

**PUBLIC LAW BOARD NO. 7425**

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

**STATEMENT OF CLAIM:**

**Claim of Lake Superior (1<sup>st</sup>) Seniority District (Twin Cities, MN) Switchman A. R. Stone for reinstatement to service with seniority rights unimpaired, removal of censure from his personal record and pay for all time lost including but not limited to the following: payment of vacation allowance, health and welfare costs, reimbursement of all expenses related to the pursuit of alternative employment, reimbursement for any damages incurred as the result of discharge from service including proceeds on any property, real estate or financial instruments sold to replace lost compensation, as a result of an investigation held on November 22, 2014. (Organization File No. D1000-020-14B; Carrier File No. 50-14-0028)**

**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.**

**By Carrier letter dated October 14, 2013 the Claimant was notified to report for an investigative hearing for the purpose of determining his responsibility, if any, in connection with an "alleged failure to comply with written instructions provided by the BNSF Medical Department and your absence without leave after your medical leave expired on October 8, 2013."**

**Following two postponements of scheduled hearing dates, the investigation was held on November 22, 2013. The Claimant was present for the investigation and was assisted in a defense against the charges by a representative of the Organization.**

**Thereafter, by letter of November 27, 2013 the Carrier advised the Claimant that it had determined from testimony and exhibits brought forth at the investigation that he was guilty as charged and had violated GCOR 1.13, "Reporting and Complying with Instructions." In assessing discipline of dismissal from service the Carrier**

letter stated it was in consideration of both the seriousness of the instant violation and the Claimant's past record. The Claimant's record shows that at the time of the incident the subject of this dispute he had been disciplined on five separate occasions for violations of attendance guidelines since becoming an employee of the Carrier on April 4, 2011.

In study of the hearing record the Board finds no merit in Organization contentions that the Claimant was denied benefit of a fair and impartial investigation. Nor does overall review of the record support Organization argument that the Carrier had prejudged the guilt of the Claimant prior to the conclusion of the investigation. That a witness for the Carrier in presenting into the record rules offered as applicable to the charges would assert a belief that the Claimant had violated the referenced rules does not serve to establish a prejudgment of guilt. This witness had been summoned to testify in support the charges.

As concerns the background leading to the charges, the Claimant had been granted a medical leave of absence on April 16, 2013. At that time the Claimant was given specific written instructions which he was directed to follow regarding this leave of absence, including a mandatory requirement he contact the Employee Assistance Program Manager (EAM) and comply with instructions as given by the latter.

The record shows that the Claimant was thereafter provided extensions of the leave of absence based on what are offered as promises of following through with required evaluations and treatment as instructed by the EAM.

Among various letters of record from the Carrier to the Claimant it is especially significant that by letter of September 25, 2013 the Medical Department reminded the Claimant of a need to follow instructions as laid out in a prior letter of April 25, 2013. Further, as concerned the Claimant's medical leave of absence, which had technically expired on September 22, 2013, this September 25, 2013 letter stated that a recommendation would be made to the Claimant's supervisor that the leave be extended to October 8, 2013. In this latter respect, the letter clearly advised the Claimant that it would be his responsibility to provide for any future extension of his leave of absence, stating:

After that date [October 8, 2013], it will be your responsibility to extend your leave with a report from a current treatment provider.

The Terminal Superintendent thereafter addressed a September 27, 2013 letter to the Claimant that reads as follows with the Board having excluded names and telephone numbers:

It has come to my attention that you have not been in compliance with written instructions from MEH/EAP. You must contact the EAM, . . .

at . . . within 10 days of first attempt of delivery of this letter and you must follow her instructions. Any failure to comply will be considered failure to comply with instructions and will be handled in a formal manner with the Division.

If you have any questions, I can be reached at . . .

By letter of September 30, 2013 the Terminal Superintendent granted the Claimant an extension of his medical leave effective until October 8, 2013. In part here pertinent this letter advised the Claimant as follows:

I have attached a copy of your extended leave form, and I have again provided you with the process documentation and forms for your return to work. Please read all of the information on all of the attached documents carefully as they contain important information and instructions. (Underscoring as contained in the original letter.)

Please remember, it is your responsibility to obtain an extension to your leave, if required. Failure to report for duty on or before the date of the expiration of the leave will be subject to consequences as outlined in the collective bargaining agreement.

\* \* \* \* \*

If you have any questions, please feel free to contact either myself at the number listed above or . . . at . . .

The record shows that the Claimant thereafter failed to comply with arrangements and instructions given in consultation with the Medical Department in a telephone call of October 1, 2013.

When it was determined that the Claimant had failed to comply with the above mentioned instructions, and that he had failed to report for duty or to have timely offered why he was not requesting a further extension of the leave of absence beyond the expiration date of October 8, 2013, the Claimant was, as hereinabove stated, directed to report for a formal investigation by letter of October 14, 2013.

In response to questions by the Hearing officer as to whether he had complied with the letter instructions to return to work either before at the expiration of his leave of absence, the Claimant said: "Yes because I had no reason for not following those instructions." In further testimony the Claimant offered that he did not report for work because he "wasn't assigned to anything" or "wasn't marked up." Nothing of

record shows that the Claimant had in fact made any contact with the Carrier to return to work or to extend his leave of absence beyond October 8, 2013.

It is also evident from correspondence of record that the Claimant failed to show up for a number of scheduled appointments so as to be in compliance with instructions as given to him by the Medical Department.


The Claimant challenged detailed Carrier documentation that showed his failure to have appeared for scheduled appointments, the Claimant asserting that he had documents to support an attendance or rescheduling of appointments. The Claimant said: "I mean I can go print something off." The hearing officer offered the Claimant benefit of a recess so as to permit him the opportunity of retrieving and presenting into evidence his claimed support documentation. The Claimant and his representative initially declined this offer, the Claimant's representative stating: "Mr. Stone's testimony is sufficient enough."


When it was subsequently shown by further Carrier documentation that the Claimant was also a no show at some additional scheduled appointments, the Claimant again asserted he had documents to refute the Carrier exhibits. The Claimant was again offered benefit of a recess to retrieve his claimed support documents. This time the Claimant and his representative took a 28 minute break to privately consider the recess offer. In what must be considered a perilous decision, upon a return to the hearing room and being asked as to what they had decided, the representative for the Claimant said: "Uh, we will proceed with this investigation." In other words, it was decided to rely only on testimony of the Claimant that he did possess the alleged support documentation.

In view of the above considerations and overall study of the record involving the charges of record in this case, and in the light of the Claimant's discipline record during a short term of employment, the Board finds no basis to conclude that the Carrier imposed discipline of dismissal from service was harsh or unreasonable. The claim to set discipline aside and return the Claimant to service will therefore be denied as being without merit or agreement support of record.

Award: Claim denied.

  
Robert E. Peterson  
Chair & Neutral Member

  
Melissa A. Beasley-Coke  
Carrier Member

  
J. Michael LaPresta  
Organization Member

Fort Worth, TX  
Dated: 4/18/17