

STATEMENT OF FACTS:

R.L. Arnn ("Claimant") was hired as a Trainman by the former Atchison, Topeka and Santa Fe Railroad Company in April, 1994 and was promoted to Locomotive Engineer in May, 1997. At the time of this claim, Claimant worked in Belen, New Mexico, protecting yard assignments and extra board calls.

In January, 2005, Claimant submitted a Notice of Intent to take family medical leave as applied under the Family Medical Leave Act ("FMLA") during the 2005 calendar year. The purpose of the leave was to assist in the care of his chronically ill daughter. Claimant requested an intermittent leave which would be taken over twelve months, when necessary. This was not Claimant's first request for FMLA relief. He had requested and received said leave in the past and it was known that he had a chronically ill child. The manner in which he used FMLA leave in the past was of concern to BNSF and was the underlying cause of the instant discipline.

Claimant "mainly used FMLA leave on Fridays, Saturdays and Sundays" and the Carrier counseled Claimant for that practice in January, 2004.

The Carrier concluded that its prior suspicions concerning FMLA abuse, were

accurate and hired an investigative agency to observe Claimant while on FMLA leave in order to verify the accuracy of its suspicions.

The report dated February 4, 2005 submitted by the investigative agency, led the Carrier to conclude that Claimant was misusing FMLA and that Claimant had misrepresented his reasons for his absences on January 28th, 29th and 30th.

Claimant was notified by letter dated February 15, 2005 to attend an investigation to determine his responsibility, if any, regarding the alleged misrepresentation when laying off on FMLA for January 28, 29, and 30, 2005. A Hearing was held March 3, 2005. Claimant was dismissed from service by letter dated March 23, 2005 for violating the General Code of Operating Rules ("GCOR") Fourth Edition, Effective April 2, 2000 specifically, Rules 1.2.7, 1.6, 1.3 and 1.15 which provide in operative part:

Rule 1.2.7 Furnishing Information

Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations.

Rule 1.6 Conduct

Employees must not be:

4. Dishonest.

Rule 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.

Rule 1.15 Duty - Reporting or Absence

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.

FINDINGS:

Based upon the record, the Board finds that the parties herein are the Carrier and the Employee Representative, within the meaning of the Railway Labor Act, as amended. This Board is duly constituted by agreement of the parties and has jurisdiction over this dispute.

Initially, the Carrier set forth its position that Claimant regularly laid off pursuant to FMLA on Fridays, Saturdays and Sundays. Because Claimant had been counseled regarding weekend absences, an investigative agency was employed to determine Claimant's activities on those days and based upon the investigative report, the Carrier concluded that Claimant misrepresented his reason for being absent from work on January 28, 29 and 30, 2005.

Furthermore, the Carrier contended that Claimant was blatantly dishonest (1) when he advised the Terminal Superintendent that his wife was unavailable to care for their sick child and that he needed the leave for that purpose notwithstanding the fact that a surveillance tape showed that Claimant, his wife and three daughters visited a Target store together. Based upon the foregoing, the Carrier submitted Claimant was dishonest concerning his wife's alleged unavailability to care for their child and (2) when he secured January 30, 2005 to take care of a sick child but was not with the child but instead traveled 200 miles because he was having emotional and mental "turmoil" on that day. The Carrier concluded that Claimant's dishonesty concerning his need to assist in the care of his daughter should uphold the Carrier's decision to remove Claimant from service.

The Organization submitted that the Carrier's entire case is based upon the events

that occurred on January 28th, 29th and 30th, on which dates the Carrier wrongfully claimed that Claimant "lied when he used FMLA to lay off" on said dates.

The Organization noted that Claimant and his family were compelled to endure, on a daily basis, the burden of caring for a chronically ill child. The Organization argued that Claimant's wife "is with this child round the clock on a daily basis" and concluded by asking "Can anyone guess what kind of feelings [Claimant] is living with when he cannot be with his wife and family each and every day?"

Based upon the foregoing, the Organization supports Claimant's conduct when he allegedly wrongfully "used the 30th day of January for himself" and criticizes the Carrier for abusing its authority when Claimant was denied an opportunity for personal time off. In conclusion, the Organization admitted that Claimant "did in fact lay off on the 30th and used that day for himself, but that discharge under the foregoing circumstances was "overly harsh, capricious and excessive".

In support of its position, the Organization cited National Railroad Adjustment Board, First Division, Award No. 25204, May, 2001 (Referee Robert E. Peterson).

In this matter, the Organization sought Claimant's reinstatement based upon the Carrier's alleged unjust dismissal of Claimant. The Carrier argued that Claimant

failed to report for duty as instructed and failed to secure family leave. In response, the Organization submitted that a leave of absence under FMLA had been discussed but no evidence existed that such request was requested or made by Claimant.

In fact, the Organization argued, FMLA was secured by the Carrier and not by claimant who allegedly requested a leave of absence under Article 12 instead of said leave.

The Board ruled it was not persuaded by the Organization's argument, namely, that:

... the Carrier placed the Claimant into the Family and Medical Leave Act and then used the Claimant's failure to qualify for a leave under such Act as a reason to terminate him from service.

Nevertheless, the Board concluded in the foregoing case that:

... the penalty of dismissal from service must be held to be excessive. The Board ... directed that the discipline be modified to time lost

The Board herein also notes that a number of cases were cited by the Carrier in support of its position that the Claimants in said cases should have been and were discharged.

In addition, the Board reviewed Public Law Board No. 5863, Award No. 32 (Thomas Rinaldo, Neutral Member), which addressed a dispute between the International Brotherhood of Electrical Workers and National Railroad Passenger Corporation, Amtrak.

Claimant's alleged offense was being absent for the purpose of taking care of his wife when under a FMLA leave of absence but when in fact Claimant was engaged in activities related to his electrical business. Moreover, the Carrier received information that Appellant's wife was not incapacitated, was at work and did not live with Appellant. Consequently, the Board concluded that the discharge was justified.

In Special Board of Adjustment, No. 988, (C.H. Gold, Neutral Member), the parties to the dispute were Transportation Communications and CSX Transportation, Inc. The Board considered the position of the Carrier that Claimant missed a call, made false statements and laid off under false pretensions. In addition, Claimant stated that he was looking for a car and would be back to work that night, all at a time when Claimant had marked off from his position for FMLA.

The Board concluded that Claimant's misconduct was a blatant misuse of FMLA and given short tenure and the severity of his infraction, termination was

appropriate.

The Board finds that the instant matter is distinguishable from the cases cited by the Carrier in that Claimant was on approved FMLA status, was responsible for the care of a known chronically ill child and had neither outside employment nor a business in addition to his position with the Carrier.

The Board has reviewed the record submitted herein, particularly the surveillance tape submitted by the Carrier and a copy of the transcript of the Investigation Hearing held on March 3, 2005.

The above referenced surveillance tape records Claimant's actions beginning January 28, 2005 at 5:29 p.m., through January 29, 2005 at 1:54 p.m., a time period of approximately twenty (20) hours. The tape begins when Claimant parked at a shopping mall with three young children in tow. They disappeared from sight, exiting shortly thereafter from what appeared to be a food market with one of the children carrying what appeared to be a gallon container of milk. The tape ends at 5:57 p.m. when Claimant returned home and entered his home through the garage door. The tape continued on January 29 at 11:00 a.m. when Claimant and two young children left their home in a pick-up truck and proceeded to a recycling center. From there, they returned home and after approximately one-half hour,

Claimant was joined by an adult woman and another young child and they drove to a mall, parked, exited the car and went into a shop. After one hour, the family emerged with packages.¹ Claimant then stopped at a gas station and an ATM machine and then returned home.

Based on the above details, Terminal Superintendent A.E. Potter ("Potter") testified that he believed Claimant was "misrepresenting the facts surrounding the FMLA".²

In addition, Potter responded to Hearing Investigation Question 289 by stating that he did not see Claimant providing any care for a serious medical condition and with respect to Hearing Investigation Question 294, Potter responded, "I believe on the certain illness day that we see the video ... there was no apparent reason to be on FMLA". It was Potter's judgment that Claimant had made a misrepresentation of

¹ Although a sign indicated a Target Store, there is no way of knowing which of the shops they went into or at which place of business they made purchases.

² Transcript Question 255 by P.L. Kreeger, Superintendent of Operations and Hearing Conducting Officer, asked Potter the following question, namely:

After viewing this information both the written document and also the video, did you was that the time you felt that Mr. Arrn was misrepresenting the facts surrounding the FMLA?

to which Potter responded:

Yes, and if you, you know if you look at the tape, I would have expected maybe see a doctor's office visit or something of that sort going on or at least you know watch the child being sick or whatever. And I know don't have no idea what the sickness is.

the need for FMLA time, that all he was doing was running errands with his children and that it was this activity plus his many requests for weekend FMLA time that led to the decision to remove Claimant from service.

The Board finds that the Carrier acted without appropriate knowledge when it disciplined Claimant for misusing FMLA leave on January 28 and 29, 2005. The testimony reveals that Potter had little understanding of the provisions of FMLA and as a result, erred in his conclusion.

The purpose of the Act is to:

...balance the demands of the work place with the needs of families ... entitle employees to take reasonable leave for medical reasons ... for the care of a child ... who has a serious health condition.

The statutory provisions Medical Certification), once approved by the employer, permit an employee to use FMLA leave as needed and in accordance with the employer's rules by said employee who has been approved as a caregiver for an immediate family member as defined by the Act.

There are no restrictions as to which days of the week may or may not be used for caregiving. Specifically FMLA:

... prohibits an employer from interfering with,

restricting or denying the exercise of any employee rights under the FMLA, including refusing to grant such leave or discourage an employee from using the leave ...

Nor does FMLA determine the purpose for which care is needed. Leave is not limited to visits to doctor's offices or to be used solely for emergencies. Once approved, FMLA leave is available for use by the person so designated for as long as the medical condition exists.³

Assuredly, Potter was not qualified to act as a medical expert to determine whether the child's condition, for which Claimant had qualified under FMLA, continued.^{4,5} The Board therefore finds that absent any investigation into the continued need for FMLA, disciplining Claimant for January 28 and 29, 2005 was inappropriate and unlawful.

Furthermore and significantly, Claimant marking off under FMLA on January 30,

³ The only restriction is the length of time available to an employee which is twelve (12) weeks annually as set forth by the Act.

⁴ The Act permits the employer to discuss the continued need for leave with the employee which in the instant matter was not done.

⁵ FMLA authorizes a request for a second opinion concerning questions for continued FMLA use. No evidence was produced that such inquiry was requested.

2005 raises additional issues. It will not be disputed by the Board that Claimant may have needed a day for himself but the way he secured the day, was wrong.

The Board herein concludes that notwithstanding mitigating circumstances, Claimant was dishonest and by doing so, violated GCOR Rule 1.6.

In addition, the fact that Claimant was compelled to use the automated phone system, which gave him few choices to differentiate his needs for January 30th from the previous two days, is inexcusable. It should be noted, that Claimant's mental health does not appear on FMLA documents although perhaps it should, thereby certifying his eligibility for leave.

The Board finds that Claimant falsified his request for FMLA leave on January 30, 2005 and under such circumstances, discipline is warranted. The Board finds however, that dismissal in this matter is unduly harsh.

Based upon the foregoing, Claimant's dismissal from service shall be reduced to a one year suspension without pay.

With reference to the procedural violations as argued by the Organization, the Board finds that the timeliness argument is without merit. With reference to the

Carrier's failure to call a witness from Human Resources who was qualified to address FMLA issues and could have clarified the Act's application, the Board agrees that said Investigation would have been better served had that been done. However, the issue as hereinabove discussed, was resolved by the Board.

AWARD:

The removal of Claimant from service for misrepresenting his need for FMLA leave on January 28 and 29, 2005, was inappropriate and unlawful.

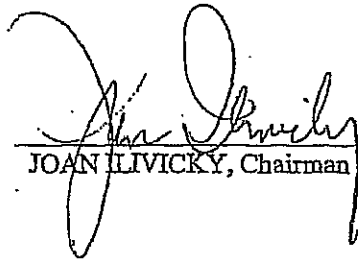
The removal of Claimant from service for his conduct on January 30, 2005 for violating GCOR Rule 1.6 as heretofore discussed, is unduly harsh, and shall be reduced to a one year suspension without pay.

Upon presentation of documents to verify earnings and benefits received from March 24, 2006 until such time that this Award is put into effect, Claimant shall be made whole for all monies and benefits lost, less his interim earnings as documented, for all days he would have worked but for his caregiver obligations.

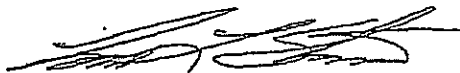
The Board shall retain jurisdiction to resolve any and all disputes between the parties arising from the implementation of this Award.

ORDER:

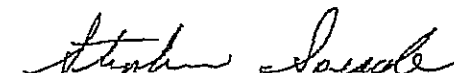
The Carrier shall have thirty (30) days from the date of postmark to implement this Award unless extended by good cause shown by a party hereto.



JOAN LIVICKY, Chairman and Neutral Member



GENE L. SHIRE, Carrier Member
Concur/Dissent



STEPHEN D. SPEAGLE, Organization Member
Concur/Dissent

Dated: November 27, 2006
New York, New York

