

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

**Award No. 14146  
Docket No. 14044  
16-2-NRAB-00002-150009**

**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 Burlington Northern Santa Fe Railroad Company violated the terms of our controlling agreement when, on January 6, 2013, the Carrier improperly issued discipline to Portland, Oregon Carman Robert Downs, employee ID# XXXXXXXX, as a result of an investigation held on December 17, 2013.**
- 2. That accordingly, the Burlington Northern Santa Fe Railroad Company shall be required to remove the Standard 10 Day Record Suspension and one year active review period issued by letter dated January 6, 2014, 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 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 issued a standard ten day record suspension with a one-year review period following a formal investigation in connection with the following:

“... your alleged excessive absenteeism on Friday, November 1, 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 19, 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 November 1, 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 December 9, 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 19, 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 this Board in its Award No. 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 November 1, 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 five previous occasions for a total of six 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 the Medical Department had a personal problem with him and “illegally” cut off his FMLA leave. Relative to the absence on November 1, 2013, the Claimant testified and submitted a document indicating that he had a follow up visit for a previous dental surgery on that date at which point additional surgery was done and he 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 establishes that the Claimant was marked off sick on the dates in question and not on approved FMLA leave. While the Claimant did provide documentation that he had a visit with the dentist on November 1st, 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 ten day record suspension was in accordance with its Attendance Policy. 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.**

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**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Second Division**

**Dated at Chicago, Illinois, this 20th day of December 2016.**