Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
FIRST DIVISION

Award No. 27579
Docket No. 47554
12-1-NRAB-00001-110205

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

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

STATEMENT OF CLAIM:

"Appealing the 'NOTIFICATION OF ABSENTEEISM - SECOND OFFENSE' assessed to personal record of Engineer M. R. Carter (Claimant) and respectfully request the removal of discipline assessed, pay for all time lost, with all seniority, vacation, and all other rights restored unimpaired. Action taken as a result of formal investigation held on August 10, 2010, in Milford, Utah."

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.

On June 18, 2010, the Carrier directed the Claimant to report for a formal Investigation on June 25, which was mutually postponed until August 8, concerning, in pertinent part, the following charge:

> **". . . to develop the facts and determine your responsibility, if any, in connection with your alleged violation of the Union Pacific Attendance Policy amended and effective November 1, 2006, and the Service Unit's corresponding Superintendent's Bulletin, as a result of your alleged failure to protect your employment by excessively absenting yourself from service as noted on the attached work history between March 11, 2010, and June 9, 2010, while employed as an Engineer with Union Pacific Railroad."**

On August 19, 2010, the Claimant was notified that he had been found guilty as charged and was assessed a "Second Offense" violation of the Carrier's Attendance Policy with no time off work.

It is the position of the Organization that the Carrier's Attendance Policy, as set forth in Superintendent's Bulletin No. 11 dated January 1, 2010, is in direct conflict with the parties' Agreement. It argued that the Carrier assessed discipline based upon a policy that requires, according to the Charging Officer, that Locomotive Engineers have no right to time off except for compensated time off and Engineers must be available 100% of the time or face disciplinary action, which conflicts with various Agreement provisions and historical past practice that override the unilateral Carrier Policy, and on that basis alone the discipline should be set aside. Turning to the merits, it argued that during the time-frame covered by the charges, the record showed that the Engineers in the pool on which the Claimant was working had an average of 35 starts and that the Claimant worked 14 starts and also had 26 days on which he was off observing vacation. According to the Organization, the Carrier's position is nullified by the fact that had the Claimant not been on vacation, he would have accumulated more starts during the period under review and thereby elevated himself into the average of his peers, a fact that the Charging Officer failed to mention in his testimony. It also argued that Crew Management refused to allow him to layoff for personal business so as to enable him to take care of his sick father, which caused him to layoff due to sickness in his family. Nor would Crew Management allow him to utilize his Agreement-provided ability to adjust the start of a solid week of vacation ahead or back three days, which caused him to layoff in a non-compensated way. It further argued that the Carrier committed a fatal procedural breach of the Claimant's Agreement due process right to a "fair and impartial" Investigation by subjecting him to double jeopardy when it counted layoffs against him and then counted them again when those days fell on a weekend. Lastly, it argued that the Carrier did not meet its

burden of proof and concluded by requesting that the discipline be rescinded and the claim sustained as presented.

Conversely, it is the Carrier's position that there were no procedural errors of any kind that would warrant reversing the discipline, because the Claimant was provided a "fair and impartial" Hearing. In response to the Organization's argument that its Attendance Policy is in conflict with various Agreement Rules, the Carrier argued that it is not and it has an inherent right to require its employees to fulfill their employment obligation to work, and under no circumstances did it bargain or negotiate that right away. In support of its position, it referenced Chicago & North Western Transportation Co. v Railway Labor Executives Ass., 908F. 2d 144, at 155 wherein the Court ruled: "What the agreements do not expressly or impliedly forbid they permit." and because it had not bargained that right away, it still retained the right to establish an Attendance Policy. It also argued that during a 90-day review period covering the timeframe of March 11 through June 9, 2010, it was discovered that the Claimant had failed to protect his assignment on nine occasions, eight of which were on weekends. This review also showed that each time the Claimant laid off from work, his turn was missed and, because of his lack of availability, it was forced to depend on someone other than the Claimant in order to conduct its business. Simply put, the Claimant failed to protect his job assignment on a full-time basis and the discipline was appropriate. The Carrier closed by asking that the claim remain denied.

The Board thoroughly reviewed the record evidence and is not persuaded that the Claimant's right to a "fair and impartial" Hearing was impaired. The Board finds nothing that warrants setting aside the discipline without reviewing the merits.

This dispute arises under the Carrier's TE&Y Attendance Policy, which was implemented in 2006 for operating employees in Train, Engine and Yard (TE&Y) service across its system. The Policy and its forerunners have been the subject of many arbitral decisions wherein one of the issues has been whether the Policy violated the parties' Agreement. For the same reasons expressed in First Division Award 27577, the Board will resolve this case on the basis of whether the Claimant violated the Attendance Policy. The Board further notes that this is the second of three absenteeism disputes involving the same Claimant.

It is not an unreasonable expectation of the Carrier to assume that its employees will meet their obligation to report to work as scheduled on a regular and timely basis consistent with the parties' Agreement. The Carrier's Attendance Policy states that employees are expected to protect their job assignments on a "full time basis" meaning being available to work their assignment, whether regular or extra, whenever it is scheduled to work. The Policy further explains that assigned rest days, layover days and Agreement-provided compensated days off are available to employees for personal business. Additionally, the Policy reveals that reasonable layoffs may be granted if the needs of the Carrier's service permit.

The Attendance Policy also identifies employees that do not work full-time as those who exhibit a frequency of pattern weekend layoffs, frequent or pattern holiday layoffs, frequent personal layoffs, frequent sick or sickness-in-family layoffs without proper medical documentation, lower availability or work days when compared to peers, or missed calls and no shows. The Policy is progressive and provides minimal discipline for First and Second Offenses with dismissal as the penalty for a Third Offense.

After careful consideration of the various arguments set forth by the parties, the Board concludes that during the 90-day review period of March 11 through June 9, 2010, the Claimant laid off on nine occasions, eight of which were on weekends. However, the record further indicates that the Claimant was caring for a sick parent when he used multiple vacation days in that effort, which sometimes coincided with weekend days. Additionally, during the on-property handling of the claim the Organization asserted, without challenge, that the Claimant used 26 days of paid vacation during the review period, which equates to slightly more than five weeks. Therefore, the Board finds that the Organization correctly argued that had the Claimant not been observing Agreement-sanctioned time off during the Carrier's review period, he would have accumulated more starts, which would have him elevated him to the average of his peers. The comparison in this dispute of an employee working seven weeks versus those working 12 weeks leads to a faulty conclusion because the circumstances are not alike. Thus, the Board finds and holds that inasmuch as the Carrier did not meet its burden of proof, the resulting discipline must be set aside and the claim sustained as presented.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 16th day of May 2012.