

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43858
Docket No. SG-45128
19-3-NRAB-00003-180622**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of S.C. Vickrey, for reinstatement to service with compensation for all time lost, including overtime pay, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal to the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on May 22, 2017. Carrier’s File No. 35-17-0029. General Chairman’s File No. 17-049-BNSF-121-T. BRS File Case No. 15846-BNSF. NMB Code No. 173.”

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 held the position of Signalman in the Carrier's service. On February 22, 2017, the Claimant was given notice of an investigation in connection with the following charge:

"An investigation has been scheduled... for the purpose of ascertaining the facts in determining your responsibility, if any, in connection with your alleged absence without authority and failure to protect your assignment as a Signalman on gang SSCX0164, starting February 17, 2017, and continuing forward. . . ."

After a formal investigation on May 22, 2017, the Claimant was found in violation of MWOR 1.15 Duty Reporting or Absence and MWOR 1.13 Reporting and Complying with Instructions and was dismissed from the Carrier's service.

The events that led to the Claimant's dismissal began on February 16, 2017, when the Claimant called his supervisor, Signal Construction Supervisor Ryan Pickard, stating that he felt "in a bad way and afraid he would hurt himself or others and needed to check himself in." Supervisor Pickard told the Claimant to contact BNSF's Employee Assistance Program (EAP) for assistance and to keep him updated on his progress. The Carrier had been previously apprised of the Claimant's medical condition.

When the Claimant did not appear at work the next day, Pickard reached out and directed the Claimant to complete his hours of service but got no response from the Claimant. As a result, Pickard's supervisor, John Zdanwic, directed Pickard to list the Claimant as an unexcused absence. On February 18, the Claimant texted Pickard telling him that he was registered in counseling for five hours a day, Monday through Friday. The Claimant was instructed to submit a medical leave of absence ("MLOA") request so that he could be off for the needed time. After a few days, the Claimant emailed his supervisor requesting assistance in applying for the MLOA, although the Claimant had been on six medical leaves of absence since 2010.

On February 22, 2017, the Claimant's supervisor directed him to supply a doctor's note and to make an MLOA request. Claimant replied that he was confused and informed his supervisor that he had already contacted EAP and taken himself out of service while seeking medical help. On February 27, 2017, the Claimant emailed a doctor's note to the Carrier which stated that the Claimant had been in the doctor's

office on that same date and provided previous dates that the Claimant had been treated by the doctor for the same condition. The note stated that the Claimant had been referred to a specialist. The Carrier responded, telling the Claimant that the doctor's note was insufficient to support his request to be away from service.

The first time that Zdanwic received documentation of the Claimant's counseling was on March 3, 2017, which indicated that the Claimant had begun counseling on March 1, 2017, along with a day-by-day summary of his efforts to begin treatment. On March 3, 2017, Claimant also submitted paperwork for a MLOA which was approved and back dated to March 1, 2017. As a result, Claimant was away from work without permission from February 18 to February 28, 2017.

The Claimant was found to be absent without leave in violation of MWOR 1.15,

BEING ABSENT WITHOUT LEAVE 1.15 Duty—Reporting or Absence
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.”

The Carrier contends that the Claimant was given sufficient assistance to complete an MLOA request, especially as he had been on previous leaves, but he failed to complete the paperwork, failing to protect his assignment from February 18 to 28. Although the Claimant stated otherwise, he did not begin treatment until March 1, 2017.

The Carrier contends that this is a serious violation and the Claimant's dismissal was justified, as he was already under a one-year review period due to a previous Level S violation.

The Organization contends that although the Claimant was away from work, he was in constant contact with his supervisor and the Carrier. There was no time that the Carrier was unaware of the Claimant's situation or his medical condition. The Organization contends that the Carrier knew that the Claimant was attempting to address a medical condition of which the Carrier was aware. The Organization contends that the Claimant made clear to the Carrier that he was confused by the

MLOA process on this occasion, despite having gone on medical leaves previously. The Organization contends that the record shows that the Claimant initially requested a thirty-day leave, but the Carrier insisted that he file the paperwork for a MLOA.

The Organization contends that the penalty of dismissal is harsh and excessive when the Claimant was struggling to address a debilitating medical condition. The Organization contends that the BNSF Attendance Policy provides that for a first attendance violation, the supervisor will discuss the situation with the employee. The Organization contends that the Claimant was dismissed for a first violation of the attendance policy.

There is no dispute as to the facts that led to the Claimant's dismissal. The Claimant left work on February 16, 2017 with his supervisor's permission because he was in a bad way. He made efforts to begin treatment, but did not actually do so until March 1. Claimant was in violation of MWOR 1.15 when he failed to protect his assignment.

Nonetheless, after careful review of the record, the Board finds that the penalty of dismissal was too harsh. The Claimant made effort to comply with the Carrier's requests and there was no period of time when he was not in contact with his supervisors. The Claimant immediately sought treatment, but the clinic was unable to see him before March 1, which was beyond his control.

Based upon the unique circumstances of this case and without precedent for any future similar claims, the Claimant is returned to the status he held at the time of his dismissal, that is, on an approved medical leave of absence. Once the Claimant is found to be fit for duty, he shall be returned to the Carrier's service, but he is not entitled to compensation for the time out of service.

AWARD

Claim sustained in accordance with the Findings.

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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 4th day of September 2019.