

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44310
Docket No. MW-45765
20-3-NRAB-00003-190687**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 (dismissal) imposed upon Mr. T. Brunner, by letter dated September 7, 2018, for violation of MWOR 1.13 Reporting and Complying with Instructions for an alleged failure to notify the Lincoln Diesel Shop layoff line at least one (1) hour prior to the start of his regular assigned shift on July 30, 2018 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-18-D070-20/10-18-0354 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Brunner shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits.”**

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 T. Brunner has established and holds seniority within the Carrier's Maintenance of Way Department. On the dates giving rise to this dispute, he was assigned as a 1st Class Carpenter with over thirteen years of seniority.

On June 25, 2018, the Claimant was hospitalized due to chest pains. His supervisor informed him he could not come back to work without a doctor's note but the Claimant was never placed on a medical leave of absence. On July 19, 2018, the Claimant provided a doctor's note clearing him to return to work but was awaiting clearance from the Carrier's Medical Department. On July 26, 2018, the Claimant signed an investigation waiver accepting a Level S, 30-day record suspension regarding his repeatedly being absent without leave. The waiver states, in part:

- “● Any absence or tardiness will need to be notified at least 1 hour before the start of your shift by calling into the Lincoln Diesel Shop Layoff Line...and leaving a voice mail with your name, phone number, employee ID, & reason for calling off or late to work.**

- I understand that this waiver is an offer of leniency on a “last chance” basis, and that any subsequent rule violation of any nature within the review period may subject me to discipline, up to and including dismissal.”**

On July 30, 2018, the Claimant called to inform that he was still not cleared to return to work, but the call was not made one hour prior to the start of his shift.

On August 1, 2018, 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 and determining your responsibility, if any, in connection with your alleged failure to comply with instructions to notify the Lincoln Diesel Shop layoff...at least one hour prior to the start of your regular assigned shift on July 30th, 2018, while assigned as a First Class Carpenter/Mechanic on BMSP0107 at the Lincoln Diesel Shop.”

After a formal investigation on August 16, 2018, the Claimant was found in violation of MWOR 1.13, Reporting and Complying with Instructions, and was dismissed from the Carrier’s service.

The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Carrier contends that it has presented substantial evidence that the Claimant is guilty of the charged misconduct and that the penalty of dismissal is fair. The Carrier points out that the Claimant confirmed that he did not comply with the terms of the waiver that he signed three days prior to the incident that gave rise to this discipline. The Carrier contends that the Claimant admitted that he did not call in at least one hour prior to the start of his shift if he was going to be absent or late to work.

The Carrier further contends that dismissal is warranted, as it is consistent with the Carrier’s Policy for Employee Performance Accountability (PEPA) and the waiver that the Claimant signed. The Carrier contends that the alleged failure to place the Claimant on a medical leave of absence is a red herring that is irrelevant to the facts here.

The Organization contends that the Carrier dismissed the Claimant for failure to follow instructions and call off work, but the Carrier’s medical department refused to allow the Claimant to return to work. The Organization further contends that the Carrier’s dismissal of the Claimant failed to consider the Claimant’s years of service and other mitigating factors.

The Claimant does not dispute that he failed to call off at least one hour before the start of his shift on July 30, 2018, in seeming violation of the waiver he signed on July 26. Nonetheless, the Board does not find substantial evidence in the record to support Carrier's decision. When the Claimant signed the waiver, he had been prevented from returning to work by decision of the Carrier's Medical Department. As such, it was not unreasonable for him to believe, as he apparently did here, that calling off was unnecessary, as it was the Carrier's decision not to permit him to work. The Carrier knew where the Claimant was and that he was trying to return to work. It was the Carrier's officers who prevented him from doing so. In light of the unique and extenuating circumstances found in this matter, this Board finds that the Carrier's decision to dismiss the Claimant was excessive. The Claimant must be reinstated to service, but because the Claimant had not been medically cleared to return to work at the time of his dismissal, the remedy does not include a monetary award.

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 23rd day of October 2020.