

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

**Claim of Seattle, Washington Conductor Arthur D. Bryant 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 October 3, 2014. (Organization File No. D325-351-14E; Carrier File No. 50-17-0003D)**

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 Claimant was dismissed from service effective October 15, 2014 in a Carrier determination that testimony and exhibits as brought forth during a hearing conducted on October 3, 2014 show the Claimant to have been in violation of the Carrier's Attendance Guidelines and GCOR 1.13, "Reporting and Complying with Instructions," in a failure to maintain full-time employment during the three month rolling period of June, July and August 2014.**

**It is the position of the Carrier that under the Attendance Guidelines for the three-month rolling period of June, July and August 2014 during which time period the Claimant was working in unassigned service that he had a layoff threshold of six weekend days. However, the Carrier says that since the Claimant had been previously disciplined for an attendance violation involving the three-month rolling period of April, May and June 2014 that two weekend absences in the month of June were not accounted for in the calculation of the Claimant's absences for the three-month rolling period here at issue. In this respect, the Attendance Guidelines state: "Following discipline for a period, violations in subsequent months will result in an attendance violation if the total days off in the following one or two months exceeds the maximum threshold for the three-month period."**

**The Carrier says in spite of not counting June absences, the Claimant violated the Attendance Guidelines when he was unavailable seven weekend days for the two months of July and August 2014, thus exceeding the three-month layoff threshold for June, July and August 2014 by one weekend day.**

**The Carrier says that the Claimant failed at the hearing to present ample reason or probative documentation to justify what it says was the Claimant's excessive availability issues for service that he alleged should have been subject to his resubmission of a request for leave time under the Family Medical Leave Act (FMLA).**

**Although in support of its position the Carrier has submitted for consideration a number of decisions from past Public Law Boards (PLBs), the Carrier especially cites the following excerpt from Award No. 80 of PLB 6006, Arbitrator Zamperini, concerning absences allegedly related to problems involving the FMLA:**

**Even if he had advised his managers that he was having family problems, we concur with the Carrier that did not constitute a blanket acceptable excuse as required by policy. Employees who have legitimate family problems must seek leave through the Family Medical Leave Act. This entails providing the Carrier with documentation of the problems in advance in order to verify that the problems in question fall under the FMLA. Merely telling a manager that you have family problems does not automatically excuse subsequent absences. An employer is not social services. They cannot consider each and every family problem that may surface. An employee has the obligation to take care of his/her family. In cases where the problem does fall under the FMLA, documentation still has to be provided and the leave has to be approved in advance even when that leave is taken on a periodic, per incident basis. The Claimant was unable to show that he provided the Carrier with any documentation to excuse his absences. Moreover, this Board has held on numerous instances, that absent the leave granted under FMLA, even excused absences can be used to determine if an employee is so frequently absent s/he has lost his value as an employee.**

**For the above reasons the Carrier says the instant claim, as presented, should be denied in its entirety.**

**In rebuttal to the above Carrier contentions, the Organization submits that it was testimony of the Claimant at the hearing that during the time period at issue some difficulties were being experienced concerning paperwork related to the Claimant's request for renewal or extension of leave under the FMLA that had initially**

commenced in October 2013. In support of its argument, the Organization directs attention to the Claimant having presented at the hearing a four-page document from The Everett Clinic regarding his FMLA leave. Thus it is offered that had the Claimant not experienced paperwork difficulties or “a string of red tape,” and FMLA had been approved in a timely manner, that perhaps some of the Claimant’s layoffs could have been avoided.

The Board has studied The Everett Clinic documents. A cover letter dated October 1, 2014, two days before the hearing date in this case, October 3, 2014, refers to documents that it is stated were faxed to the company on three different dates, namely, May 13, 2014, May 30, 2014, and June 12, 2014. Attachments to the letter show that there were several internal problems with the Clinic processing the paperwork while awaiting the Claimant providing the Clinic certain FMLA forms. A Clinic notation of June 12, 2014 states in part that the Claimant had called stating “BNSF did not receive the modified FMLA papers faxed to them on 5/30/14. I spoke with Therese, RN, who will fax them again today.” Further, the Claimant said that the paperwork did not get to the Carrier until sometime in June 2014 and that starting in August 2014 he was approved for FMLA leave of four days per “year, whereas he had previously been approved for four days a “month.”

The Organization also urges that even if, *arguendo*, the Carrier was considered to have proven their charge, which it maintains it did not, that permanent dismissal of the Claimant from service is patently excessive for the alleged infraction at issue.

The Organization submits in this latter regard that the Attendance Guidelines state that managers are empowered to apply the Guidelines considering “all relevant information;” not act in a rigid or “wooden” manner; and in every case should use “common sense.”

Notwithstanding any application the above mentioned provisions of the Attendance Guidelines may have in consideration of certain cases, it is evident in the case here at issue that the Carrier did not act in a rigid or wooden manner.

The Board does, however, find that although the Claimant was subject to a severe discipline penalty in view of his current and past attendance related violations, we do not believe discipline should rise to the level of the ultimate penalty of a dismissal from service. We find more appropriate discipline to be the time the Claimant has been of service, without pay. Accordingly, the Board will direct that the Claimant be returned to service with seniority and other benefits unimpaired and that discipline be modified to that of a Suspension from service with a One Year Review Period; without compensation for all time lost; and, subject to the Claimant successfully passing all required return to service examinations.

**Award:**

**Claim disposed of as set forth in the above Findings.**



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**Robert E. Peterson**  
**Chair & Neutral Member**



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**Melissa A. Beasley-Coke**  
**Carrier Member**



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**J. Michael LaPresta**  
**Organization Member**

**Fort Worth, TX**

**Dated:** March 1, 2018