

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41871  
Docket No. MW-41676  
14-3-NRAB-00003-110250**

**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. C. Martinek for alleged violation of EI 22.6.1 BNSF Absenteeism and Layoff Policy and MOWOR 1.15 Duty - Reporting or Absence, in connection with charges of failure to report for duty at the designated time of 0730 on December 29, 2009, while assigned as a motor grader operator on Gang TMOX0438 headquartered at Gillette, Wyoming was arbitrary, capricious and in violation of the Agreement (System File C-10-D040-27/10-10-0362 BNR).**
- (2) The discipline [twenty (20) day record suspension] imposed upon Mr. C. Martinek for alleged violation of EI 22.6.1 BNSF Absenteeism and Layoff Policy and MOWOR 1.15 Duty - Reporting or Absence, in connection with charges of failure to report for duty at the designated time of 0730 on January 12, 2010 while assigned as sectionman on Gang TSEC0997, headquartered at Gillette, Wyoming was arbitrary, capricious and in violation of the Agreement (System File C-10-D040-28/10-10-0363).**
- (3) The discipline [thirty (30) day record suspension] imposed upon Mr. C. Martinek for alleged violation of MOWOR 1.15 Duty-**

Reporting or Absence, in connection with charges or failure to report for duty at the designated time of 0730 on January 26, 2010 while assigned as sectionman on Gang TSEC0997, headquartered at Gillette, Wyoming was arbitrary, capricious and in violation of the Agreement (System File C-10-D040-29/10-10-0364).

- (4) The discipline [thirty (30) day record suspension] imposed upon Mr. C. Martinek for alleged violation of MOWOR 1.15 Duty-Reporting or Absence, in connection with charges or failure to report for duty at the designated time of 0730 on January 29, 2010 while assigned as sectionman on Gang TSEC0997, headquartered at Gillette, Wyoming was arbitrary, capricious and in violation of the Agreement (System File C-10-D040-30/10-0365).
- (5) As a consequence of the violation referred to in Part (1) above, Claimant C. Martinek shall now receive the remedy prescribed by the parties in Rule 40(G).
- (6) As a consequence of the violation referred to in Part (2) above, Claimant C. Martinek shall now receive the remedy prescribed by the parties in Rule 40 (G).
- (7) As a consequence of the violation referred to in Part (3) above, Claimant C. Martinek shall now receive the remedy prescribed by the parties in Rule 40 (G).
- (8) As a consequence of the violation referred to in Part (4) above, Claimant C. Martinek 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 facts indicate that beginning in August 2009, the Claimant missed work or showed up late for work. This occurred in two sets. In the first instance, the Claimant was absent without approval on August 10 and 12, 2009. The Claimant did not contest the Carrier's assertion and chose to sign a Waiver and accepted a Level S Record Suspension with a 36-month review period in lieu of an Investigation. The record further reveals that at that time, Claimant's Roadmaster, R. Woodside, discussed with the Claimant his need to be at work and on time each work day.**

**The Carrier alleged that the second round started on November 30, 2009, and from that date through February 13, 2010, the Carrier alleged that the Claimant was absent without permission on 13 days and was late on several occasions during which time Roadmaster Woodside coached and/counseled the Claimant regarding his attendance problems on nine separate occasions.**

**The Carrier asserted that the Claimant chose not to heed any of the counsel that Roadmaster Woodside offered and on December 29, 2009, the Claimant arrived at work late without notifying his Supervisor before the start of his shift. It further stated that this happened again on January 12, 2010; on January 26, the Claimant did not come to work and on January 29, 2010, the Claimant was late for work and did not contact his Supervisor until two hours later.**

**For each of the alleged violations, the Claimant received a Notice of Investigation. Beginning on January 5, 2010, the Carrier directed the Claimant to report for multiple Investigations starting on January 13, 2010, which were mutually postponed until April 14 and 17, 2010, concerning, in pertinent part, the following charge:**

**“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to report for duty at the designated time of 0730 on December 29, 2009, while assigned as Motor Grader on gang TMOX0438, headquartered at Gillette, Wyoming.” (For the sake of brevity the Board will not reiterate all of the charges for each date because the aforementioned charge is representative of all the other days covered by the other separate charges.)**

**Subsequently, on various dates the Carrier timely notified the Claimant that he had been found guilty of the charges contained in the four Notices of Investigation and he was assessed a 10-Day, 20-Day and two 30-Day Record Suspensions.**

**The Board notes that this is the first of three discipline cases involving the same Claimant before this tribunal.**

**It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because the attendance matters were at the very least all of a patterned piece, entailing the exact same violation under the exact same circumstances, within a month's time that should have been addressed collectively. As such, those violations took place in “rapid fire” succession, before progressive discipline could be properly applied to change the Claimant's behavior and individual Investigations for separate dates that should have been combined into one Hearing only had the effect of piling up discipline without giving the Claimant an opportunity to correct his behavior. Additionally, it argued that because all of the attendance problems were professionally attested to be part of the Claimant's drug addiction problem, and because that behavior was already addressed by a disciplinary Waiver, the Investigations should never have occurred and should have been cancelled as timely requested by the Organization. The Organization asks that because of the aforementioned procedural violations, the discipline should be set aside without reviewing the merits because the Hearings were not fair.**

**Turning to the merits, the Organization argued that during the time period covered by the multiple charges the Claimant was addicted to methamphetamines. The Claimant testified that because of his addiction, days could go by in which he either could not sleep or, alternatively, could not be awakened. Simply put, it argued that the Claimant's days ran together without independent significance and**

were tied together by the drug and its effect. Sleep could not be had for days, because the drug would not allow it. Wakefulness then could not be had for days, thereafter, and the body would reach an inevitable point of exhaustion, in which the addict, herein the Claimant, lost all control over staying consciously awake - no matter how hard he tried to stay awake - that resulted in him missing days and being late on occasion. The Claimant admitted to his errors, however, the Organization argued that the record evidence shows that the Claimant had already entered into a Discipline Waiver Program on February 16, 2010, regarding his addictive usage and had taken steps to correct the problem as he completed a three-day detoxification process, a month-long inpatient stay at a treatment facility and was actively participating in an outpatient aftercare program. It further argued that he had tested negative for drugs and had been returned to the Carrier's service on April 14, 2010. The question it then posed is that after the Claimant had effectively served a two month actual suspension for his behavior prior to entering the Waiver Program on February 16, why was he being disciplined again for his prior behavior inasmuch as all of the dates covered by the Notices of Investigation preceded his entrance into the drug rehabilitation program. It concluded that the charges were counter-productive to the rehabilitation process and requested that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that there were no procedural errors in the handling of the Claimant's case and nothing that it did prejudiced the Claimant's contractual rights. Therefore, it requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier raised the question, "Does an employer have the right to require its employees to do what they are instructed to do – in this case, request permission to miss work?" And if so, does that employer have the right to discipline the employee who refuses to follow instructions – missing work without permission? It argued that because common sense dictates that the first question must be answered "yes" then it only stands to reason that the second question must be answered "yes" as well. It argued that under its Rules an employee has an obligation to report to work his designated assignment on its respective work days and on time and those Rules further require that if an employee needs to be absent from work, there are procedures to be followed in notifying the Carrier that he will not be able to report to work. It further argued that there was evidence presented in each Investigation that shows that the Claimant repeatedly violated those Rules and that at each Investigation, the

Claimant confirmed those violations by testifying that he either came to work late without informing his Supervisor or was absent without permission. The Carrier also addressed the Organization's argument that infers the Claimant had already paid the price for his absenteeism and/tardiness problem by his entrance into the Waiver Program. According to the Carrier, the Organization's theory is incorrect because the Claimant testified during his Investigation for January 12, 2010, that on February 8, 2010, while on duty, he was asked to take a drug test, which he failed and because of that failure, he was allowed to enter the rehabilitation program. Therefore, his entrance into that program was not because of his failure to report to work, but was because he was on duty with a prohibited substance in his bodily fluids. Lastly, the Carrier argued that at no time did the Organization dispute the fact that the Claimant voluntarily confessed to his offenses. Instead, the Organization presented a defense that is not based on merits, but instead, relies only on procedural arguments, which the Carrier asserted was rendered moot account of the Claimant's admission of guilt. It closed by stating that the discipline was appropriate and it asked that the discipline not be disturbed.

There is no dispute between the parties that on each date covered by the four separate charges the Claimant was either absent without permission or tardy without notifying his immediate Supervisor that he would be late. The thrust of the Organization's argument both procedurally and substantively is that the Claimant's violations were due to his addiction to methamphetamines and because the Claimant had admitted his drug addiction problem and had addressed the problem by entering a drug rehabilitation program, those Investigations were counter-productive to rehabilitation. That argument is not persuasive. The Claimant did not voluntarily enter into the drug rehabilitation program to address his absenteeism and/or tardiness; on the contrary, he entered because he had tested positive for a foreign substances in his bodily fluids while on the job working and because of that he agreed to a Waiver Agreement. The Board concludes that the Carrier did not err when it chose to address the Claimant's tardiness and/or absenteeism problems through the investigative process.

The Organization's secondary argument was that the four separate Investigations should have been merged into one Hearing because the issues were identical and occurred during a short period of time. The Organization's argument has substantial merit because the decision not to combine the four separate Investigations covering four different dates within a relatively short period of time denied the Claimant any opportunity to correct his behavior. Therefore, the Board

concludes that the four Investigations shall be considered to have been merged into one formal Investigation covering four different dates. As previously stated, substantial evidence was adduced at the Hearings proving that the Claimant was guilty as charged.

The only issue remaining is whether the discipline assessed was appropriate. At the time of the incident, the Claimant had approximately 18 years of service with some prior discipline, including a Conditional Suspension concerning a positive drug screen and the recent signing of a Waiver Agreement for a Level S Record Suspension for an identical violation account of failure to report for duty at the designated time. The Board finds and holds that the 10-Day, 20-Day and one 30-Day Record Suspensions covered by the instant case shall be removed from the Claimant's disciplinary record and they shall be replaced with one Level S 30-Day Record Suspension covering all four dates of the combined case. The aforementioned modification in the Claimant's discipline record changes his permanent disciplinary record to two Level S Record Suspensions.

**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 16th day of June 2014.