

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14026
Docket No. 13911
10-2-NRAB-00002-090020**

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (
(International Brotherhood of Electrical Workers
(BNSF Railway Company

STATEMENT OF CLAIM:

- “(1) That in violation of the governing Agreement, Rule 40 in particular, the BNSF Railway Company arbitrarily and unjustly dismissed Electrician Brett Beier as a result of an investigation held on March 18, 2008.**
- (2) That accordingly, and as a result of this arbitrary, unjust and excessive discipline assessed Electrician Brett Beier, the Carrier be ordered to return Electrician Beier to service immediately and further compensate Electrician Beier for all lost wages, rights, benefits and privileges which have been adversely affected as a result of the dismissal.**
- (3) That accordingly, all record of this matter be removed from Electrician Brett Beier’s personal record.”**

FINDINGS:

The Second 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.

According to the record, on April 16, 2008 Claimant B. Beier was dismissed from his position as an Electrician at the Carrier's facilities in Topeka, Kansas, following his 11th absence during the relevant review period. The Organization filed a timely claim challenging that action on May 15, 2008, progressed it in the usual fashion on the property and, following denial at the highest appeal level and discussion in conference on September 19, 2008, advanced the matter to arbitration for final and binding resolution.

The transcript of the Claimant's formal Investigation on March 18, 2008 reveals that on September 5, 2007, he had been counseled by Shop Superintendent R. Galvan regarding what Galvan characterized as excessive absenteeism. By letter of that same date Galvan informed the Claimant that as a result of his attendance record his next absence would trigger application of the Carrier's formal progressive disciplinary policy in accordance with the BNSF Mechanical Attendance Policy.

Evidence adduced at the Investigation reveals that following his September 5 session with Galvan, the Claimant generated 13 more absences, of which Galvan excused all but six. According to Supervisor of Maintenance E. J. Thomas, to whom the Claimant reported, he then took a call from Beier on Friday, February 22 (normally a work day for him) in which the Claimant indicated that he would not be reporting due to illness. Thomas testified that he did not authorize the absence. The Claimant states he had the flu on February 22 and that he had spoken with, but not visited, his doctor. He states that he described his symptoms and was told he could not be treated with antibiotics and to expect the illness to last five to six days.

On March 6, 2008, Galvan held a follow-up meeting with the Claimant, the details of which he confirmed in correspondence to Beier that day, indicating that in light of the circumstances attending some of the Claimant's absences, he had earlier adjusted downward the number of countable occurrences under the relevant policy from 54 to 7. He went on to state that since that date, however, the Claimant had recorded 13 additional events, six of which he had also excused. According to Galvan, that meant that in reality he had a total of 67 occurrences within a short period of time. Following the March 18, 2008, Investigation, the Claimant was found guilty of violating Rule A-28.14 Duty - Reporting or Absence, as well as the Mechanical Attendance Policy, and was dismissed from service on April 16, 2008.

The Carrier takes the position that although the Claimant called in on February 22 prior to the start of his shift, he was never granted permission to be away from work that day. In the face of his prior excessive absenteeism, including his 8th, 9th and 10th absences following his September 5, 2007, meeting with Galvan, he was extremely lenient in allowing 53 of the Claimant's prior occurrences to be considered "special circumstances." It is clear that the Claimant could and should have been dismissed well before February 22. Having never seen a doctor, and having never received anything in writing from a physician documenting the reasons for his absence on that date, the Claimant was plainly in violation of Rule A-28.14. The only evidence offered by the Organization in support of its position is information documenting a flu outbreak that occurred during the period the Claimant was absent from work. Significantly, however, no evidence is offered in support of the Claimant's assertion that he was sick. Additionally, the Carrier discounts the Claimant's testimony suggesting he received a telephonic diagnosis from his doctor, noting that physicians normally avoid such actions for obvious reasons of liability, and pointing out the discrepancy between the Claimant's testimony here and that given in another pending matter in which he stated that he spoke not with his physician, but with a nurse practitioner about his symptom.

Rule 26 – ABSENCE FROM WORK provides:

"An employee desiring to remain away from work will obtain permission from his supervisor. If sickness or other unavoidable cause prevents him from reporting at his regular post of duty, he will notify his supervisor as promptly as possible."

The BNSF Mechanical/P&M Attendance Policy provides that an employee may be off work seven times in a 12 month period before formal discipline is assessed. It further states, in part:

“The eighth and subsequent absences within the one year period, excluding special circumstances, will result in traditional discipline being assessed. 8th absence being a 10 day record suspension, 9th absence a 20 day record suspension, 10th absence a 30 day record suspension. The Record Suspensions will be entered into the operations test data base as a Rule 99, and the Safety Rules and General Responsibility rule number S-28.14 Duty-Reporting or Absence will be cited as the offense. Additionally, the Record Suspensions will be entered into the employee’s personal record. An eleventh (11) absence within the one year period will be considered a dismissal offense.”

Extensive documentation offered by the Organization demonstrates that the Claimant had been embroiled in civil and criminal litigation over a period of many months with his ex-wife involving domestic issues which required multiple appearances in court and with court services. Those matters contributed heavily to his unsatisfactory attendance record. Other absences during the review period were attributed to events including car troubles, taking his son to a doctor and other circumstances.

Based upon our review of the record, it seems apparent that although many of the problems requiring the Claimant to miss work were associated with a protracted marital dispute, some of which may have been eligible for treatment under the FMLA on which the Claimant was fully informed, he failed to take advantage of FMLA or the Carrier’s EAP resources despite numerous attempts at counseling by Carrier Officials. With 67 absences in a 12 month period - and leniency shown to reduce that number to 13 - followed by acknowledged failure to receive permission to miss work on February 22, there is little doubt that the Claimant’s attendance record put him in violation of Rule 26 and subject to dismissal pursuant to the BNSF Mechanical/P&M Attendance Policy.

Because the Board functions in an appellate capacity, our authority is limited in these circumstances to determining whether the record establishes arbitrariness on the part of the Carrier. We find no such evidence. Nor do we find sufficiently compelling mitigating circumstances to justify an attendance record which essentially rendered the Claimant a part-time employee. The Claimant's domestic issues appear to have been serious, and the nature of those issues seems to have been given full consideration by his Supervisors. But as with genuine illness, excessive absenteeism for legitimate reasons may always be the basis for discipline, because the employer is entitled to rely on the dependability of its employees.

The Organization's charges of Carrier delay in processing this claim have been examined, as have its assertions that Rule 39 was violated with regard to the degree of detail reflected in Galvan's denial of the claim. Both arguments are rejected as unpersuasive. For the foregoing reasons, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 3rd day of November 2010.