

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31845
Docket No. SG-32270
96-3-95-3-90**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Brotherhood of Railroad Signalmen

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corporation (NRPC):

Claim on behalf of M. S. Amador for reinstatement to service with all rights and benefits unimpaired and with compensation for all lost time, account Carrier violated the current Signalmen's Agreement, particularly Rule 48, when it failed to provide the Claimant with a fair and impartial investigation and imposed the harsh and excessive discipline of dismissal from service in connection with an investigation conducted on May 17, 1994. Carrier's File No. NEC-BRS(W)-SD-6750. General Chairman's File No. SWGC-956. BRS File Case No. 9585-NRPC(P)."

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.

At the time of his dismissal, Claimant was assigned as a Communications and Signal Maintainer in Amtrak's Peninsula Commute Service (PCS). By letter of May 17, 1994, Claimant was directed to appear for an Investigation for his alleged violation of Carrier's Rule "O," because of his alleged excessive absence. Following the Investigation, he was dismissed from Carrier's service.

Carrier's absentee policy provides that three absences or early departures within a 30 day period constitutes excessive absenteeism. It is a progressive policy. An employee's first offense results in formal counseling and a warning that further excessive absence will result in discipline. For his/her second offense, an employee receives a letter of warning. For the third offense an employee is assessed a ten day suspension, and for the fourth offense within a 12 month period, the employee is subject to dismissal from service.

The record indicates that Claimant was counseled on May 10, 1993, for his first offense. He received a warning on June 29, 1993 for his second offense, and accepted a five day actual and five day deferred suspension in connection with a third offense on December 12, 1993. Claimant's absences on April 4, 5, 6, 11, and 15, 1994 constitute his fourth instance of "excessive absenteeism" under Carrier's policy within a 12 month period.

By letter of June 1, 1994 the Organization appealed Claimant's dismissal, requesting that he be reinstated without backpay. That appeal was denied on June 30, 1994 and the claim was subsequently progressed in the usual manner.

The Carrier raised a procedural objection on the basis that the Organization never raised the issue of violation of Rule 48 on the property, and, therefore cannot do so now. Agreement Rule 48 is simply the Discipline Rule, implicitly covering all disciplinary proceedings, and its invocation cannot have caught Carrier by surprise. Accordingly, we find no reason to dismiss this claim on that basis.

Neither does this Board find any evidence to support the Organization's contention that Claimant was not afforded a fair Hearing as specified by Rule 48. On the contrary, a careful review of the transcript reveals that Claimant was offered the opportunity to present testimony and evidence during the investigatory Hearing.

With respect to the merits of this case, there is no disagreement on the record concerning the number and frequency of Claimant's absences. The Organization maintains that the central issues in dispute are whether the Claimant's admitted absences amounted to excessive absenteeism and whether those absences warranted Carrier's permanent dismissal of the Claimant. Specifically, the Organization contends that Claimant's absences during April 1994 were the result of a serious medical emergency in Claimant's family, and Carrier was fully aware that Claimant was taking time off to secure medical treatment for his wife.

The Organization further notes that the Board has previously held that a family medical emergency must be considered in determining whether an employee was justified in being absent from work. See, for example, Second Division Awards 6386 and 12618. It maintains that Carrier abused its managerial discretion when it refused to consider the reason for the Claimant's absences in this situation.

This Board is in agreement with the Organization that absenteeism policies should not be applied in utter disregard of mitigating circumstances. In light of Claimant's unrefuted testimony considering the severity of his wife's illness during the days in question, and the documentary evidence that Claimant accompanied her to the hospital for tests on April 5, the ultimate penalty of dismissal is excessively harsh. However, in view of the fact that were it not for Claimant's previously problematic attendance record, the instant case would not be before the Board at all, we find that Claimant shall be returned to work, but without backpay -- as he requested in his original claim.

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.

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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of December 1996.