

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

**Award No. 27580  
Docket No. 47577  
12-1-NRAB-00001-120019**

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 - THIRD 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 January 5, 2011, 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 November 23, the Carrier directed the Claimant to report for a formal Investigation on December 2, 2010, which was mutually postponed until January 5, 2011, concerning, in pertinent part, the following charge:

**“. . . to develop the facts and determine responsibility, if any, in connection with your alleged failure to protect your employment between August 20, 2010, and November 17, 2010, as noted on the attached work history, while employed as an Engineer with Union Pacific Railroad. These alleged actions indicate a possible violation of Union Pacific Attendance Policy amended and effective November 1, 2006, and the Service Unit's corresponding Superintendent's Bulletin, and Rules 1.15, and 1.13, and any other applicable rules that may be brought up during the investigation that are contained in the General Code of Operating Rules, effective April 7, 2010.**

**A review of your previous history indicates this equates to a Level 5 infraction, and if you are found to be in violation of this alleged charge, the discipline assessment may result in your dismissal.”**

**On January 14, 2011, the Claimant was notified that because he had been found guilty as charged, he was assessed a "Third Offense" violation of the Carrier's Attendance Policy and was dismissed from service.**

**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 they must be available 100% of the time or face disciplinary action, which conflicts with various Agreement provisions and historical past-practice that override unilateral Carrier Policy and, on that basis alone, the discipline should be set aside. Turning to the merits, the Organization argued that during the time-frame covered by the charges, the record showed that Engineers in the pool on which the Claimant was working had an average of 38 starts and that the Claimant worked 21 starts and observed seven days of vacation. According to the Organization, the Carrier's position is nullified by the fact that had the Claimant not been on this paid leave, he would have accumulated more starts during the period and thereby elevated himself into the average of his peers, a fact that the Charging Officer failed to mention in his testimony. The Organization asserted that the Claimant laid off for a minimal amount of time during the period under review inasmuch as he was only off in non-compensated status on six occasions during the 90-day period, which was reasonable and, in reality, he was available or worked 79 days during the 90-day period, which**

equates to being available 88% of the time. 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 they fell on a weekend. Lastly, the Organization argued that the Carrier did not meet its burden of proof. It 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. The Carrier also argued that during a 90-day review period covering the timeframe August 20 through November 17, 2010, it was discovered that the Claimant had failed to protect his assignment by laying off on eight occasions, five of which were on weekends in non-compensated status. 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.

The Carrier further stated that the Claimant had previously been issued a "First Offense" on March 9 and a "Second Offense" on August 19, 2010, to no avail, as this instant offense represented the Claimant's "Third Offense" within one year, which clearly showed that he was either unwilling or unable to follow the policy. Therefore, permanent dismissal 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 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 third 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 on 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 being the penalty for a Third Offense.**

**After consideration of the various arguments set forth by the parties, the Board has determined that during the 90-day review period of August 20 through November 17, 2010, the Claimant laid off on eight occasions, five of which were on weekends in non-compensated status. The Claimant's layoff record exhibited a pattern of weekend layoffs, which further indicated that when he laid off from work, his turn was missed and the Carrier was required to depend upon another employee to fill his assignment. The Board finds and holds that the Carrier met its burden to prove that the Claimant was guilty as charged.**

The only issue remaining is whether the discipline was appropriate. At the time of the incident, the Claimant had approximately 33 years of service with no showing in the record of any other disciplinary problems prior to the alleged absenteeism violations that occurred in this case and in First Division Awards 27578 and 27579. In the first of the aforementioned Awards the Board determined that the Claimant was guilty as charged; however, in the second case the Board found that the Carrier did not meet its burden of proof and rescinded the discipline and sustained the claim as presented. Therefore, the Board concludes that the proven guilt in this instance is not the Claimant's "Third Offense," but instead constitutes his "Second Offense." Accordingly, under the Carrier's Attendance Policy it is not a dismissible offense. Accordingly, the Board finds and holds that the Claimant is to be returned to service with seniority unimpaired and pay for time lost in accordance with the parties' SYSTEM AGREEMENT – DISCIPLINE RULE. The Board exercises its prerogative to note that oftentimes absenteeism and/or tardiness are signs of problems that have arisen in one's personal life account of illness in the family or the loss of a loved one. During the handling of the Claimant's three cases there were some legitimate layoffs involving the treatment of Shingles, illness of the Claimant's father and the honoring of the death of a daughter, which reasonably may have contributed to the totality of the Claimant's absenteeism. Nevertheless, the Claimant is forewarned that he needs to adhere to the Carrier's Attendance Policy following reinstatement.

**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 First Division**

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