

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42872
Docket No. MW-43641
18-3-NRAB-00003-160428**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Foreman M. Kjos, by letter dated March 6, 2015, for alleged violation of MWOR 1.15 Duty Reporting or Absence, MWOR 1.6 Conduct, MWOR 1.3.3 Circulars, Instructions and Notices and MWOR 1.13 Reporting and Complying with Instructions in connection with his alleged ‘... absent without proper authority on 12/2/2014 & 12/3/2014, while assigned as Foreman Gang TSEC 1368 LaCrosse Section.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-15-D070-4/10-15-0176 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Kjos shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered.”**

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.

While holding his daily conference call on December 2, 2014, Roadmaster Barbee, Sr. learned that the Claimant was not at work or on the call. The Claimant was not at work the following two days and none of the absences were approved, as the Claimant admitted during the subsequent Investigation that resulted in his dismissal for violation of the above-noted MOWRs. The claim that followed was not resolved on the property and was referred to the National Railroad Adjustment Board for arbitration.

The Carrier insists that the Claimant's admission constitutes substantial evidence that he violated the aforementioned MWORs, thus nothing more is needed for proof. The dismissal was proper as extended absence is a stand-alone dismissible violation. The Organization requests leniency, which is the province of the Carrier, not the Board, which should not substitute its judgment for that of the Carrier. Should the claim be sustained, the Claimant is due only reinstatement with seniority restored and compensation for lost wages, less outside earnings. He must attempt to mitigate damages. The Board is not authorized to alter the negotiated health plan that sets out related benefits for reinstated employees. The Organization has not shown that alleged procedural defects have prejudiced the Claimant. The Organization claims prejudgment when the request to postpone the investigation was denied, but omits mention of two mutually agreed to postponements prior to the investigation.

The Organization asserts that the Investigation was not fair and impartial because the Conducting Officer and main Carrier witness were father and son, a request for a postponement was rejected, the Conducting Officer asked improper questions and the charges were pyramided. The Carrier failed to meet the burden of proof as the Claimant pre-Investigation was charged only for absence on

December 2, 2014, but post-Investigation he was charged with the following day's absence as well. The discipline was punitive rather than corrective. NRAB awards indicate that Rule 40G remedies should include lost overtime wages and reimbursement for premiums, deductibles and co-pays covered by health insurance had the Claimant not been wrongfully terminated.

The Board finds the Organization's procedural or due process contentions unpersuasive. Simply because the Conducting Officer, William Barbee, Sr., was the father of the Carrier's main witness, Roadmaster William Barbee, Jr., that does not *per se* justify a conclusion that the investigation was not fair and impartial. Indeed, there are no credibility issues in this case, thus it is not a situation where the father believed questionable testimony from his son. Moreover, while the Organization contends that a request for postponement of the hearing was denied, the record shows two mutually agreed to postponements and the transcript contains the testimony of the Claimant, thus establishing his attendance at the investigation. As to the allegations that charges were pyramided, while the investigation considered herein was the first of three same-day Investigations involving Claimant Kjos, each investigation involved a separate and distinct charge. The Organization has not shown that the investigation of the Claimant's unauthorized absences was not fair and impartial simply because of the alleged pyramiding.

The Board need not weigh the evidence in this case, as the Claimant not only admitted his absence on December 2 and 3, 2014, he also admitted that the absences were unauthorized. As for the contention that the resulting dismissal was punitive rather than corrective, there is logic in the observation that dismissal can always be viewed as punitive given the consequences, but that alone may not suffice as justification for expunging or modifying the discipline. The Claimant's prior discipline record includes a February 6, 2013 formal reprimand, and May 20, 2013 and January 28, 2014 record suspensions. Each of the above-noted disciplinary measures was the Carrier's response to the Claimant's failure to report and each measure resulted from a waiver of the investigation.

The Claimant was hired on August 11, 2001, so he served approximately 11 ½ years before incurring discipline. The Board has considered the Claimant's testimony that he was suffering from depression that at times made it difficult for him to get out of bed. While this may be true, the record contains no supporting

documentation of what must be considered an affirmative defense. Moreover, any depression from which the Claimant suffered did not relieve him of the responsibility of protecting his employment by obtaining authorization for his absences and possibly by obtaining a medical leave of absence in order to address and treat his depression. Whatever the Claimant did or did not do to address his health issues, the picture drawn by the evidentiary record is that of an employee who in recent years shows no ability to benefit from progressive or corrective discipline. This pattern gives the Board no justification for providing yet another opportunity, as this would simply be an intrusion into the Carrier's prerogative to engage in leniency. The Carrier must have an accountable work force and has a right to demand that its employees consistently appear for their assigned shifts or, at a minimum, give advance notice of an absence if at all possible. The Claimant has been unable to meet this bedrock requirement.

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 10th day of January 2018.