

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41429
Docket No. MW-41488
12-3-NRAB-00003-110060**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The discipline [ten (10) day record suspension] imposed upon Mr. J. Kotschwar by letter dated October 23, 2009 for alleged violation of MOW Operating Rule 1.15 Duty-Reporting or Absence for allegedly failing to give sufficient notice and proper notification when requesting floating vacation day for August 31, 2009 while assigned as track inspector on Gang TINS 1373 headquartered at Gillette, Wyoming was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-2/10-10-0020 BNR].**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant J. Kotschwar 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.

On September 4, 2009, the Carrier directed the Claimant to report for a formal Investigation on September 14, which was mutually postponed until October 2, 2009:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to give sufficient notice and proper notification on August 30, 2009, when requesting floating vacation day for August 31, 2009, while assigned Track Inspector on gang TINS 1373, headquartered at Gillette, Wyoming.”

On October 23, 2009, the Claimant was found guilty as charged and was assessed a ten-day record suspension.

It is the position of the Organization that the Carrier failed to meet its burden of proof and the Investigation was not “fair and impartial.” It argued that the Hearing Officer refused to allow the Organization’s representative to present evidence of the Carrier’s common practice of allowing single vacation days with less than 48 hours’ advance notice and incorrectly determined that it did not have a direct relationship to the case. Additionally, it argued that when the Organization requested a recess to gather evidence, the Hearing Officer incorrectly denied the request. It asserted that because of those procedural violations the claim should be sustained without even reviewing the merits. Turning to the merits, it argued that the testimony and evidence presented at the Hearing revealed that the Carrier knew in advance of August 31, 2009, that the Claimant had requested the day off with vacation pay, and for some unaccountable reason such as miscommunication,

overlooked that request. The Organization concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the facts show that the Claimant did not comply with the Rules for taking off the day in question. It argued that he never contacted his Sunday and Monday Supervisor, the correct Roadmaster, in sufficient time to secure proper approval. It further argued that the Claimant admitted he did not secure proper approval to be absent in sufficient time and then, with no approval from anyone, and no reason given in advance, he failed to show up for work. It closed by stating that the Claimant's absence was unauthorized and it asked that the claim remain denied.

The Board thoroughly reviewed the record and transcript and is not persuaded that any alleged procedural violations rise to the level to sustain the claim without reviewing the merits or that the Claimant was denied his "due process" Agreement rights.

At the time of the incident giving rise to this dispute the Claimant was a Relief Track Inspector in the Gillette, Wyoming, area who had two Supervisors. The Claimant testified that he verbally advised one of those Supervisors (Woodside) well in advance, that he was requesting August 31 as a floating vacation day, but that Supervisor was not his Supervisor on August 31. On August 30, the Claimant sent Roadmaster Woodside a text message requesting August 31, 2009, as a floating vacation day. During the course of the Investigation, Roadmaster Woodside was questioned as follows:

"Q. And Mr. Woodside, did Mr. Kotschwar request a floating vacation day or vacation day for August 31st?

A. Yes.

Q. And Mr. Woodside, how was that request made?

A. James sent me a text message.

Q. And Mr. Woodside, when did he send his text message?

A. . . . That would be 9:47 p.m.

Q. . . . would you read that into the transcript please.

A. Certainly. To: Mr. Woodside, Jay Ramsdell; Sent: Sunday, August 30th, 21:47:13 2009; Subject: vacation; 'I will be taking Vacation Monday August 31st and Thursday September 3rd.

Q. . . . did you reply to that request?

A. . . . Yes. 'K, are you telling me you got scheduled vacation or asking for floaters?' Sent Sunday, August 30th, 2153 p.m., which is 9:53 p.m.

Q. . . . did Mr. Kotschwar reply to your reply?

A. No.”

Roadmaster Woodside's testimony was not effectively refuted. Additionally, when the Claimant was asked whether he received a response from Roadmaster Ramsdell, he testified that Ramsdell told him that he had provided insufficient notice to be granted the time off.

The Agreement provides that floating vacation days may be taken upon 48 hours' advance notice from the employee to the proper Carrier Officer, which the Claimant failed to do. The Claimant did not comply with the Rules for being off on August 31. He failed to contact his Sunday and Monday supervisor (Roadmaster Ramsdell) in sufficient time so as to secure proper authorization. The Claimant testified that he had no contact with the right Roadmaster until it was far too late. And then, with no approval from anyone, and with no reason given in advance, he failed to report for work on August 31, 2009. Subsequently, the Claimant stated that he was off because of illness, which occurred on the day he was told that he was not authorized to take off. Substantial evidence was adduced at the Investigation to satisfy the Carrier's burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether the assessed discipline was appropriate. The Board' review of the discipline reveals that it was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). Therefore, the Board finds and holds that it will not be set aside because it was not excessive, arbitrary, or capricious. The claim will remain denied.

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 Third Division

Dated at Chicago, Illinois, this 5th day of September 2012.