

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38955
Docket No. MW-38896
08-3-NRAB-00003-050334
(05-3-334)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [withheld from service beginning June 16, 2003 and five (5) day suspension beginning April 8, 2004 and ending April 12, 2004 with requirement to contact EAP Counselor] imposed upon Mr. J. L. Nutz for alleged violation of Rule 1.15 (Duty - Reporting or Absence) in connection with his absence from his assigned laborer position at Grand Island, Nebraska on June 13, 2003 was unwarranted, excessive and in violation of the Agreement [System File C-04-S090-2/10-04-0240 (MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. L. Nutz shall now receive the remedy prescribed by the parties in Rule 40(G).”

FINDINGS:

The Third 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 Claimant, a Laborer with approximately 30 years of service with the railroad, was absent from duty on his assignment in Grand Island, Nebraska, on June 13, 2003, without proper authorization. In his career with the railroad the Claimant has previously held positions as Assistant Foreman, Foreman, Assistant Roadmaster, and Roadmaster. He testified that he has the medical condition of clinical depression that contributed to his missing work and being absent without authority on June 13, 2003.

At the Investigation, which was held on March 11, the Claimant presented a letter dated March 9, 2004, signed by D. B. Jameson, M.D., a physician with Prairie Creek Family Medicine, which stated as follows:

"Jerry Nutz, is a patient of ours and has been for some time. He currently carries the diagnosis of 1) clinical depression. He is stable and in remission. 2) Hypertension, which is in good control with Atenolol, 3) Deep pressure ulcer left heel - healed.

Jerry is at the current time doing great. He has no restrictions regarding work. He will be able to do (this) current job without restrictions but should continue on the Wellbutrin indefinitely.

His prognosis is good and at this time I would see no difficulty with him returning to work, and in fact, I think that this would be therapeutic to be back at work for him."

The Claimant testified that as of the date of the letter and, currently, at the time of the Investigation, he was under a doctor's care for his depression. He stated that he desired the Carrier to assist and support him regarding his medical needs so that he could remain employed and be a responsible employee.

The Claimant admitted in the Investigation that he did not comply with Rule 1.15 Duty - Reporting or Absence, which states as follows:

“Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be cause for dismissal.”

At the outset of the Investigation, before any witness was called, Local Chairman G. R. Spencer asked for and was granted leave to enter into the record what he termed “a protest of this investigation after being turned down for SIAP.” He then read into the record a letter dated March 4, 2004, that he sent by facsimile and e-mail to Division Engineer R. Bacon. In the letter the Local Chairman stated that he believed that “because of the circumstances noted [the Claimant’s June 13, 2003 absence allegedly being caused by untreated clinical depression and continued long absence from work allegedly being caused by treatment for clinical depression and, at a later date, a foot ulcer], the BNSF would be better served if Jerry’s discipline would be handled under the BNSF’s PEPA, (Policy for Employee Performance Accountability) guidelines as opposed to an investigation.” The letter quoted from paragraph a of the PEPA’s section headed Non-Serious Rule Violations: “An employee involved in a first non-serious incident may choose alternative handling.” The letter concluded:

“Because the investigation only concerns the one event only on June 13, 2003, and because of the medical circumstances involved and the fact this June 13 event does not fall under any of the items listed in PEPA under Serious Rule Violations, we respectfully request that this matter be handled and resolved via the SIAP, Safety Incident Analysis Process.”

The Local Chairman noted that R. G. Bacon responded for the Carrier to the Local Chairman’s letter as follows:

“Gerald, I understand why you want this to go to PEPA, but the problem I have is that he never once tried to get in touch with anyone to explain what he was going thru, I have given him 3 different chances to get himself taken care of and all 3 times he has

assured me that it wouldn't happen again, bottom line is I can't trust the PEPA policy to police this type of behavior."

In his closing statement in behalf of the Claimant at the Investigation, the Local Chairman contended that the Carrier "is violating their own policy by not handling this case through the alternative handling procedures of the PEPA Policy."

Following the Investigation, by letter dated April 8, the Carrier notified the Claimant that as a result of the Investigation he was being issued a five-day suspension beginning April 8 and ending April 12, 2004, and that he was required to contact a particular EAP counselor for violation of Rule 1.15 in connection with his unauthorized failure to report for duty on June 13, 2003.

The Organization, by letter of its Vice General Chairman dated May 2, 2004, appealed the discipline. First, the letter argued, the Carrier improperly denied its request, made both before and at the Hearing, to have this matter handled through the Carrier's PEPA policy. Such denial, the appeal asserted, constituted disparate treatment because "the Carrier has on numerous occasions granted this under far more serious offences than the one we are dealing with here." In addition, the appeal letter claimed that "the discipline issued did not fit the offence. . . ." The Organization contended that the discipline administered was especially inappropriate in view of the fact that the Claimant was under a doctor's care for clinical depression on June 13, 2003, the date of his absence. The Organization argued that the Carrier needed to take into consideration all of the circumstances of this 30-year employee's absence "and realize that what happened to [the Claimant] was nothing more than an anomaly caused by one episode of mental illness of which he had no control over."

In its answer to the Organization's appeal letter, the Carrier, by letter from its Division Manager dated June 7, 2004, asserted that the Claimant had been on vacation for five weeks prior to June 9, 2003, the date that he was supposed to return to work following vacation, but did not report for the entire week of June 9-13, 2003. The Carrier acknowledged that the Claimant "left messages on the Grand Island Section's answering machine," but asserted that he "failed to contact his Foreman or Roadmaster . . . to obtain authority to be absent from work." The Carrier noted that the Claimant acknowledged at the Investigation that he missed work on June 13, 2003, without proper permission to be absent from work and that

he thereby violated Rule 1.15. The fact that the Claimant was being treated for clinical depression, the Carrier asserted, did not relieve him of the responsibility to obtain proper authority for being absent from work. The Carrier further asserted that the Organization's request for alternative handling pursuant to the PEPA Policy was based on the assumption that the clinical depression of which the Claimant was diagnosed was the reason he failed to report for duty, but that "[t]his fact was not proven during the formal investigation." The Carrier maintained that being absent from work without proper authority was "a serious rule violation" that "justifie[d] [that] Alternative Handling be denied in this case."

In a subsequent appeal letter dated July 19, 2004, to the General Director Labor Relations, the Vice General Chairman, in complaining of the Carrier's failure to handle this case under its PEPA policy, asserted that the Claimant "is a long time employee with no history of discipline" and argued that "there simply was no logical reason not to handle this case under the Carrier's PEPA policy."

In responding on September 9 to the Vice General Chairman's argument, the General Director Labor Relations quoted the Division Engineer's response of March 4, 2004, to the Local Chairman's letter of the same date verbatim and added the following comment:

"In reading Mr. Bacon's response of March 4, 2004 it is obvious the Claimant had absented himself more than June 13, 2003, and had never explained anything about his problems to his supervisors."

The parties discussed this case in conference on December 14, 2004, without resolution, and on January 19, 2005, the Vice General Chairman again wrote to the General Director Labor Relations reiterating that the case should have been handled through the Carrier's "alternative discipline policy," that the Claimant had not called to report off because he had a mental illness which caused him not to use good judgment, and that the discipline was excessive in view of the Claimant's "discipline free employment of over thirty years."

Although during the internal appeal process the Carrier took the position that the Claimant's one-day absence of June 13, 2003, without authority was "a serious rule violation," the Carrier's Policy for Employee Performance Accountability, in Appendix B, contains a list of "Serious Rule Violations." The one

violation in that list related to attendance is item 6, which states, "Extended unauthorized absence (as may be defined by labor agreements and applicable law)." Of course an employee should attend work every day, and it is an infraction to miss work without authorization. However, by implication, in the Carrier's own categorization of violations in Appendix B, it indicated that a single day of unauthorized absence (assuming no history of poor attendance) although by no means condoned, was not to be considered a serious Rule violation.

The Carrier asserts, however, that the Claimant was not absent only one day, but the entire week, from June 9 through June 13, 2003. It also relies on Division Engineer Bacon's letter of March 4, 2004, as indicating that the Claimant had not been absent merely for one day. These arguments only confirm that, despite the fact that the charge letter refers to a single day of absence, the Carrier has not administered discipline in this case on the basis of a single day of unauthorized absence, but on alleged multiple absences.

Our study of the record and arguments persuades the Board that the Carrier imposed a suspension of five days as the discipline in this case on the basis of alleged past attendance violations and absences for which the Claimant was never previously reprimanded or even charged. The Claimant was charged in this case with a single day of unauthorized absence. The Board is unable to sustain a five-day suspension for that infraction where it is apparent from the record that the basis for such penalty was other alleged absences or attendance violations for which the Claimant was never charged or disciplined and, so far as the record shows, which were never subject to review in the grievance procedure. Under these circumstances, and in agreement with the Organization's contention that the discipline administered in this case was excessive for the violation charged and found, it is the Board's opinion that the proper discipline for the Claimant's infraction would have been a written reprimand. The Board finds that the five-day suspension should be reduced a written reprimand and that the Claimant should be made whole for five days of lost wages.

The Board considered the Organization's contention that the Claimant's infraction should have been handled under the Carrier's Policy for Employee Performance Accountability. Specifically the Organization relies on the provision in the Policy under the heading Non-Serious Rule Violations which states, "An employee involved in a first non-serious incident may choose alternative

handling. . . .” No precedent regarding alternative handling was cited by either party involving a non-serious Rule violation. The Organization contends that the quoted provision makes it mandatory to refer a first non-serious Rule violation to alternative handling when requested by the employee or the Organization on the employee’s behalf. The Carrier contends that it has the discretion to determine which alleged violations to administer through alternative handling. The Board is of the opinion that this case is not an appropriate one for determination of so important an issue in view of the overall circumstances of this case.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of February 2008.