

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39928
Docket No. MW-40042
09-3-NRAB-00003-070227
(07-3-227)**

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak) –
(Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [three (3) days’ suspension without pay] imposed upon C. Hayes for alleged failure to comply with Amtrak’s Standards of Excellence, specifically that part referring to ‘Attending to Duties’, on October 4, 7 and 17, 2005, was unwarranted and in violation of the Agreement (Carrier’s File NEC-BMWE-SD-4588D AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, ‘. . . the Organization requests that the discipline assessed Mr. Hayes be rescinded and that his record be cleared of this incident. Also, the Organization requests that Mr. Hayes be compensated for the three (3) days suspension that he served September 11 thru 13th, 2006.’”**

FINDINGS:

The Third 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.

By letter dated October 26, 2005, the Carrier notified the Claimant to appear for a formal Investigation on November 1, 2005. The notice charged the Claimant with violations of Amtrak's Standards of Excellence provisions regarding attendance to duties. It specified that the Claimant was absent on: October 4, 7 and 17, 2005. Following multiple postponements, the Hearing was held on January 9, 2006. On January 23, 2006, the Carrier notified the Claimant that the Hearing Officer had found him guilty of the charges and that he was assessed a three-day suspension.

There is no dispute that the Claimant was absent or left early on the dates charged. The Organization contends, however, the dates were taken under the Family Medical Leave Act and cannot count against the Claimant's attendance record. The record is clear that the Claimant did not apply for FMLA leave until after the dates in question. We conclude that the Carrier proved the charge by substantial evidence.

The record also reflects compelling mitigating circumstances which we believe should be considered in evaluating the penalty. There is no dispute that the Claimant suffered from a serious health condition and that his absences and early departure on the dates in issue were for doctor's appointments related to his condition. Furthermore, once the Claimant applied for FMLA leave, he was conditionally granted intermittent leave for doctor's appointments related to his health condition. Thus, although the Claimant was clearly in the wrong for not applying for FMLA leave sooner, we find that the penalty of a three day suspension under these circumstances was excessive. The penalty shall be reduced to a written reprimand and the Carrier shall compensate the Claimant for wages lost due to the three day suspension.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 31st day of August 2009.