact, and they did not.

The Board finds that there is insufficient evidence to establish a violation of Rule 1.6. The evidence of record establishes that the Claimant made a good faith effort to protect his assignment.

The Carrier argues that the discipline was assessed in accordance with the PEPA policy and did not consider the medical documentation submitted by the Claimant because it was untimely submitted. The Board finds that the nature of these proceedings is to gather all the facts which would include circumstances explaining his absenteeism to determine his responsibility. Thus, the Board finds that the penalty is excessively harsh in consideration that the Claimant made a proper attempt to report his tardiness. In consideration of the totality of the circumstances, and the 22-year tenure of the Claimant, as well as his discipline record, the penalty is modified to a time-served suspension.

AWARD

Claim sustained in accordance with the Findings.

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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 17th day of June 2019.