

**PUBLIC LAW BOARD NO. 7833**

**SMART - TRANSPORTATION DIVISION \***

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**CASE NO. 5**

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**AWARD NO. 5**

**and**

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**BNSF RAILWAY COMPANY \***

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**STATEMENT OF CLAIM:**

Claim for the denial of the discipline claim of Nebraska Seniority District (St. Joseph) Conductor M. Foust and our request for removal of censure from his personal record and pay for all time lost (20 day record suspension) as a result of an investigation held on October 14, 2015.

**FINDINGS**

Claimant M. Foust was charged with being unavailable 8 weekend days, which exceeded his allotment of 6.5 weekend days by 1.5 days during the three-month rolling period of June, July, and August 2015. As a result of the investigation, the Carrier notified the Claimant on October 28, 2015, that he was assessed a 20-day record suspension and a 12-month review period. The Organization filed a claim on behalf of the Claimant on February 18, 2016. The Carrier denied the claim on May 31, 2016. The matter was then progressed in accordance with the Parties' Agreement, after which, it remained in dispute. It is properly before the Board for resolution.

It is the position of the Carrier that the Claimant was afforded a fair and impartial hearing. The Carrier points to the testimony of Division Trainmaster Natasha Sadofsky, who

stated that Claimant was aware of System General Notice Number 37 - Guidelines for TYE and Yardmaster Attendance. The guidelines state in relevant part:

**BNSF TYE employees and Yardmasters are key members of our community, and have a legitimate expectation of reasonable opportunity to be off from work. And, along with all other members of our community, BNSF TYE employees and Yardmasters share certain responsibilities to the community as a whole. One of these basic responsibilities is to be “full-time” employees.**

**I. Specific principles for applying these Guidelines follow:**

**4. For employees in unassigned and mixed service, there is a maximum threshold of twenty-five percent of weekdays and weekends, measured separately. (25% less the total of all rest days equals final threshold.)**

**11. Any layoff touching a weekend day will be considered a weekend day, with a 30-minute grace period. As a result, an employee may be charged with three weekend days for a given week.**

**12. Any layoff period from 0-25 hours is considered as one unavailable day.**

**13. Working a portion of a calendar day does not negate a layoff period that begins or ends on that day from counting as an unavailable day for the purpose of attendance.**

**II. Discipline handling (including progression and the applicable review period) for Attendance Guidelines violations follows:**

**B. Review Period**

**The TYE Attendance Guidelines review period is an “active” review period and requires an employee work a period of time which exceeds a complete 12 month period without another Attendance Guideline discipline incident before the prior Attendance Guideline violation is considered “inactive”. However, attendance violations will not be “cleared” from an employee’s record.**

Ms. Sadofsky testified that the Claimant was an unassigned employee for the entire three months, which means that he did not have assigned days off. She said that employees have a responsibility to maintain their full-time status by being available for 75% of the weekend time in a three-month rolling period. The Claimant was allotted 6.5 days or a 25% unavailability threshold, but he laid off for 8 days, which brought his availability rate to 69%.

Ms. Sadofsky said the System General Notice Number 37 is found on the computer system. She stated that the Claimant also violated two General Code of Operating Rules, which state the following:

### **1.3.3 Circulars, Instructions, and Notices**

**Circulars, instructions and notices, and other information are issued and canceled by the designated manager. Before beginning each day's work or trip, crew members and any others whose duties require, must review those that apply to the territory they will work on.**

### **1.13 Reporting and Complying with Instructions**

**Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.**

The Carrier points out that the Claimant offered no explanations for his absences. The Carrier asserts that the discipline was warranted.

The Claimant stated that he was aware of the attendance guidelines and rules. He testified that he did not understand why he was charged with three weekend days for one weekend around July 5, 2015, or why he was charged with being unavailable on July 12, 2015, although he worked earlier that day.

The Organization disputes that the Claimant had a fair hearing. The Organization argues

that it was unfair for the hearing officer to lead the Carrier's witness to conclusions about the Claimant's guilt. It challenged how the weekend days were counted. The Organization points out that the discipline is no longer active, it has served its purpose, and should be removed from the Claimant's personal record.

### **OPINION OF THE BOARD**

The Board has reviewed the record in this case, including the transcript of the formal investigation and the documentary evidence presented at that hearing. The record reveals that the Carrier has posted attendance rules. The application of the rules explains how days are counted and allows for employees to be marked as unavailable even if they work a portion of a weekend day. The Claimant acknowledged that he was aware of the rules. Thus, the evidence supports the Carrier's assessment of discipline. In addition, the attendance guidelines state that attendance violations are not cleared from an employee's record.

Therefore, under the particular circumstances presented in this case, and on the weight of the evidence before us on the record, the Board concludes that the censure will not be removed from the Claimant's personal file.

AWARD

The claim is denied.

*Lisa Charles*

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Neutral Member

*Tommy Bosselle*

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Carrier Member

*JBR*

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Organizational Member

Dated April 6, 2018