

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39288
Docket No. CL-39436
08-3-NRAB-00003-060118
(06-3-118)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Massachusetts Bay Commuter Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the TCU (MBCR-06D-0505)
that:

- a. The Carrier acted in an arbitrary and capricious manner when it assessed discipline of dismissal on Claimant Kevin Loftus April 28, 2005.
- b. Claimant’s record is cleared of the charges brought April 11, 2005 and he be reinstated with seniority unimpaired and compensated for all time lost in accordance with Rule 6-B-1.”

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.

The Claimant was a Solari Operator at South Station in Boston, Massachusetts. He was responsible for making loudspeaker announcements and updating display boards in the station showing departure times and track numbers for outbound commuter trains.

By letter dated April 11, the Claimant was directed to appear on April 14, 2005, for a formal Investigation in connection with four charges: (1) alleged dishonesty in that he requested and was granted an emergency vacation from April 6 to 10, 2005, to care for an ailing daughter and paid sick leave on March 23, 30, and 31, 2005, but performed services for another employer during the vacation period and on the sick days (2) alleged violation of the provisions on "Outside Employment" in the MBCR Handbook in that Claimant's outside employment "severely compromised" his abilities to perform his duties at the railroad (3) alleged violation of MBCR attendance requirements and (4) alleged violation of the MBCR Code of Professional Conduct & Employee Conduct by rude, disrespectful, and unprofessional conduct on April 1, 2005, toward a company supervisor.

After a mutually agreed to postponement, an Investigation was held on April 21, 2005. The Hearing Officer issued a Decision Letter on April 28. He withdrew Charge No. 2 from consideration because of lack of evidence that the Claimant had received the MBCR Handbook prior to April 1, 2005, and because the charge was essentially a duplication of Charge No. 1. He also withdrew Charge No. 3 because the specific document relied on by the Carrier as having been violated, namely, the Attendance Policy, was not cited in the Notice of Investigation.

The Hearing Officer found that Charge No. 1, which he called the "most serious" charge, was "proved in its entirety." The decision letter, addressed to the Claimant, stated:

"... I find the Carrier proved you were deliberately dishonest in marking off sick on March 23, 30 and 31, 2005, when the true purpose for your absences was to allow you to perform service for Amtrak on those dates. Further, I find you were dishonest when you

requested and accepted sick pay allowance under false pretenses (misappropriation) for March 23, 30 and 31, 2005. Finally, I find that you utilized dishonest means to secure an unscheduled vacation on April 6 through 10, 2005.”

The Hearing Officer also sustained Charge No. 4, finding that the Claimant was “rude, unprofessional and disrespectful” of his supervisor and showed “contempt for proper authority” when he took a letter of counseling the supervisor wanted him to sign, crumpled it up in his hand, and said that the letter meant nothing to him. Based on the findings of the Hearing Officer, the Chief of Passenger Operations assessed “Dismissal In All Capacities Effective Immediately” as the discipline for the Claimant’s conduct.

The Organization does not dispute that the Claimant worked for Amtrak on three of the days for which he requested vacation time off because his daughter was allegedly very sick. Nor does it contest that the Claimant worked for Amtrak on three days for which he was absent and collected sick pay from MBCR. These facts are undenied in the record. Rather the Organization argues that the withdrawal of two of the original charges shows that the Claimant was not guilty of them. “That being so,” the Organization asserts, “it was incumbent upon the Carrier to consider carefully both the possibility of the remaining charges being unfounded and, conversely carefully considering a fair, reasonable and supportable discipline when reaching a decision on the remaining charges.”

The Hearing Officer’s explanations for withdrawing two of the charges, however, are incompatible with the Organization’s contention that their withdrawal reflects the Claimant’s innocence. Charge No. 2 was withdrawn, the Hearing Officer stated, because there was no proof that he received the handbook prior to April 1, 2005, “and because said charge is essentially a duplication of the specifics outlined in Charge One. . . .” The Hearing Officer, as noted, found that Charge No. 1 was proved in its entirety. In addition, he commented that “[t]he requirement contained in the MBCR Handbook is basically common sense – do not work at another job if it affects your availability for your employment at the MBCR.”

The Hearing Officer's explanation for withdrawing Charge No. 2 shows that he did not believe the Claimant to be innocent of the charge that his outside employment interfered with his ability to perform his MBCR duties. On the contrary, the fact that one basis for withdrawing Charge No. 2 was that it duplicated elements of Charge No. 1, which the Hearing Officer found was "proved in its entirety," indicates that the Hearing Officer believed the allegations of Charge No. 2 to be true. The charge was withdrawn on a procedural defect – absence of proof of timely delivery of the handbook – and not on the merits. Similarly Charge No. 3 was withdrawn because of a procedural insufficiency – failure to cite the MBCR Attendance Policy in the charge letter – and not because the charge lacked merit. There is no suggestion in the Hearing Officer's withdrawal of two of the charges that he believed the Claimant to be innocent of the allegations contained in the charges.

The Organization argues that the fact that the Claimant worked on the days he was granted vacation time off in connection with his daughter's alleged illness does not indicate he was dishonest because "[t]here are any number of reasons why after being granted the requested vacation, the Claimant found he did not need to care for his ill daughter." The more believable explanation, the Organization asserts, "is that after being granted the time off he realized, for whatever reason, he was not needed to care for his daughter."

The Claimant had the opportunity at the Hearing to provide an innocent explanation for requesting vacation time off to care for a "very sick" child and then working for another employer on three of the five days he was allowed to be off. He offered no explanation whatsoever. The Board will not speculate about a possible innocent explanation where the Claimant has offered no explanation and the most probable explanation is that the Claimant was not being truthful with the Carrier and wanted the time off because the hours of the other job, which the Claimant apparently considered his primary job, conflicted with the hours of his job with the Carrier. That explanation is supported by the fact that in the two-week period prior to the vacation request, the Claimant took three days of paid sick leave, but worked full shifts for Amtrak on those same days.

On two of those three days the majority of the hours worked for Amtrak overlapped with the Claimant's scheduled hours at MBCR. On all three days the work performed for Amtrak, i.e., baggage handling, was more strenuous than the work the Claimant would have had to perform for the Carrier had he not taken paid sick time. These facts indicate that the Claimant was not eligible to receive sick pay for the three days and that his request and acceptance of sick pay for those days was dishonest. Similarly, in the absence of an explanation from the Claimant of how he was able to work for Amtrak when the sickness of his child allegedly prevented him from working for MBCR, the Carrier was entitled to conclude that the Claimant was not being honest when he claimed he needed time off to care for a sick child any more than he was honest the preceding weeks when he claimed to be sick, but worked at a more strenuous job for Amtrak.

The Organization argues that the Carrier could have requested documentation of illness if it believed that the Claimant was falsely claiming sick pay. That might be true in a situation where the Carrier is suspicious that an employee is falsifying illness but has no concrete evidence to support its belief. Here the Carrier had clear and convincing evidence that the Claimant was working on a more strenuous job on the same days for which he claimed he was too sick to work for the Carrier. In such circumstances it had no obligation to seek verification of illness. The facts spoke for themselves. It was incumbent upon the employee to provide an innocent explanation of the facts, if he could. He made no attempt to do so.

There is substantial evidence that the Claimant was dishonest both with regard to the reason offered in support of his request for unscheduled vacation time and in requesting and accepting sick pay, as alleged in Charge No. 1. The evidence further supports the conclusion that the true reason that the Claimant requested vacation time and paid sick time on the dates in question was to enable him to work for Amtrak. The Board so finds.

The Organization notes that the MBCR Handbook for Bargaining Unit Employees contains the following provision:

“If MBCR determines that an employee’s outside work interferes with performance or the ability to meet the requirements of MBCR as they are modified from time to time, the employee may be asked to terminate the outside employment if he or she wishes to remain with MBCR.”

In light of that provision, the Organization argues that the appropriate action for the Carrier to have taken in this case was to require the Claimant to terminate his outside employment.

Certainly the quoted provision from the Handbook would have permitted the Carrier to require the Claimant to give up his outside employment as a condition of remaining employed. The provision, however, is not a license for an employee to falsely claim sick pay or otherwise act dishonestly in an effort to conceal the fact that he has a second job which conflicts with his MBCR job. An employee who practices such deception rightly exposes himself to appropriate discipline.

The evidence also establishes the Claimant’s guilt with respect to Charge No. 4. On April 1, 2005, his supervisor handed and asked him to sign a “Final Written Warning” letter in a counseling session concerning his alleged unprofessional manner of making announcements. He does not deny that instead of signing the letter to acknowledge that he received it, he crumpled it up in his hand in front of his supervisor and said, “This means nothing.” The Claimant defends his conduct, however, on the basis that he requested but was denied union representation.

Both the Claimant’s supervisor and a manager who was present specifically to witness the serving of the Final Written Warning letter on the Claimant testified that the Claimant did not request representation. The Hearing Officer credited their testimony. As an appellate forum, the Board will normally accept the credibility findings of the hearing tribunal. There would be no reason to make an exception in this case. The Claimant’s self-serving testimony that he was denied union representation is contradicted not only by the testimony of his supervisor, but also that of a manager from a different station who was a disinterested witness and testified that the Claimant did not request representation. In addition, the Claimant’s credibility is tainted by the charge of dishonesty which the Board has

upheld. The Board accepts the finding of the Hearing Officer that the Claimant did not request union representation when handed the Final Written Warning letter by his supervisor.

The Board finds that the Claimant was rude and disrespectful to his supervisor, and conducted himself unprofessionally, when he refused to sign a Final Written Warning letter as requested by his supervisor and, as his supervisor watched, crumpled it up in his hand, stating that the letter meant nothing. The Carrier proved the Claimant's guilt with respect to Charge No. 4.

The Claimant's conduct, which was the subject of Charge No. 1, provided sufficient grounds to dismiss him. Taking paid sick leave from one's employer when one is not sick in order to be free to work for a second employer is dishonest and disloyal conduct toward the first employer. It is also dishonest and disloyal conduct to request vacation time off on very short notice, in lieu of sick leave, to care for a very sick child when the real reason for taking off is to work on a second job. Such acts disrupt the orderly operation of the employer's business, subject it to unnecessary costs and inefficiencies, and, most importantly, destroy the trust that is essential to the employer-employee relationship. Dishonesty of this kind – of which the Claimant was guilty – involving deception for the purpose of covering up that one is absent from one's job in order to work for another employer is generally considered just cause for discharge. The Board will not disturb the Carrier's disciplinary action in this case.

AWARD

Claim denied.

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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 21st day of July 2008.