

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14059
Docket No. 13924
13-2-NRAB-00002-130013

The Second Division consisted of the regular members and in addition Referee Lynette A. Ross when award was rendered.

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

STATEMENT OF CLAIM:

- “1. That in violation of the controlling Agreement, Rule 35 in particular, the BNSF Railway Company, as a result of an unfair and unwarranted investigation held on January 8, 2010 at Glendive, Montana, unjustly and arbitrarily assessed Mechanical Department Electrician Jason R. Allery the ultimate discipline of being dismissed from employment from the BNSF Railway Company.
2. Accordingly, the BNSF Railway Company be ordered to promptly return Electrician Jason R. Allery to its service and to make him whole for any and all lost wages, rights, benefits and privileges which were adversely affected as a result of the unjust assessment of discipline and that all record of this matter be expunged from his personal record, all in accordance with the terms of Rule 35 of the controlling Agreement.”

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.

The instant case involves Claimant Jason R. Allery's dismissal on January 21, 2010, for allegedly failing to comply with instructions from the Carrier's Medical Director and the Carrier's Employee Assistance Program (EAP) Manager. The Claimant had approximately four and one-half years of service at the time of his dismissal.

The facts show that on July 31, 2009, the Claimant for the second time in 2009 and for the fourth time over the past two years, voluntarily sought help through the EAP as provided for in the BNSF Drug and Alcohol Policy. According to Section 9.4, of the Policy, "[e]mployees enrolling voluntarily in EAP are required to follow all specified treatment and education instructions" and "[e]mployees may be returned to service on the recommendation of the EAP Manager."

The Carrier contends that when the Claimant was enrolled in the program, he was fully informed by EAP Manager D. Reinecker that a long-term treatment program was needed and that he must successfully complete the program before he could be released to return to work. On August 6, 2009, the Claimant was admitted to Cornerstone of Recovery ("Cornerstone"), an in-patient recovery center. He completed the first stage of the program on September 8, 2009. However, on September 9, Reinecker was informed that the Claimant was refusing to continue into the next stage of the recovery program. On that date, Reinecker participated in a conference call with the Claimant and his counselor.

According to the Carrier, during the conference call Reinecker informed the Claimant that leaving treatment without completing the program in its entirety would constitute noncompliance with EAP recommendations; he would not be able to return to work; and he would cease being covered by his medical leave of absence, thereby leaving his job unprotected. Subsequently, the Claimant's counselor informed Reinecker that the Claimant had decided to leave treatment on the following day, September 10, 2009, "no matter what the consequences."

On September 11, 2009, Reinecker left a message with Glendive Shop Superintendent J. Kirby informing him that (1) the Claimant was not in compliance with EAP recommendations, (2) EAP could not release him for work, and (3) EAP could no longer support the Claimant's medical leave of absence. On September 25, 2009, Kirby sent the Claimant a certified letter informing him that the Carrier was lacking medical documentation supporting his continued absence from work. The Claimant was instructed to provide current and complete medical documentation to substantiate his continued absence from work, or in the alternative, to submit medical information showing that he was medically cleared to return to work within ten days of receipt of the letter. The Claimant was instructed to provide the medical information to T. Goetz, BNSF Manager Vocational Rehabilitation, and was provided Goetz's mailing address in Billings, Montana, and a fax number. Lastly, the letter notified the Claimant that his failure to provide the required medical information would be considered failure to comply with instructions, and forewarned him that disciplinary action would be initiated.

According to the Carrier, on October 12, 2009, the Claimant called Reinecker in order to "touch base." Reinecker urged the Claimant to carefully consider his decision to leave treatment and, based on their conversation, requested that the Claimant call him the following day to formalize and initiate an agreed-upon treatment plan. The Claimant did not contact Reinecker as requested. Subsequently, on October 22, 2009, upon being contacted by Shop Superintendent Kirby, Reinecker informed Kirby that he had had no contact with the Claimant since October 12. However, by the day's end, an understanding was reached wherein the Claimant provided assurances that he would comply with a counselor-directed treatment program with support from the Carrier's EAP. Nevertheless, as of November 2, 2009, the Claimant had failed to follow Reinecker's recommendations and the Carrier informed the Claimant that his medical leave of absence was cancelled.

Meanwhile, on October 24, 2009, the Carrier issued the Claimant a letter directing him to report for a formal Investigation on November 2, 2009, for the purpose of determining the facts and the Claimant's responsibility, if any, for his alleged failure to report for duty and his alleged extended unauthorized absence during the period of September 26 through October 21, 2009. The Investigation was postponed by mutual agreement and was subsequently conducted on January 8, 2010. By letter dated January 21, 2010, the Carrier informed the Claimant that he was

dismissed for failing to comply with Rule S-28.13, Reporting and Complying with Instructions, of the governing Mechanical Safety Rules and Policies.

The Organization promptly appealed the Carrier's disciplinary action and the parties ultimately conducted an on-property conference regarding the matter. The parties were unable to resolve the dispute. The case is now properly before the Board for final and binding adjudication on the merits.

The Board carefully reviewed the record. We find substantial evidence in support of the charge and the Claimant's violation of Rule S-28.13. The record shows that the Claimant was given ample opportunity to complete the multi-step program developed for him by Cornerstone. The Claimant referred himself to the EAP and, consequently, was required to comply with the above-quoted provisions of Section 9.4, of the Carrier's Policy. The Claimant was given multiple opportunities to comply with the care provisions of the Cornerstone program but, as EAP Manager Reinecker determined on November 2, 2009, the Claimant ultimately failed to do so.

By the Claimant's own admission, he elected to leave the treatment program developed for him by his counselor at Cornerstone. Despite having assured Reinecker on October 12, 2009, that he would contact Cornerstone, talk to his counselor and resume his medical program, he failed to follow through with those commitments. As a result, Reinecker and Goetz determined that the Claimant had failed to conduct himself in a manner that would allow the Carrier to consider his employability or reestablish his medical leave of absence. Based on the testimony and evidence of record, the Board concludes that the Carrier's finding as to the Claimant's guilt of the charge of failing to follow instructions in violation of Rule S-28.13 was proven by substantial evidence.

As to the quantum of discipline imposed by the Carrier, the Board finds that the Claimant's dismissal was warranted. As a result of his failure to complete the program developed for him by his counselor at Cornerstone, the Claimant forfeited his medical leave of absence and could not be deemed medically qualified for service. The Claimant placed himself in the situation where his ability to remain an employee of the Carrier, whether in active service or on a medical leave of absence, ceased to be an option.

Therefore, the Board rules that the Carrier did not abuse its discretion by dismissing the Claimant following the Investigation held on January 8, 2010. Because the discipline assessed was neither arbitrary nor capricious, the Board will not disturb the Carrier's dismissal action.

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 26th day of November 2013.