

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
—SECOND DIVISION**

Award No. 13851
Docket No. 13731
05-2-04-2-8

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

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

STATEMENT OF CLAIM:

- “1. That the Burlington Northern Santa Fe Railroad Company violated the current agreement, effective September 1, 1974, as amended, in particular Rule 40, when they unjustly dismissed Mechanical Department employee Arthur L. Travis on February 5, 2003.
2. That the Burlington Northern Santa Fe Railroad Company failed to provide Mechanical Department employee Arthur L. Travis with a fair and impartial investigation as required by Rule 40.
3. That accordingly, the Burlington Northern Santa Fe Railroad Company be ordered to immediately reinstate Mechanical Department employee Arthur L. Travis to its service with all seniority rights unimpaired and to make him whole for all wages, rights and benefits lost, including but not limited to: vacation, insurance, hospitalization and Railroad Retirement rights resulting from his removal from Carrier service. Further, that any and all reference to this dismissal, including all correspondence, be removed from Mr. Travis'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.

This is a disciplinary action taken against the Claimant for alleged violation of the Attendance Policy during the period from September 1 through September 30, 2002. The Notice was sent to the Claimant under date of October 9, 2002. Following several postponements, the investigation was held on January 21, 2003. Subsequently, by letter dated February 5, 2003 the Claimant was found guilty as charged and was issued a Level IV Dismissal from service.

The Organization argues that the Claimant was not provided his rights under Rule 40 to a proper investigation and discipline. The investigating officer was improper and prejudiced; a complete transcript was not provided; and witnesses with direct knowledge were not called. Moreover, the Carrier failed to follow its own policy with regard to attendance. The Claimant had serious health and financial problems of which the Carrier was aware and yet the Carrier did not counsel nor refer the Claimant for help. The policy reads in pertinent part:

“Three (3) days absent or part time for any reason, within a reasonable length of time, (usually a year is used as a base) the first line supervisor is to coach/counsel the employee and explain the importance of working regularly, and full time. This also offers an opportunity for the foreman to assist the employee with any problems he or she may be having.

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Conversely, the employee that has special circumstances, receiving treatment for a documented illness should receive special consideration. A general foreman should be involved in this process."

No one assisted the Claimant. There was no coaching and counseling and ultimately the transcript indicates that the Claimant was diagnosed with clinical depression.

The Carrier denies any violation of Rule 40 in that the Claimant was properly notified and the investigation fair and impartial. The investigating officer was the proper officer and brought out all the necessary facts. As for the Employee Assistance Counselor who did not testify, she was called and declined to testify due to confidentiality issues as per her Company's policy. The Carrier also denies any Carrier violations of the Attendance Policy. In fact, the Carrier's position is that the Claimant failed to follow the governing provisions even after meetings in March, May, and June, 2002, which reviewed the Attendance Policy. Similarly, there was no request for a medical leave of absence in September. The Carrier holds that its actions and decision were proper.

The Board finds no procedural errors. There is absolutely no showing that missing text or pages in any manner compromised the Claimant. Nor is there any demonstration that the lack of a witness or the status of the investigating officer affected the Claimant's rights.

On merits, there is no doubt from this record that the Carrier has proved a violation of absenteeism policy. Specifically, in this instant case, the Claimant was, as the Carrier stated, "absent without authority 10 days during the month of September 2002." The evidence proves the Claimant guilty as charged. And there is no evidence that the Claimant took any action to obtain a medical leave of absence in September.

The Organization notes that this is an eleven year employee. It points out that the Carrier was aware that the Claimant had medical and financial problems.

It argues that the Claimant called in each time he was absent and no one advised him that his absence would not be excused. The Organization argues that the Carrier had an obligation to assist, coach and counsel the Claimant. It strongly argues that given the Claimant's medical state, the Carrier's actions were excessive.

Having found the evidence supports guilt, the Board has turned to the issues of mitigation and discipline. The record indicates that the Claimant had medical and financial issues of which the Carrier was aware. In this instance the Claimant called off three times with car trouble, five times as sick, was late once and failed to report once in September. The record indicates that the Carrier was not only aware of the Claimant's problems, but discussed the Claimant's attendance problems. As indicated in the Letter dated April 11, 2003, the Claimant "signed letters confirming meetings held with Carrier officers on 3/16/02, 5/3/02 and 6/21/02." Further, he has a clear record of past discipline:

"In May 2000, he signed waiver and received formal reprimand for laying off without authorization. In August 2001 . . . he received a 10-day record suspension for . . . violation of BNSF Smoking Policy and using unsuitable language. In August 2002, he signed waiver and received 30-day record suspension and a 1 year probation for . . . violation of the attendance policy from January 1, 2002 through June 30, 2002. In March 2002, . . . a 20-day record suspension for . . . unsuitable language. In October 2002 . . . a 30-day record suspension and 3 years probation for . . . violation of attendance guidelines from July 1, 2002 through August 31, 2002."

Given the full state of this record, the Board in its appellate function can not find that the Carrier failed to properly apply the Attendance Policy or that the discipline was excessive. It was the Claimant's responsibility to protect his assignment. His failure to do so was not mitigated by the fact that he notified his Foreman he would not be at work and nor was it mitigated by car problems or medical issues as they exist in this record. The claim must be denied.

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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 May 2005.