

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41876
Docket No. MW-41924
14-3-NRAB-00003-120197**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. C. Martinek by letter dated December 2, 2010 for alleged violation of MOW Rule 1.13 Reporting and Complying with Instructions, in connection with charges of failure to comply with instructions with regard to extending his medical leave of absence, as indicated in the letter dated October 15, 2010 by Ms. Kathryn G. Straight, Director of Administration, was arbitrary and without merit (System File C-11-D070-5/10-11-0147 BNR).**
- (2) 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).”**

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.

It was asserted by the Carrier that on September 30, 2010, the Claimant advised Division Engineer C. Turnbull that he was experiencing severe pain, and because of that, the Carrier placed the Claimant on a Medical Leave of Absence that commenced on September 30 and ran through October 25, 2010. Because the Claimant allegedly failed to mark up for duty, and/or extend his leave of absence beyond October 25, the Carrier brought charges against the Claimant.

On November 5 the Carrier directed the Claimant to report for a formal Investigation on November 12, 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 comply with instructions to return to work or extend your medical leave of absence which expired October 25, 2010, as stated in the medical leave of absence cover letter from Director of Administration, Kathryn G. Straight, dated October 15, 2010, received by on October 16, 2010.”

On December 2, 2010, the Claimant was notified that he had been found guilty as charged and was dismissed.

The Board notes that this is the second 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 Hearing was held in "absentia." It argued that

the Carrier should have postponed the Investigation because it had no way of knowing whether the Claimant could attend inasmuch as he may have been ill and going forward with the Hearing shows that the Carrier had pre-judged the Claimant's guilt. The Organization asks that the discipline be set aside without reviewing the merits.

Turning to the merits, the Organization asserted that the Claimant was pulled out of service on September 30, 2010, and never requested a leave from service thereafter, and had not been medically cleared to return to work from the unilaterally imposed leave from service. It argued that when the Carrier failed to take the necessary steps to certify that the Claimant could safely return to service and then disciplined him in the harshest manner possible, it impermissibly abridged the Claimant's contractual rights under the Agreement. The Organization further argued that the Carrier recognized the weakness of its disciplinary decision six months after the fact when the highest designated Officer to handle grievances argued that the Claimant was not dismissed in accordance with the Carrier's discipline policy, but rather had "resigned" his position through an automatic forfeiture of his seniority, pursuant to Rule 15 of the Agreement and that the Investigation had been a mere "courtesy" of sorts accorded the Claimant, which was not required to effectuate his termination. According to the Organization that change in position was completely disingenuous in its late adoption and was waived by its lack of assertion early on. Lastly, it argued that even if there had been a valid basis to discipline the Claimant, which there was not, dismissal was excessive. It concluded by requesting that the discipline should 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 it did not err in holding the Investigation in "absentia" because the Claimant made no request for a postponement. It asserted that it looked for the Claimant on its premises and called the Claimant's telephone number without success. Therefore, it was within its right to proceed with the Hearing. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier stated that the Claimant was granted a Medical Leave of Absence from September 30 through October 25, 2010. It asserted that the Claimant did not extend his leave of absence by October 25, and

because of that, he automatically forfeited his seniority. It argued that even though it was not required to do so, it scheduled a formal Investigation so that the Claimant would have an opportunity to explain his behavior. However, for unexplained reasons the Claimant chose not to attend which, according to the Carrier, showed a lack of interest on the part of the Claimant in protecting his employment. It further argued that the evidence presented at the Hearing was not refuted that the Claimant was aware that he was afforded a Medical Leave of Absence with the condition that he report for work at its conclusion or offer proof that his medical leave needed to be extended. Therefore, it was clear that the Claimant was guilty as charged and the assessment of dismissal was appropriate and consistent with its discipline policy. It closed by asking that the discipline not be disturbed.

The Board will first address the Organization's procedural arguments. The Organization asserted that the Claimant was denied a "fair and impartial" Investigation because it was held in "absentia" and the Claimant was unfairly pre-judged as being guilty. Our review of the transcript and record of evidence reveals that the Claimant chose not to appear at the Investigation and offered no proof that he was ill and/or unable to attend the Hearing for some other reason. The Carrier did not violate the Claimant's right to a fair and impartial Hearing in this instance when it was held in absentia. The fact that the Carrier chose to go forward with the Investigation did not show pre-judgment on its part. It is further noted that there is no requirement that an accused employee must attend their formal Investigation. When a charged employee chooses not to attend, he does so at his own potential peril because he offers no rebuttal or alternative theory or story. See Second Division Awards 11763, 13217, 13360, 13491, 13924, 13957 and 13989. Accordingly, the dispute will be resolved on its merits.

Turning to the record, the Organization argued in its Submission to the Board that the Carrier in its denial of May 13, 2011, from the highest designated Carrier Officer asserted that the Claimant was not "dismissed" in accordance with the Carrier's discipline policy, but rather had "resigned" his position through an automatic forfeiture of his seniority pursuant to Rule 15 of the Agreement. The Organization suggested that alleged change in position by the Carrier was an admission by the Carrier of the fatal weakness of its disciplinary action against the Claimant inasmuch as it abandoned its grounds for the assessment of discipline against the Claimant. The argument is novel. Our examination of the record

reveals that the Organization wrote to the Carrier on August 1, 2011. There was no mention in its letter that it perceived that the Carrier had abandoned its original decision for the Claimant's termination. Additionally, the record shows that the Carrier responded to the Organization on October 20, 2011, and reiterated that it believed that the Claimant was guilty of violating MOWOR 1.13 – Reporting and Complying with Instructions. We conclude that the Organization's argument is new because it was not advanced on the property. Therefore, there is no showing that the Carrier abandoned its original decision for the Claimant's termination.

Our review of the transcript shows that on September 30, 2010, the Claimant told Division Engineer C. Turnbull that he was experiencing severe pain despite the fact that he was using pain medication. The Carrier stated without rebuttal that out of concern for the Claimant's health and safety, as well as for his co-workers, the Claimant was placed on a Medical Leave of Absence. The Claimant's leave began on September 30 and ran through October 10, 2010, and then was unilaterally extended by the Carrier until October 25 when the Claimant did not return on October 10. The letter regarding the Claimant's Leave of Absence stated, in pertinent part:

“Failure to report for duty on or before the date of the expiration of the leave will be subject to consequences outlined in the Collective Bargaining Agreement.”

Additionally, Claimant's Medical Leave of Absence stated the following:

“Failure to report for duty on or before the date of the expiration of the leave, unless application for extension has been approved, will be considered absent without authority and can be grounds for termination (for some crafts, failure to do so can result in automatic forfeiture of seniority).”

Again, it was not disputed that the Claimant did not mark up for duty; nor did he extend his Leave of Absence on or before October 25, 2010. Because the Claimant chose not to attend the Investigation, he offered no alternative theory or plausible reason as to why he failed to return to service on October 25, or extend his Medical Leave. Therefore, the Board concludes that there was substantial evidence

adduced at the Investigation so as to warrant the conclusion that the Carrier met its burden to prove that the Claimant was guilty as charged. The Board notes that we have chosen not to address the allegation that the Claimant automatically forfeited his seniority in accordance with Rule 15 when he failed to return from his Medical Leave of Absence because that issue was not raised during the formal Investigation.

The only issue remaining is whether the Claimant's termination was appropriate. At the time of the incident, the Claimant had approximately 18 years of service with prior discipline, including a Conditional Suspension concerning a positive drug screen and two Level S Record Suspensions on his disciplinary record. (See Third Division Award 41871 wherein the Board revised the Claimant's permanent discipline record.) The instant offense was of a serious nature. Therefore, the Board finds and holds that the discipline will not be disturbed because it was neither contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor arbitrary, excessive or capricious.

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 16th day of June 2014.