

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 27227
Docket No. 46716
10-1-NRAB-00001-070160
07-1-160**

The First Division consisted of the regular members and in addition Referee Michelle Camden when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Locomotive Engineers and Trainmen
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Appealing the ‘Second Offense’ Violation of the Union Pacific Attendance Policy assessed to personal record of Engineer C. L. Dunnivant and request the removal of discipline assessed and pay for any and all time lost with all seniority, vacation, and all other rights restored unimpaired. Action taken as a result of formal investigation held on June 14, 2006 in Portland, Oregon.”

FINDINGS:

The First 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.

Claimant Engineer C. L. Dunnivant was assigned to the XE21 Engineer's freight pool on the Portland Service Unit. He was hired by the Carrier on June 7, 1994.

P. Alyward, Director of the Western Region, testified that the review period for the Claimant was from March 3 through June 1, 2006, a 91-day period. During that period, the Claimant was off for five of the 13 weekends in an uncompensated status. Alyward stated that the Claimant had 10 non-compensated occurrences during the review period. He had 46 job starts, five vacation days and two personal leave days. The Claimant removed himself from service on six of the 11 holidays considered.

The Claimant testified that May 19 was the court date for the adoption of his daughter to be final. He and his wife separated, so the Claimant spent from May 19 to June 1 to find housing and child care. He further testified that he had attempted to use his compensated time for those dates, but it was denied by Crew Management System personnel. The Claimant also noted that there were only eight incidents, not ten, i.e., March 19 was counted twice, as was May 20. There were only eight occurrences.

The Organization appeals on both procedural and substantive grounds. The Organization objects because the Notice of Investigation presumed guilt, and was untimely. It also argues that the Attendance Policy itself is vague and an attempt to change working conditions. The Organization contends the Carrier did not prove any violation of the policy.

The Carrier asserts there is substantial evidence of the Claimant's culpability. The discipline in this matter was reasonable and consistent with Company policy. There were no procedural errors which would warrant voiding the discipline.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for that of the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion.

Regarding the alleged procedural errors, there were none that would warrant vacating the discipline assessed.

The Board finds insufficient substantial evidence in the record to uphold the Carrier's position regarding the Claimant's violation of the Attendance Policy. The Claimant was charged with excessively absenting himself from work during the review period and failing to protect his employment on a full time basis.

The Claimant had eight non-compensated occurrences, missed five of 13 weekends, and six of 11 holidays. He was charged with failing to protect his employment on a full time basis. Three of the non-compensated occurrences happened on May 19-20, May 20-21 and May 22-23, i.e., the dates immediately following the adoption of the Claimant's daughter. The Carrier's own policy states that "Every effort will be made to identify those employees who have legitimate reasons for their absences." The Claimant had a legitimate reason for his absence during the May 19-23 period with the court date for his daughter's adoption and the subsequent separation with his wife. Moreover, the Claimant made an effort to use his compensated time for this period, but his request was denied. When these three occurrences are removed from the mix, there were only five. Five occurrences in a 91-day period simply does not establish a violation of the Carrier's Attendance Policy.

There is simply not substantial evidence that the Claimant was in violation of the Carrier's Attendance Policy in this case.

AWARD

Claim sustained.

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.

Form 1
Page 4

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 18th day of October 2010.