

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14145
Docket No. 14043
16-2-NRAB-00002-150008**

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

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

STATEMENT OF CLAIM:

- “1. That the Burlington Northern Santa Fe Railroad Company violated the terms of our controlling agreement when, on December 12, 2013, the Carrier improperly issued discipline to Portland, Oregon Carman Robert Downs, Employee ID#XXXXXXX, as a result of an investigation held on November 22, 2013.**
- 2. That accordingly, the Burlington Northern Santa Fe Railroad Company shall be required to remove the Stand Formal Reprimand and one year active review period issued by letter dated December 12, 2013, and all other record of this unjust and improper discipline shall be expunged from his 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 the 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 a bonafide medical leave, vacation, designated 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 it 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 issued a formal reprimand with a one-year review period following a formal investigation in connection with the following:

“ . . . your alleged excessive absenteeism on Friday, October 25, 2013 while assigned as a Carman at Portland, OR. Consistent with the terms of the Mechanical Attendance Guidelines, all or part of your entire attendance record for the preceding 12 month rolling period, in addition to foregoing dates, may be reviewed at the investigation. The date BNSF received first knowledge of this alleged violation is November 4, 2013.”

Preliminarily, the Board will address a procedural issue raised by the Organization. The Organization’s contends that the proceedings in this case 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” in this case was October 25, 2013, the date that the Claimant marked off sick, and that the Carrier was required to schedule the Investigation to begin within 20 days of this date. The Organization contends that the Carrier’s scheduling of the investigation for November 22, 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 November 4, 2013, when the Carrier reviewed the 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.

This same issue involving the parties at bar was decided by the Board in its Award 14109, wherein the Board held as follows:

“The Board finds that the ‘occurrence’ giving rise to the formal investigation was not simply the incident on December 22, 2012, but 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 was in compliance with Rule 35 in the scheduling of the investigation. See Award No. 1 of Public Law Board No. 7491 which reached a similar conclusion in a dispute between the same parties now at bar.”

The Board finds that as set forth in Award 14109, the Carrier’s scheduling of the investigation within 20 days of its review of the Claimant’s attendance records was proper and not in violation of Rule 35.

In regard to the merits, the record in this case, establishes that on October 25, 2013, the Claimant marked off sick from his regular assignment. Evidence was also

submitted indicating that during the previous 12 month period the Claimant had marked off on four previous occasions for a total of five absences during the rolling 12 month review period. While acknowledging that he was absent on these dates, the Claimant contended that some of the dates should have been excused FMLA days but that “he had gotten cheated on by the Medical Department.” Relative to the absence on October 25, 2013, the Claimant testified and submitted a document indicating that he had dental surgery on that date and was unable to work.

While the Claimant believes that his FMLA leave was improperly handled by the Medical Department, that issue is beyond the jurisdiction of the Board. This Board is constrained to rule based on the facts that are contained in the investigatory record, which establish that the Claimant was marked off sick on the dates in question and was not on approved FMLA leave. While the Claimant did provide documentation that he had dental surgery on October 25th, the Board has held that even legitimate excuses can be considered excessive when viewing an employee’s overall attendance record. The Board finds that the Carrier sustained its burden of proving the Claimant’s guilt of the charge.

Relative to the discipline assessed in this case, 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). The Board finds that the discipline assessed in this case was not arbitrary or capricious and will not disturb same.

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 20th day of December 2016.