

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 27226
Docket No. 46714
10-1-NRAB-00001-070158
07-1-158**

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 ‘Third Offense’ Violation (reduced to ‘Second Offense’ by Board Decision) of the Union Pacific Attendance Policy assessed to personal record of Engineer L. L. Johnson 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 1, 2006 in La Grande, 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 L. L. Johnson was assigned to the RE27 Engineer's freight pool on the Portland Service Unit. He was hired by the Carrier on April 1, 1988.

D. Cagle, Manager of Safety and Special Projects, testified that the review period for the Claimant was from January 4 through April 4, 2006, a 91-day period. During that period, the Claimant was off on seven of the 13 weekends in an uncompensated status. He had 13 non-compensated occurrences during the review period. He had 46 job starts, used two personal days and had eight vacation days, which gives him 56 paid occurrences. The average number of job starts for the board was 56. Cagle stated that the Claimant removed himself from service on five of the 11 holidays considered. He also missed 12 turns or 24 trips during the review period.

During cross examination about each individual holiday, Cagle admitted that the Claimant was in OK status for every holiday, save one for which he was off on FMLA. He was laid off personal on Good Friday, but that was after the review period. Cagle took exception to the Christmas and New Year's holidays because the Claimant had laid off sick on the Wednesday before both and did not actually work from December 21 to January 2, 2006. In Cagle's words, the Claimant was "sharp shooting the board."

The Claimant testified regarding each absence. He stated he had appropriate FMLA leave, which he had used since 2000 for migraines. For three of the Layoff Sick (LS) days, the Claimant stated he had called Crew Management System (CMS) personnel to utilize his FMLA time and had a wait time of 43-52 minutes. An individual with migraines cannot spend that kind of time waiting on the phone. Instead, the Claimant called the regular CMS line and laid off sick, which he did in about three minutes.

The Claimant stated that he was a single parent with two children in his custody. His father also had a stroke during the review period and the Claimant assisted with his father's care and modifications to his father's home to make it accessible.

The Claimant also testified that during the review period, he averaged more than 3,800 miles per month. He had accumulated 11,598 miles of service through April 21, 2006. This is an average of 3,919.73 miles per month, an amount that is in excess of the mileage provision in the BLET Agreement.

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, thus circumventing the parties' Agreement. 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 to 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.

Five criteria are considered when determining if there is a violation of the Attendance Policy. They include: frequent or pattern of weekend layoffs, frequent or pattern of holiday layoffs, frequent personal layoffs, excessive use of sick time for self or family and lower availability when compared to peers.

The Claimant absented himself on seven of the 13 weekends during the review period. Of those seven, three were occasions when the Claimant had called the CMS number seeking to use FMLA and was told his wait time would be anywhere from 43 to 52 minutes, an unreasonable amount of time for a person with

a migraine to wait on hold. Instead, the Claimant called the general CMS number to lay off sick, which only took three to four minutes.

Cagle originally testified that there were seven of the 11 holidays on which the Claimant was in a non-compensated status. That number was actually only two. Cagle considered it an incident over the Christmas - New Year's holidays because the Claimant was off in between the holidays. The record shows that the Claimant's status was okay for every holiday except December 31, 2005 and April 16, 2006 (Good Friday) which was outside of the review period.

There were 13 alleged incidents of non-compensated occurrences in the 91-day period. Of those, three were occasions when the Claimant had called the CMS number for FMLA use and was given an unreasonable hold time for a person with a migraine headache. He chose to use LS time instead.

The final criteria under the policy involves availability when compared to peers. Cagle testified that the Claimant had 46 starts. When coupled with his personal days and vacation, he was actually compensated for 56 occurrences. That was the average for the board he occupied. He worked the same amount as the average of all of his peers.

One last item that was overlooked was the Claimant's mileage. While it is not an enumerated criteria under the policy, this information simply cannot be ignored. The Claimant showed that he logged an average of nearly 4,000 miles per month. If that is not indicative of working full time, it would be difficult to imagine what is.

There is simply no credible evidence that the Claimant was in violation of the Carrier's Attendance Policy in this case.

AWARD

Claim sustained.

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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 First Division**

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