

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38053
Docket No. CL-39141
07-3-05-3-654

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Claim of the Systems Committee of the Organization (GL-13109) that:

1. Carrier acted in an arbitrary, capricious and unjust manner in violation of Rule 19 of the Agreement, when by notice of September 17, 2004, it assessed discipline of “Termination from Service Effective Immediately” against Claimant Steve Douglas, pursuant to an investigation held on September 10, 2004.
2. Carrier shall now reinstate Claimant to service with seniority rights unimpaired and compensate Claimant an amount equal to what he could have earned, including but not limited to daily wages, holiday pay and overtime, had discipline not been assessed.
3. Carrier shall now expunge the charges and discipline from Claimant’s record.”

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 March 18, the Carrier notified the Claimant to report for a formal Investigation on March 24, 2003. The notice charged the Claimant with violating Amtrak's Service Standards, Professional and Personal Conduct, Alcohol and Drugs; Teamwork; Conduct; as well as the Carrier's Drug and Alcohol Policy and its Harassment Policy. The notice specifically alleged that on March 16, 2003, a Manager, having reasonable suspicion, directed the Claimant to submit to drug and alcohol screens; that the Claimant did not submit to the tests; that the Claimant caused excessive delay in the administration of the test; that the Claimant caused a disturbance at the medical center where the Claimant was taken for the test; that upon leaving the medical center, the Claimant provoked two young men using racial slurs; that during the cab ride back to the station, the Claimant cursed the Manager, used a sexual orientation slur, hit, kicked and tried to choke the Manager and threatened the Manager.

By letter dated March 21, 2003, the Carrier notified the Claimant, in light of a voice mail message that the Claimant had left that day and in light of the Hearing Officer's understanding, that the Claimant was on medical leave of absence, that the Investigation was postponed "until such time as you return to work." By letter dated September 17, 2003, the Carrier notified the Claimant that it had decided to proceed with the Investigation and directed him "to provide the Amtrak Medical Department sufficient medical documentation indicating the reasons as to why you cannot attend an Administrative Hearing at this time." The letter further advised the Claimant, "Failure to comply with the above direction within ten (10) business days of receipt of this letter will result in your Investigation being rescheduled."

The Claimant did not respond to the September 17, 2003, letter. By letter dated July 21, 2004, the Carrier notified the Claimant that the Investigation was scheduled for August 11, 2004. On August 10, 2004, the Claimant furnished the Carrier with notices from two different doctors. One, dated August 9, 2004, stated of the Claimant, "His history suggests depression and panic disorder. He claims inability to participate in a formal investigation. I suggest he be given 1 month to recover and participate." The second doctor's note simply stated, "Estimated length of disability: 8-10-04 to 9-10-04."

The Carrier opened the Hearing on August 11, 2004, received the medical documentation, and recessed the Hearing until September 10, 2004. By letter dated August 11, 2004, the Carrier notified the Claimant of these events.

On September 9, 2004, the Claimant left voice mail messages for the Hearing Officer and the Organization stating that he was continuing his medical leave, that he would not be attending the Hearing the following day and that he would fax medical documentation. No further medical documentation was received by the Carrier.

The Claimant did not appear at the Hearing on September 10, 2004. The Claimant's representative appeared and sought a further postponement. The Hearing Officer denied the postponement request. The Claimant's representative protested the denial and left the Hearing. The Hearing proceeded in absentia. On September 17, 2004, the Hearing Officer issued her decision finding that the charges were sustained and the Carrier notified the Claimant that he had been dismissed from service.

The critical issue presented in this case is whether the Carrier violated Rule 19 when it denied the Organization's request to postpone the Hearing beyond September 10, 2004, and proceeded in absentia. The Organization contends that under Rule 22, "employees absent because of personal sickness or physical disability . . . will be considered on indefinite leave of absence." In the Organization's view, the Claimant was still on an indefinite leave of absence on September 10, 2004, and the Carrier acted in disregard of Rules 19 and 22 by holding the Hearing on that date.

We are unable to agree with the Organization's position. Rule 22 expressly allows the Carrier "to require from employees on leave of absence reasonable, periodic documentation attesting that their medical condition prevents their return to service." Moreover, the question under Rule 19 is not whether the Claimant was medically disabled from performing service, but whether he was medically disabled from attending the Hearing. After postponing the Hearing indefinitely in March 2003, the Carrier patiently waited six months. It then gave the Claimant notice that it wished to proceed with the Hearing, but also gave him an opportunity to submit medical documentation of his inability to attend the Hearing, and advised him that if he failed to provide such documentation within ten business days, the Hearing would be scheduled. The Carrier's actions in this regard were certainly reasonable. When the Claimant failed to respond to the letter, the Carrier still waited a considerable period of time and then acted appropriately in scheduling the Hearing for August 11, 2004.

On the day before the scheduled Hearing date, the Claimant produced medical documentation of his inability to attend the Hearing until September 10, 2004. Despite the extreme tardiness of the Claimant's proffer, the Carrier accepted it and rescheduled the Hearing for September 10. True to his pattern, the Claimant called the day before the Hearing, stated that he was medically unable to attend and promised to supply documentation. However, this time, the Claimant never supplied any further medical documentation. By this point, the Hearing had been postponed for approximately 18 months. The Claimant's failure to produce medical documentation of his continued inability to attend the Hearing justified the Carrier in proceeding with the Hearing on September 10, 2004. See Public Law Board No. 3188, Award 29.

We reviewed the record carefully. The Manager testified that he observed the Claimant to have slurred speech and bloodshot eyes and to be smelling of alcohol. This gave the Manager reasonable suspicion and justified his ordering the Claimant to submit to a drug and alcohol screen. The Manager's testimony further established that the Claimant obstructed the testing process, stalling being taken to the medical center by claiming to have lost his backpack, looking for his backpack, finding it, taking every item out of the backpack to ensure that all of his belongings were there, and then insisting on speaking with an Amtrak Police Officer. At the medical center, the Claimant continued to stall, insisted on reading the consent form into a tape recorder and resisted when told by hospital security that he was not allowed to operate a tape recorder in the hospital. The Claimant did not submit to the test.

The Manager further testified that he took the Claimant back to the station in a taxi. When the taxi pulled up at the medical center, two African-American young men got out. The Manager testified that the Claimant taunted the two men with racial slurs and attempted to provoke them into a fight. In the taxi ride back to the station, according to the Manager, the Claimant cursed the Manager using a sexual orientation slur, kept putting the tape recorder microphone in the Manager's face, kicked the Manager - possibly by accident - and hit the Manager and tried to choke the Manager. When they arrived at the station and exited the taxi, the Manager testified, the Claimant threatened him, telling him that he was dead and that he should watch his back.

The Organization argues that the Carrier failed to call witnesses mentioned in the Manager's testimony. However, the Organization failed to make such objections at the Hearing and, accordingly, waived them. Moreover, the entirety of the Manager's testimony was based on his personal knowledge of events that he witnessed and in

which he participated. There is no question that the Carrier proved the charges by substantial evidence.

The Claimant's conduct can only be characterized as intolerable. Given the severity of the offenses, the penalty of dismissal was not arbitrary, capricious, or excessive.

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 25th day of January 2007.