

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 29707
Docket No. 49493
19-1- NRAB-00001-180237

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 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 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. The Claimant was assigned and working as an Engineer on the Wichita yard job. The Carrier reviewed the Claimant’s attendance for June, July, and August of 2016. During the period of review, the Claimant was working in assigned service, a regularly scheduled yard job. The Claimant had been previously disciplined for the period of April to June 2016 for

attendance. As such, June layoffs were not counted for the period ending in August. However, the Claimant was allowed the full three-month threshold. The Claimant had earned a threshold of two any day, and the Claimant absented himself four weekdays.

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, 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 27, 2016. Following the Investigation, the Claimant received a Discipline Notice dated October 27, 2016 finding a violation of GCOR 1.13 Reporting and Complying with Instructions and GN System No. 113. The Claimant was dismissed. 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 25, 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's role was limited to conducting the Investigation and assessing the discipline. The notice of the Investigation was issued by the Director of Administration. The three Investigations were held on the same day due to the request for the Organization for postponement. The Carrier contends that that administrative LOA occurred in June of 2016, so it was not applicable in the review period. The Carrier asserts that the Claimant's record reveals a history of attendance violations prior to his personal situation. The Carrier further contends that the evidence supports a finding of the cited rules. The Claimant had earned a threshold of two any day, and the Claimant absented himself four weekdays. The Claimant exceeded his allowable threshold by two days. 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 Carrier asserts that this is the Claimant's fifth violation event in less than 12 months. The dismissal is appropriate in accordance with the Carrier's attendance policy. It is the position of the Carrier that the claim should be denied.

The Organization contends that the Claimant was denied a fair and impartial Investigation because the Hearing Officer assumed multiple roles in the organization. The Organization contends that by holding multiple Investigations within a short period of time, the Carrier is stacking discipline in an effort to support the ultimate sanction of dismissal three times, and in essence denied him of the opportunity to correct his behavior. Moreover, the Organization contends that the policy has been unreasonably applied. On June 6, 2016, the Claimant worked his regular shift. The Carrier insisted that he work overtime, and the Claimant explained that had a previously scheduled meeting with the Department of Child Protective Services following his shift. The Carrier then laid the Claimant off administratively which affected his threshold. The Organization argues that the Carrier has penalized the Claimant for exercising his rights to vacation. The Claimant is a 22-year veteran who happens to suffer from mental health issues. Lastly, the Organization contends that the Carrier failed to consider relevant information regarding his layoff; the Claimant suffers from post-traumatic stress disorder due to his oldest son committing suicide after returning from combat in Afghanistan. It is the position of the Organization that the claim should be sustained.

The attendance policy of the Carrier initially recognizes that TYE employees have a legitimate expectation of reasonable opportunity to be off from work. The policy further reads that these employees share several responsibilities; one of which is to his or her job assignment on a full-time basis. The policy measures an individual's compliance over a three month rolling period. Each month of attendance is calculated independently and then combined to determine the threshold for a three month review period. The policy provides for a maximum threshold of one day per month for employees in five day assigned service. The attendance policy provides notice to employees that excluded time off, i.e., vacation, personal leave, medical leave, furlough board, and so forth, will affect the employee's threshold, but does not count as an attendance layoff. The attendance policy encourages employees to contact his or her supervisor to discuss absenteeism or other options available to address the employee's need and protect his or her assignment. The attendance policy also admonishes all managers to use "common sense" and never act in a rigid or "wooden manner" when applying the policy standard to a case. However, when a decision is made to discipline an employee, the attendance policy sets forth a progressive chart; first violation is a formal reprimand, followed by record suspensions, and maybe dismissal for the fourth occurrence. Retention periods are considered active and inactive (over twelve months without another attendance discipline incident), but are not "cleared" from an employee's record.

The attendance policy of the Carrier sets forth its expectations for its employees. Attendance is an essential function of employment. Moreover, regular and reliable level of attendance is necessary to promote the efficient operations of the Carrier. The attendance policy identifies and gives notice to the employee of those occurrences where the Carrier has determined that the absenteeism has reached a certain threshold to subject the employee to discipline. The Board finds the policy to be reasonable and communicated to the Claimant. The Claimant testified that he was familiar with the attendance policy.

The Carrier charged the Claimant with violation of the System General Notice No. 113 incorporated as is fully rewritten and Rule 1.13 Reporting and Complying with Instructions read:

**"Rule 1.13 Reporting and Complying with instructions:
Employees will report to and comply with instructions from supervisors**

who have the proper jurisdiction. Employees will comply with instructions issued by manager of various departments when the instructions apply to their duties.”

The Board has reviewed the record and finds no material procedural error in this case. The Claimant’s procedural and due process rights were not compromised by having the Hearing Officer assessing the discipline, or by the three Investigations heard on the same date.

Regular attendance at work is a legitimate job requirement. The Carrier may expect employees to be at work when required and on a regular basis. The Organization argues that the parties’ Agreement states in pertinent part that “...The Carrier will maintain a sufficient number of Engineers to permit reasonable layoff privileges and to protect vacancies, vacations, and other extended vacancies.” Equally fundamental is the concept that a contractual benefit of sick days does not isolate an employee from discipline for abusing sick leave or for being excessively absent. While an employee has the right to be absent for legitimate illness when he or she is absent, provided the employee has available sick leave accruals, the number of days taken, the pattern of the days being taken and or the circumstances of such absences may, nonetheless, warrant appropriate discipline.

The Carrier’s Attendance guidelines provide for a threshold of days off per month, and an employee who exceeds that threshold during the three-month period of review is subject to discipline. It is not disputed that the Claimant had earned a threshold of two any day, and the Claimant absented himself four weekdays exceeding the threshold by two. The Board finds that the Claimant has violated the cited rules, and the Carrier has met its burden of proof by substantial evidence.

The Claimant was disciplined for attendance for the three-month period prior to this incident. A review of his record indicates that the Claimant has a history of discipline for absenteeism. The Claimant was sufficiently notified of the Carrier's expectations and of disciplinary consequences if he did not improve his attendance. The Claimant explained that his personal and family issues were affecting his employment, and that he was now seeking treatment for his mental health issues. The attendance policy encourages employees to contact his or her supervisor to discuss absenteeism or other options available to address the employee’s need and protect his or her

assignment. What is absent from the record, other than his application and denial for FMLA, is his efforts to explore options with the company to address these concerns, especially since his various leave banks had been exhausted. When the questioned was posed by the Hearing Officer, the Claimant responded that he did speak to someone, and that someone was the Hearing Officer. This should be an awkward moment in any proceedings for a Hearing Officer, when the Hearing Officer poses relevant information related to the Investigation, and thus is a potential witness. The policy requires the manager to discuss options available to address the employee's need. The Claimant explained that he was a proud man and had difficulty expressing his personal issues in the workplace, and instead of seeking help through the EAP, he went to a private counselor. There is no information in the record of the dates when all these events were happening to measure if the Claimant took timely actions or whether this is an 11th hour response to termination and this should have been developed at the Investigation. It is not disputed that the personal family tragedies occurred.

The Board finds that the penalty is not commensurate with the offense in consideration of the facts and circumstances of this case and employment record of the Claimant due to the mitigating factors, and 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.