

PUBLIC LAW BOARD NO. 7425

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

STATEMENT OF CLAIM:

**Claim of Dilworth, Minnesota Engineer Shayne Woolverton 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 May 1, 2014. (Organization File No. D1137-255-14E-A; Carrier File No. 50-15-0026D)**

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.**

**On March 14, 2014 the Carrier gave written notice to the Claimant that a formal investigation would be held on March 16, 2014 for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with alleged failure to perform service as a full-time employee in accordance with the Carrier's Attendance Guidelines; the Carrier alleging that the Claimant's absences for the three-month period of December 2013 through February 2014 was over the threshold allowed for such period of time.**

**The scheduled date for the investigation was postponed on three occasions and not held until May 1, 2014. The Claimant was present for the investigation and was assisted in a defense against the charge by a representative for the Organization.**

**By letter of May 19, 2014 the Carrier notified the Claimant that based on testimony and exhibits brought forth at the investigation it had determined him to be in violation of System General Notice No. 37, the Attendance Guidelines, and that he was therefore dismissed from service effective that same date in view of this finding and in consideration of his discipline record.**

During the three-month time frame at issue the Claimant was in unassigned service. In keeping with the Attendance Guidelines and this type of service the Claimant was expected to not layoff more than 25% of weekdays and weekend days, as measured separately, and taking into consideration any excluded time. Although the charge refers to the months of December 2013, January 2014 and February 2014, it is submitted that since the Claimant had signed a waiver of discipline for a separate Attendance Guidelines violation for the months of December 2013 and January 2014, none of the absences for those two months were used in the instant case; the Claimant having laid off unpaid on 7.5 weekdays and 7 weekend days for February alone, placing the Claimant 1 day over his weekend day layoff threshold.

As concerns the above reference to absences for February alone, Item 15 of the Attendance Guidelines reads: "Following discipline for a period, violations in sequential months will result in an attendance violation if the total days in the following one or two months exceeds the maximum threshold for the three-month period."

A principal argument raised by the Organization is that the Claimant provided undisputed testimony that he had contacted local management about his attendance issues; having advised local management that he was experiencing some depression issues, panic attacks, and was under the care of a doctor. In this respect, attention is directed to the Claimant having testified that he had been visiting with a counselor and a doctor and that this seemed to be helping him with his condition. The Claimant presented into evidence at the investigation a statement dated April 15, 2014 from Human Service Associates of Moorhead, MN that reads:

This is to inform you that Shayne Woolverton, locomotive engineer, has been under my care since April 4, 2014. Mr. Woolverton will continue to be seen for an indefinite amount of time until a satisfactory resolution of his presenting issues.

There is no question, as the Carrier offers, that the above Human Service Associates statement, which is dated April 15, 2014 and shows the date care started to be April 4, 2014, are both dates of time one month after the Claimant was notified by letter of March 14, 2014 to report for an investigation involving his absences from work. The statement does not identify the "presenting issues" for which the Claimant is under the care of Human Service Associates. It is noted, however, that at the investigation when asked by his representative if he wanted to offer an explanation as to what was occurring in his life to cause him to miss work, the response of the Claimant was:

I, uh, I recently was married, and my wife has three kids, which never affected my work, really. And then I found out she was pregnant, and, uh, she got really sick all the time, and, uh, and then something

happened to me. I don't, I, I can't explain what happened to me, except for what the doctors told me, and that's, I have panic attacks, I guess. I didn't do what I was supposed to do all the time. I tried to take care of my wife and her three kids and my family and maybe the baby that was coming and take care of everybody's problems and everything, and then I'd freak out and get scared when it was time to come to work. And I can't, I ha – I can't explain to anyone why because I don't even know why. So, uh, yeah.

The Claimant's representative next asked the Claimant if he had sought medical assistance and whether he was diagnosed as having panic and anxiety disorders; the response here of the Claimant being as follows:

I have acute anxiety, panic attacks, and he said I was depressed, too, I guess. Um, so, and then he suggested I go see a doctor, another doctor and get on medication for it, which I've done, and, uh, I'm trying to work through the medication now, and if it helps, it helps a lot. Um, it makes it so that I can sleep and eat and function normally. And, uh, kind of takes life back to normal.

The Carrier submits, as the record shows, that a local supervisory official had presented several assistance options to the Claimant, i.e., contact with the Carrier's Employee Assistance Program, a medical leave of absence, and the filing by the Claimant of an application for time off under the Family and Medical Leave Act (FMLA). The Claimant identified as the time that he had approached a Carrier supervisory official was in January or February. It is therefore noteworthy that it appears from the aforementioned Human Service Associates statement that it was not until April 4, 2014 that the Claimant sought assistance with his asserted problems.

There is no question that certain employee absenteeism is inevitable or unavoidable and that an occasional absence may not impact the business of the Carrier. However, it must be borne in mind that employees having been hired for or to be available for work on a rail carrier that operates 24/7 in the transport of commodities for shippers or customers, that those employees have a high degree of responsibility to report for or be readily available for service on a regular basis and, as in the present case, not lay off in excess of the number of days set forth in the Carrier's Attendance Guidelines.

As concerns its assessment of discipline, the Carrier submits that notwithstanding the Claimant's contentions about more recent events that the Claimant offered as affecting his work attendance, the instant attendance related violation was the Claimant's 5<sup>th</sup> "anytime" violation of the Attendance Guidelines in the previous 12 months, and the Claimant's 12<sup>th</sup> overall discipline of record.


As stated in Award No. 7348 of the Second Division, NRAB, Arbitrator James C. McBrearty:


It is obvious that if all employees were so unfortunate as to be unable to work to the same extent as Claimant, the Carrier could not continue operation, and the economic well-being of all concerned would be defeated. If Claimant is only capable of being a part-time employee, he should become one.


It being obvious that the Claimant has demonstrated that the application of past discipline has failed to correct the Claimant's conduct with respect to excessive absences from work, the Board finds no proper basis to disturb the penalty of dismissal from service as assessed by the Carrier in connection with this latest attendance related violation by the Claimant. The claim will be denied.

Award:

Claim Denied.

  
Robert E. Peterson  
Chair & Neutral Member

  
Melissa A. Beasley-Coke  
Carrier Member

  
J. Michael LaPresta  
Organization Member

Fort Worth, TX  
Dated: March 1, 2018