

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 27228
Docket No. 46719
10-1-NRAB-00001-070154
07-1-154**

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 R. E. Cody 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 April 21, 2006 in Las Vegas, Nevada.

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 R. E. Cody was assigned to the Utah Service Unit working on the RE59 pool for 17-18 years. He has been with the Carrier for about 37 years at the time of this matter.

Manager of Operating Practices (MOP) W. C. Bennett testified that the review period for the Claimant was from December 23, 2005 to March 23, 2006, a 91-day period. During that period, the Claimant was off on five of the 13 weekends in an uncompensated status. He had nine non-compensated occurrences during the review period. He had 34 starts during that period, which put him third from the bottom of approximately 36 employees in the pool.

MOP Bennett was not the manager at the time of the review period. He was promoted on April 1, 2006. The actual charging manager was MOP A. Gray. Gray was injured and not able to attend the Hearing. He was replaced by Bennett.

The Claimant testified that he had the flu and strep throat during the period in question. He stated that instead of laying off sick, he had personal leave days and he used those so his time would not look so bad. He used all 11 personal days he had during this period. He stated he was sick all of this time, except for maybe two days. The Claimant was not able to provide specific details of the reasons for most of his absences. He did not provide any medical documentation regarding his absences.

The Organization appeals on both procedural and substantive grounds. The Organization objects because the original charging manager was not present at the Hearing, 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 Attendance Policy states in part:

"Full time means being available to work your assignment, whether regular or extra whenever it is scheduled to work. Assigned rest days, layover days, and agreement provided compensated days off are available to you for personal business.

* * *

It is your responsibility to notify your manager, in advance of layoffs if possible, on personal or family issues that may affect your ability to work full time. Substantiating documentation is expected and may be required."

The Claimant was absent from work nine times during the 91-day review period. He laid off sick eight times and was assessed one missed call, for which he was exonerated. The Claimant also laid off on five of 13 weekends, and five holidays. The fact that the Claimant took his 11 personal days was also entered into the record.

The alleged violation was based on several criteria: the number of non-compensated occurrences, the number of weekends and holidays available for work, frequent sickness and availability compared to peers.

The Claimant had nine non-compensated occurrences: eight sick and one missed call, which was later exonerated. So, we are considering eight sick calls in a 91-day period. Also, on five of 13 weekends the Claimant laid off. He was available on the remaining eight. So, on average, the Claimant had one sick occurrence every 11 days and was available on 61% of the holidays during the review period.

Then the Claimant was compared to his peers, i.e., others in his pool. Testimony revealed that the Claimant was third from the bottom of about 36 employees in terms of actual starts. This is coupled with the fact that the Claimant was allowed to use all 11 personal days during the review period.

It is troubling to the Board that the Claimant was allotted contractual time off, in this instance 11 personal days - but then was penalized when he used those days. The measure of employees relative to their peers without consideration of other factors does not provide a fair measurement. If the Claimant is allowed to take all 11 personal days in one 91-day period, his starts will, of course, be less than the rest of the pool. This rationale will punish any employee who properly notifies CMS of their intention to use their compensated days off. Employees cannot be punished for exercising a contractual right.

The Board understands that the Carrier operates 24 hours a day, seven days a week and that maintaining adequate staffing is of utmost importance to its operation. However, if the employees are entitled to take contractual time off, there cannot be a penalty for doing so.

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 5

Award No. 27228
Docket No. 46719
10-1-NRAB-00001-070154
07-1-154

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

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