

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 33493  
Docket No. MW-33856  
99-3-97-3-356**

**The Third Division consisted of the regular members and in addition Referee Sandra Gilbert Pike when award was rendered.**

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Consolidated Rail Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The ten (10) day suspension assessed trackman, B. Jenkins for his alleged absence from duty on October 4, 5, 9 and 10, 1995 was without just and sufficient cause and totally unwarranted (System Docket MW-4238-D).**
- (2) Trackman B. Jenkins’ record shall be cleared of this charge and he shall be compensated for all wage loss suffered.”**

**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.**

**On September 19, 1995 and on October 3, 1995, Carrier sent letters to Claimant warning that future unauthorized absences could subject him to disciplinary action.**

By letter dated October 13, 1995, Claimant, a Trackman at Kalamazoo Michigan, was instructed to appear October 23, 1995 for Investigation on charges of being absent without permission on October 4, 5, 6 and 10, 1995 and excessive absenteeism. A corrected notice of investigation dated October 18, 1995 was issued for being absent without permission on October 4, 5, 9 and 10, 1995 and excessive absenteeism.

A third letter dated October 20, 1995, notified Claimant that his seniority had been forfeited due to absence without permission on October 4, 5, 9, 10, 11, 12, 16, 17 and 18, 1995."

By certified letter dated December 1, 1995 the Carrier notified Claimant that an Appeal meeting had been held on November 13, 1995 regarding Claimant's forfeiture of seniority, and that he was restored to service and should return to work but that he must provided medical documentation confirming fitness for duty before returning to work. Claimant received this certified letter on December 6, 1995 and therefore was not notified that he had been reactivated prior to the hearing.

Ultimately a Hearing was conducted on December 6, 1995 in the absence of the Claimant. A Notice of Discipline was issued on December 22, 1995 notifying Claimant that he had been found guilty and assessed discipline of ten working days actual suspension based upon the evidence adduced at the Hearing and his prior record.

The Organization asserts that Claimant was prejudiced by not being present at the Hearing and that his absence was justified in light of the notice of forfeiture of his seniority and the fact that he had not received the certified letter dated December 1, 1995 informing Claimant that his seniority was reactivated.

Further, the Organization asserts that Hearing and disciplining of Claimant was improper because an Appeal meeting conducted on November 13, 1995, resulting in the restoration of seniority, violated Double Jeopardy prohibitions. The Organization argues that Claimant's seniority was acknowledgment and acceptance that the Claimant had valid medical reasons for his absences on October 4, 5, 9, 10, 11, 12, 16, 17 and 18, 1995. The Carrier asserts that the December 1, 1995 letter has no bearing on the formal charges in this case and further that double jeopardy is inapplicable as that concept concerns criminal sanctions and has nothing to do with disciplining an employee for actions inconsistent with his employment relationship. The term double jeopardy does indeed refer to Fifth Amendment Constitutional protections for criminal defendants.

However, the concept of fairness would indicate that an employee should not be tried and disciplined twice for the same offense. However, there is no record of a finding of guilt or innocence resulting from the November 13, 1995 Appeal meeting. Claimant's seniority was reinstated with the provision that he supply medical evidence that he was absent due to illness before returning to work.

A careful review of the record convinces this Board that there exists substantial evidence to support Carrier's decision to hold the hearing in absentia. Despite the fact that Claimant did not receive the letter notifying him that his seniority had been reinstated, Claimant received proper notice of the Investigation in a timely manner, allowing him the opportunity to be present. The Claimant chose of his own volition not to attend that Hearing. It is well settled that an employee's failure to appear at a disciplinary proceeding cannot be used to discredit the proceeding and, in fact, such a failure is at the employee's own peril. See Second Division Award 12339, 8225, 7844. Special Board of Adjustment No. 894, Award 313 states that "the Claimant who chooses not to attend an investigation is bound by the record established at the hearing." The Organization had a representative present and did what it could to preserve Claimant's rights. Under these circumstances, we find nothing improper in Carrier conducting the Hearing in the absence of Claimant and relying upon the evidence adduced therefrom. See Second Division Awards 13217, 12452, 8225, 7844.

As to the merits of the case, the Organization asserts that Claimant had justifiable reason to be absent on the dates in question. The Organization asserts that Claimant should be excused from reporting his illness to his immediate supervisor due to Claimant's expectation that his supervisor would know he would be off work on the days in question simply by virtue of his enrollment in a Company sponsored treatment program.

The Carrier upholds its decision based upon the fact that Claimant failed to notify his immediate supervisor of these absences. Carrier contends that even if the Claimant shows justification for the specific absences charged, due to his excessive absenteeism the discipline is justified.

The Organization introduced evidence that Claimant sought and was receiving treatment through the Carrier's Employee Assistance Program. The evidence did not specify days or times of treatment or that Claimant was unable to work. The Organization introduced long distance telephone bills which indicated that telephone

calls from Claimant's number to various Carrier telephone numbers had been made in the afternoons of several of the days in question. Carrier records indicated that no notice of absence due to illness or other cause had been received by Carrier. Since Claimant was not present and did not testify at the Investigation, no testimony was introduced to dispute or explain the alleged failure by Claimant to notify his supervisor, the reason for telephone calls to Carrier numbers or who may have been contacted.

This Board has consistently held that illness is a justifiable reason to be absent from work. Time off for a valid illness is a negotiated benefit.

In Third Division Award 20148, the Board states that:

"If the person accused can show that he was not responsible for the absences because of reasons beyond his control, such as illness, or other excusable reasons, he should not be subject to discipline."

However, this Board has also consistently held that the Employer has a right to have an employee on the job and to know when an employee will work. The evidence indicates that Claimant was absent without permission and that he did not notify his immediate supervisor that he would be absent or the reason for his absence.

Second Division Award 6240:

"This Board has repeatedly pointed up the detrimental effect of absenteeism upon the operation of the railroads. (Award 1814 - Carter, Award 5049 - Johnson). The confusion and disruption created when an employee absents himself from work without due notice to supervision is harmful not only to the Employer but to other employees as well. We cannot fault management when it takes effective measures to deter excessive absenteeism and tardiness."

Second Division Award 8568:

Excessive failure to report for duty forces the carrier to take extraordinary measures to alleviate the disruption caused by the absences . . . . Even if the Claimant had a valid medical excuse, he was still under an obligation to timely report this problem to the carrier."

The evidence indicates that Claimant worked some but not all of the regularly scheduled work days between and October 4 and October 18, 1995. Claimant's expectation of clairvoyance by the supervisor regarding what days he would be absent appears to this Board as unreasonable. By warning letters dated September 19, 1995 and October 3, 1995, Claimant had been made aware that his absences up to that time, were considered unauthorized and that future unauthorized absences could subject him to disciplinary action.

The Carrier asserts that the discipline imposed was fair in light of the excessive absenteeism of Claimant. Excessive absenteeism, even for legitimate reasons can result in discipline. See Second Division Award 10073. Just cause for discipline having been established, prior absences and discipline can properly be considered in assessing the appropriate measure of discipline.

We find substantial evidence that Claimant was guilty of the charges for which discipline was imposed. We find the discipline appropriate in this case in light of the excessive absenteeism complicated by Claimant's failure to notify his supervisor even after receiving warning letters that future unauthorized absences could result in disciplinary action.

**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 Third Division

Dated at Chicago, Illinois, this 22nd day of September 1999.