

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

**Award No. 14109  
Docket No. 13999  
14-2-NRAB-00002-140030**

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

**PARTIES TO DISPUTE:** ( **(Brotherhood Railway Carmen-Division of TCU/IAMAW  
(BNSF Railway Company**

**STATEMENT OF CLAIM:**

- “1. That the BNSF Railway Company violated the terms of the current agreement, in particular Rule 35, when on March 4, 2013, the Carrier issued a standard formal reprimand and a one (1) year review period to Carman Jered Messerly for alleged excessive absenteeism on December 22, 2012.**
- 2. That accordingly, the Carrier be ordered to remove the reprimand and all record of this discipline from Claimant’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.

As background, on March 1, 2012, the Carrier put into effect its Mechanical Attendance Guidelines in an effort to manage employee attendance. The guidelines state, in part, that “absenteeism is excessive when an individual’s incident of

absenteeism affects our ability to efficiently run business or impacts performance of his/her work group.” In determining what constitutes an absenteeism incident, the guidelines specifically state that absences due to medical leave, vacation, holidays, bereavement leave, paid military leave, paid personal leave and jury duty are typically recognized as excusable, and not as “incidents” in evaluating employee absenteeism. The Carrier states it does not monitor each employee’s attendance on an individual basis and that “employees are responsible for their attendance.” The Carrier further states that its first knowledge that an employee may have reached a threshold of excessive absenteeism is when bi-monthly attendance reports are generated at the end of each pay period, at which time a Carrier Officer makes a determination whether an employee has been excessively absent based on the number of incidents of “non-recognized absences” during a “rolling 12-month review period.”

The Claimant was assigned as a Carman at the Carrier’s facility in Havre, Montana, and was assessed a formal reprimand and a one-year review period following a formal Investigation in connection with the following:

“ . . . your alleged excessive absenteeism on December 22, 2012, while assigned as a Carman at Havre, Montana. Consistent with the terms of the Mechanical Attendance Guidelines, all or part of your entire attendance report for the preceding 12 month rolling period, in addition to the foregoing dates, may be reviewed at the investigation. The date BNSF received first knowledge of this alleged violation is January 4, 2013.”

Preliminarily, the Board will address two procedural issues raised by the Organization. First, the Organization’s contends that the proceedings were fatally flawed based on its position that the Carrier failed to schedule the Investigation within the time limits prescribed in Rule 35 of the controlling Agreement, which reads, in part, as follows:

“ . . . Such investigation shall be set promptly to be held not later than twenty (20) days from the date of the occurrence, except that personal conduct cases will be subject to the twenty (20) day limit from the date information is obtained by an officer of the Carrier and except as provided in (b) hereof . . . .”

It is the Organization's position that the "date of the occurrence" was December 22, 2012 – the date that the Claimant left a voicemail indicating that he would not be reporting for his Assignment – and that the Carrier was required to schedule the Investigation to begin within 20 days of that date. The Organization contends that the Carrier's original scheduling of the Investigation for January 23, 2013, was beyond the 20-day time limit as set forth in Rule 35. Contrariwise, the Carrier asserts that its first knowledge that the Claimant's absences had become excessive was on January 4, 2013, when the Carrier reviewed bi-monthly reports of the Claimant's number of incidents of absences during a "rolling 12-month review period." Accordingly, the Carrier concludes that its initial scheduling of the formal Investigation was within the mandated time limits of Rule 35 of the Agreement.

The Board finds that the "occurrence" giving rise to the formal Investigation was not simply the incident on December 22, 2012 but, rather, it was the relationship of this incident to other incidents of absence during the preceding 12 months. This "occurrence" did not happen until the Carrier's January 4, 2013 review of the bi-monthly attendance records. Therefore, the Board finds that the Carrier scheduled the Investigation in compliance with Rule 35 of the parties' Agreement. See Award 1 of Public Law Board No. 7491, which reached a similar conclusion in a dispute between the same parties now at bar.

The Organization further asserts that the Carrier violated Rule 35 of the Agreement by failing to notify the Claimant's representative that the claim was disallowed within 60 days of the date the claim was filed. The evidence presented on the property indicates the following sequence of events:

March 8, 2013 – date of Local Chairman's claim letter to Superintendent  
March 11, 2013 – date claim letter mailed  
March 14, 2013 – date letter received by Superintendent  
May 10, 2013 – date Superintendent mailed denial of claim

Based on the above, the Board finds that the claim, although dated March 8 and mailed on March 11, was not considered "filed" until March 14, 2013, i.e., the date the Superintendent actually received the claim. The Superintendent disallowed the claim

on May 10, 2013 when he mailed the denial to the Local Chairman, i.e., 57 days after the claim was filed. Such handling is consistent with the terms of Rule 35. Accordingly, the Board finds that the Organization's procedural argument relative to the time limit issue cannot prevail.

With regard to the merits, the evidence of record is undisputed that on December 22, 2012, the Claimant called and left a voicemail on the General Foreman's cell phone stating that he would not be reporting for service. It is also undisputed that during the previous 12-month rolling period, the Claimant was absent from work for various reasons on four other occasions, for a total of five absences in the period. In fact, these absences occurred in less than eight months. The record also indicates that when the Mechanical Attendance Guidelines were initially implemented, the Claimant was present at a Safety Briefing at which time the guidelines were reviewed.

While not disputing the fact that the Claimant was absent on five occasions during the 12-month rolling review period, the Organization emphatically asserts that the Mechanical Attendance Guidelines are vague and non-specific in identifying what constitutes excessive absenteeism. The Organization contends that the guidelines do not specifically define the threshold of absenteeism and that the Carrier "cannot hold employees responsible for excessive absenteeism when they refuse to say what the threshold is."

In opposition to the Organization's position, the Carrier avers that it is within its right to establish a "subjective attendance standard of 'excessive' so long as it is not applied in an arbitrary or capricious manner." In support of its position, the Carrier cited two on-property decisions – Award 6 of Public Law Board No. 7155 and Award 15 of Public Law Board No. 7175 – involving employees disciplined for excessive absenteeism.

The Board finds that the Carrier has the managerial right to establish reasonable standards for attendance and to make a determination based on a particular employee's attendance during the rolling 12-month period whether such employee is excessively absent so long as such determination is done in a reasonable manner. In Award 6 of Public Law Board No. 7155, the arbitrator, in dealing with similar attendance guidelines for Train Dispatchers, stated as follows:

**“The Guidelines are not, as the Organization suggests, without a ‘set standard.’ Absenteeism is excessive when the incidents of absenteeism ‘disrupt the regular working schedule of dispatchers in their assigned office.’ While this determination is subjective, it is applicable, subject to the requirement that management’s determination not be unreasonable, arbitrary, capricious or otherwise an abuse of discretion.”**

**Applying these principles to the present case, the Board finds that the Carrier’s determination that the Claimant’s attendance had reached an excessive level was not unreasonable or arbitrary.**

**Relative to the discipline assessed, the Carrier notes that the assessment of a formal reprimand was warranted and was the lowest level of discipline under its Policy for Performance and Accountability (PEPA) and the Mechanical Attendance Guidelines. Because the Board finds that the discipline assessed was neither arbitrary nor capricious, it will not be disturbed.**

**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 17th day of December 2014.**