

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 14022
Docket No. 13903
10-2-NRAB-00002-090016

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(International Brotherhood of Electrical Workers
PARTIES TO DISPUTE: (
(Metro-North Railroad

STATEMENT OF CLAIM:

“Appeal of discipline of ‘Five (5) day deferred suspension’, imposed upon Electrical Worker John S. Delfino on January 7, 2009, by the MTA Metro-North Railroad. We respectfully request adjudication of said case and request that the discipline be removed from Mr. Delfino’s record; that he be restored to service with seniority unimpaired and with all pay due him including but not limited to earnings lost, holiday pay, overtime he could have earned, vacation pay and other forms of compensation from the first day he was held out of service; and that he be made whole for vacation rights, made whole for pension benefits including Railroad Retirement and Unemployment Insurance, made whole for any other benefit that he would normally have earned during the time he was held out of service.”

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Following a Hearing held on December 9, 2008, Claimant J. Delfino was assessed a five-day deferred suspension by notice dated January 7, 2009. The Carrier's charges leading to that action were stated in its October 23, 2008 Notice of Investigation as follows:

"Excessive late starts, whereas you reported late for duty on the following dates totaling five (5) occurrences and two hundred fifty two (252) minutes for the month of September 2008; 9/4/08, 9/18/08, 9/22/08, 9/24/08, 9/29/08."

The matter presented to the Board for resolution is whether the discipline assessed should be expunged as improper on grounds that the Claimant's tardiness incidents were authorized and permissible under the Family and Medical Leave Act (FMLA).

The record reflects that following receipt of the Claimant's July 30, 2008 application for leave pursuant to FMLA, on August 22, 2008 the Carrier approved 12 days of intermittent leave status between August 22, 2008 and August 21, 2009 based upon his reported medical condition. It is undisputed that the applicable Federal Guidelines place no limitations on the dimensions of incremental leave an employee may take when approved for intermittent leave under FMLA:

"There is no limit on the size of an increment of leave when an employee takes intermittent leave . . . However, an employer may limit leave increments to the shortest period [o]f time that the employer's payroll system uses to account for absences of leave, provided it is one hour or less."

The Carrier's witness concedes that by law and Carrier policy an employee is entitled to report late if the employee's physician so states on the FMLA application. According to the record before the Board, the Claimant's physician represented on the Claimant's application form that continuing treatment was required because the Claimant was prescribed the medication "Lorazepam" and was being treated by a

psychiatrist. He further indicated that the duration for recovery after taking the medication was "as needed." In response to the question, "If the patient will need care only intermittently or on a part-time basis, please indicate the probable duration of his need," the physician noted "as needed" for the Claimant's condition.

On the basis of that documentation the Organization, conceding that the Claimant's late incidents were the result of oversleeping as a result of treating with "Lorazepam," argues that the Claimant was approved for late starts by virtue of the notation "as needed" on his FMLA application, and that such documentation constituted proper notice to the Carrier that the Claimant would be late intermittently. It further urges that the Claimant was not required to notify the Carrier if he was going to be late because the Carrier had not yet decided whether the Claimant was approved for late starts. The Carrier's Manager witness testified at the Hearing as follows:

"Q. . . . and he [Facility Director] told him [Claimant] that he doesn't need to do that [call in late] because there hasn't been a decision yet on whether his FMLA qualifies him to be late or not, or do you remember that?"

"A. Yes.

In sum, the Organization asserts that on the dates recited in the charge letter the Claimant was authorized to report late for work under FMLA as a result of his physician's statement confirming that he was on a prescription medication and the period for recovery after taking the medication was "as needed."

In response, the Carrier portrays the Claimant's use of approved FMLA leave "for random bouts of lateness" as beyond the boundaries of the approval he received for 12 days of intermittent leave under FMLA. The Claimant did not, the Carrier argues, receive leave approval for the specific purpose of being late as a result of reactions from prescribed medications, and the Organization's argument to that effect simply misapprehends FMLA guidelines.

Based upon a careful review of the record the Board concurs with the Carrier's judgment. The Claimant's FMLA leave was approved for the specific purpose of attending doctor's appointments. At no time did he either request authorization or

submit any evidence indicating that his condition involved a need to be frequently late in reporting, nor was approval for such an attendance pattern ever approved by his treating physician or by his employer.¹

Because it is not disputed that the Claimant reported late for duty on five separate instances during September 2008 without authorization, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 13th day of May 2010.

¹ While the "as needed" notation of his physician will never win the war against ambiguity, if the Claimant believed sleep-related problems from his medications excused late reporting, we believe it not unfair to believe that at some point after he began to amass a tardiness record the responsible thing to have done was to clear up any misunderstanding on this issue with his Supervisor, particularly in light of record evidence demonstrating that no decision had been yet made to approve late reporting.