

PUBLIC LAW BOARD NO. 7293

**PARTIES) SMART - TRANSPORTATION DIVISION
TO)
DISPUTE) BNSF RAILWAY COMPANY**

STATEMENT OF CLAIM:

Appeal on behalf of Tulsa, Oklahoma Yardman A. R. Shields for removal of a Level S 30 Day Record Suspension and 3 Year Review Period from his personal record and pay for all time lost as the result of an investigation held on June 3, 2011. (Organization File D-1962; Carrier File 55-11-0061)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The dispute at issue calls for a determination as to whether the Claimant, who had requested and been approved for intermittent leave days off from work in application of the Family Medical Leave Act (FMLA) has violated the conditions under which this FMLA approval was granted and thereby subject to discipline.

According to the record, the Claimant was notified by letter of May 11, 2011 to report for a hearing in a charge of alleged failure to comply with Terminal Superintendent instructions as set forth during a conference held on January 28, 2011 concerning compliance of FMLA layoff requirements as approved on December 16, 2010. The FMLA leave was approved for, as a health care provider or physician stated on an application as submitted by the Claimant that the latter "may need 1-2 absences per month; duration 1 day."

A scheduled hearing date of May 23, 2011 was postponed by mutual agreement and the hearing was held on June 3, 2011. Thereafter by letter of June 15, 2011 the Carrier notified the Claimant that it had determined through testimony and exhibits brought forth at the hearing that the Claimant was guilty as charged and thereby assessed the discipline at issue, a Level S 30 Day Record Suspension and 3 Year Review Period that commenced that same date, June 15, 2011.

In support of its disciplinary action the Carrier says it is necessary to recognize that the Claimant had previously been placed on notice that his pattern of FMLA usage was inconsistent with the terms of his approved FMLA leave. The Carrier thus

references the Claimant's approved FMLA time for December 2009 to December 2010 and thereafter December 2010 to December 2011 where, as in the instant case, approved FMLA was one to two absences per month; duration one day.

The Carrier submits that on February 9, 2010 the Claimant was notified by letter that an audit of his time off during the two-month period of December 2009 and January 2010 shows an unusual pattern of FMLA usage; a disproportionately number of FMLA days taken having been on days next to a weekend day, holiday or rest days. The letter further stated:

Your pattern of leave is inconsistent with physician-recommended leave requirements.

Given the nature of your FMLA usage, BNSF is monitoring the situation closely. It is your responsibility to contact the treating doctor and have him/her fax updated information to the HR Benefits Processing Team at 1-817-352-3672. The Benefits Processing Team can also be reached by calling 1-800-234-1283 or Company line 8-593-6400.

Complete Family/Medical Leave information packet is enclosed.

The Carrier says the Claimant complied with the above instructions for the balance of 2010; layoffs from work being consistent with his FMLA leave time as approved.

The Carrier next shows that on December 16, 2010 the Carrier received and approved the Claimant's application for intermittent FMLA leave for the period December 16, 2010 through December 15, 2011; the approval again being for one to two absences per month; duration one day.

In this latter regard, the Carrier submits that by letter of January 24, 2011 the Claimant was notified about an audit having shown that during the past month (December 2010) he again had a pattern of having taken a disproportionately large number of FMLA days on or next to weekend days, holidays or regular rest days, with the pattern of leave being inconsistent with his physician-recommended leave need being one to two absences per month; duration one day. The letter also requested the Claimant meet with the Terminal Superintendent on or before February 4, 2011.

As instructed, the Claimant met with the Terminal Superintendent on January 28, 2011, the Terminal Superintendent offering in testimony at the hearing that the Claimant was told that his layoffs were exceeding the allotted days as approved for his FMLA and questioned the layoffs being next to his rest days and weekends. The Terminal Superintendent further said that he had told the Claimant of his

expectations that the Claimant take his FMLA leave time consistent with that which was approved, i.e., one to two absences per month; duration one day, and that a failure to do so would be cause for the matter being handled in a formal manner. The Claimant was said to have understood the Terminal Superintendent's instructions; he would contact the medical department so as to obtain approval for an increase in FMLA days and recertify his medical leave. In this latter respect, the Terminal Superintendent said he provided the Claimant with a new FMLA packet to submit if he needed time off other than the then FMLA approved days.

According to the record the Claimant did not submit a new application for additional FMLA time off, but proceeded to lay off three days FMLA in February 2011; two days FMLA in March 2011; and four days FMLA in April 2011, with three of the latter mentioned days being consecutive days. This pattern of FMLA leave days being cause, the Carrier offers, for the Claimant to be notified by aforementioned letter of May 11, 2011 to report for a hearing and the subsequent assessment of discipline.

It is the position of the Claimant and the Organization on his behalf that the Claimant was singled out for discipline and prejudged because of a past on-the-job injury in 2008; subjected to disparate and discriminatory treatment; the hearing was not conducted a fair and impartial hearing; the Carrier failed in its obligation of burden of proof; and, discipline as assessed is harsh and excessive under the facts brought forth at the investigation.

The Board has given studied consideration to the aforementioned procedural argument that the Claimant was singled out for discipline, prejudged, and discriminatorily treated. Certainly, more than mere assertion of adverse and discriminatory treatment is necessary to support such contentions, the record not showing any basis for the claimed treatment. In addition, it is noted that the Claimant became an employee of the Carrier on July 12, 2004 and that prior to the instant case arising from the notice of hearing dated May 11, 2011 the only formal discipline on the Claimant's record at the time is a Formal Reprimand that was assessed on December 12, 2010 in the Claimant's then waiver of a formal hearing in a charge of failure to be available as a full time employee for a rolling three month period of time.

As concerns the Claimant's FMLA being subject to audit, unrefuted facts of record are that the Carrier conducts periodic audits of employees approved for FMLA. Testimony at the hearing was that there are between 30 to 40 Tulsa, Oklahoma Terminal employees who have been approved for some form of FMLA leave. It was therefore incumbent upon the Claimant or the Organization on his behalf to have sought and offered evidentiary documentation that these employees are not being periodically audited and that other employees have not been subjected to discipline for a violation of approved FMLA leave.

It is also evident that the hearing was conducted in a fair and impartial manner. The Claimant had adequate notice of the charge against him; he was present for and assisted in a defense against the charge by a representative of the Organization; he and his representative had opportunity to prepare and present a defense against the charges; and, opportunity was given to present and examine witnesses.

In merits argument, it is noteworthy that both the Claimant and his representative were most adamant at the hearing in asserting that the Claimant was entitled to 12 weeks of unpaid FMLA leave and therefore not guilty as charged. In this same respect, in its initial appeal of discipline the Organization likewise asserted that the Claimant was qualified for 12 weeks of FMLA and that “nothing short of that time would be satisfactory” and that “the Claimant had 63 days left of FMLA time.”

There is no question, as the Carrier submits, that although the FMLA requires covered employers to provide 12 weeks of unpaid, job-protected leave to eligible employees under certain stated conditions, the fact remains that the Claimant had requested and been approved for intermittent FMLA leave of but one to two absences per month; one day duration. Thus the contention that the Claimant had been approved for 12 weeks or 84 days of FMLA leave and had 63 days of FMLA leave left is without any basis in fact.

The Board also finds lacking in support of record the Organization contention that the statement of the Claimant’s health care provider or physician that the Claimant may need one to two absences per month; one day duration did not intend “a hard ceiling that could not be breached” as concerns the number of FMLA days that the Claimant need take as leave. Certainly, as the Carrier offers, it was the Claimant’s health care provider or physician who placed the limited number of intermittent leave day needs on the application to be one to two days per month; duration one day. In other words, there was no indication on the FMLA application that there was a need for other than a possible one to two days per month of single day absences; not more than that number or that FMLA leave days be consecutive.

In this same respect, the Board is not persuaded that consideration be given to a note presented by the Claimant at the June 3, 2011 company hearing involving his purported physical or medical condition. Dated May 13, 2011, or two days after the Claimant was notified to report for a hearing, the note is from a Doctor of Osteopathic Medicine and Clinical Associate Professor of Medicine, Center for Health Sciences, Oklahoma State University. The notes states that the Claimant “has a medical condition which is very unpredictable and can come on at almost any time with various types of symptoms” and that “it tends to wax and wane in its severity and its predictability.” As the Carrier submits, this note is not from the Claimant’s health care provider or physician who had only stated on the approved

FMLA application as on file with the Carrier that the Claimant “may need 1-2 absences per month; duration 1 day.”

It is without question, as the Organization submits, that the statutory provisions of the FMLA provide a right to have any paid leave, e.g., personal days, vacation, sick leave, run concurrently with unpaid medical leave provided it meets any applicable requirements of the leave policy. At the same time it must be recognized, as the Carrier offers, that the FMLA provides that at least 30 days advance notice be given of a need to take FMLA leave when a need for leave is foreseeable such as a planned medical treatment or as soon as practicable if 30 days’ notice is not possible. Further, the FMLA provides that when the need for leave is unforeseeable that a covered employee must provide notice as soon as practicable.


It remains unclear in study of the record as to what extent the Claimant gave notice of his marking off work FMLA. Further, as concerns the record even assuming, *arguendo*, the Claimant’s need for FMLA leave days was to be recognized as unpredictable, the Claimant has failed to show why such an unpredictable need falls an inordinate number of times coincident with the Claimant’s scheduled time off from his job assignments.

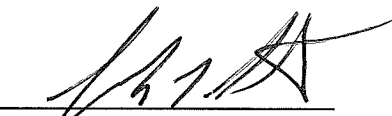
Claimant testimony and statements of his representative at the hearing suggest that they were either extremely confused about the applicable provisions of the FMLA or were trying to frame testimony and statements without admitting that the record supported a finding that the Claimant had in fact been warned and counseled in the past about the nature of his usage and pattern of leave days being inconsistent with and exceeding the number of days as otherwise approved for FMLA leave time.

The repetition of an offense after proper warning, as in this case, evinces an attitude of indifference or irresponsibility and is usually considered as reasonable cause for the administration of discipline. Under the circumstances, the facts of record clearly establishing that the Claimant was guilty as charged, we find no reason to disturb discipline as assessed. Consequently, the appeal request that discipline be set aside not being justified, the claim will be denied.

AWARD: Claim denied.


Robert E. Peterson
Chair & Neutral Member


Andrea N, Smith
Carrier Member


J. Michael LaPresta
Organization Member

Fort Worth, TX

Dated: 9/26/17