

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39695
Docket No. MW-40199
09-3-NRAB-00003-070460
(07-3-460)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Northern Indiana Commuter Transportation District

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. C. Perkins under date of September 1, 2006 for alleged violation of District attendance requirements for absence on July 3, 2006 and July 10, 2006 was arbitrary, capricious, excessive, discriminate and in violation of the Agreement (System File D-18-06-380-03N).
- (2) As a consequence of the violation referred to in Part (1) above, the discipline shall now be removed from Mr. C. Perkins' record and he shall be reinstated to service with all rights and benefits intact and paid for all time lost.”

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 notice dated July 19, 2006, the Claimant was directed to attend a formal Investigation to determine the facts and the Claimant's responsibility, if any, in connection with the allegation that he violated the Carrier's attendance requirements, as well as the terms of a January 2006 Waiver of Investigation. The Investigation was conducted on August 23, 2006. By letter dated September 1, 2006, the Claimant was notified that as a result of the Investigation, he had been found guilty as charged, and that he was being dismissed from the Carrier's service. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to discharge him.

The Carrier initially contends that the Notice of Investigation properly apprised the Claimant of the charge against him, and he was given an opportunity to prepare a defense. The Carrier asserts that at the Investigation, the Organization had no questions about the Notice. The Carrier argues that the Investigation was fair and impartial, and the Claimant received Agreement due process.

The Carrier contends that the charges were proven by substantial evidence. The Claimant failed to comply with the terms of the Waiver of Investigation and Last Chance Agreement, and over the course of his employment, he demonstrated a pattern of abuse of the Carrier's attendance policy. The Carrier emphasizes that the Claimant was afforded an opportunity to correct his actions short of disciplinary action, yet he chose not to correct his attendance problems. The Carrier asserts that the Claimant's failure to comply with the attendance Rules and with the provisions of his Investigation Waiver and Last Chance Agreement resulted in the Claimant's discharge.

The Carrier argues that there is more than substantial evidence in the record to support its decision to discharge the Claimant. The Carrier insists that the charges were sufficient, the evidence supports a finding of guilt, and the discipline imposed was appropriate under the circumstances. The Carrier asserts that its

actions cannot in any way be construed as an abuse of discretion. The Carrier contends that the record demonstrates that there is no justification for the relief requested in the claim, and it must be denied.

The Carrier emphasizes that there is no reason for the Board to substitute its judgment for that of the Carrier. Based on the Investigation, dismissal was a proper exercise of the Carrier's judgment and reversal is not warranted.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Claimant was denied a fair and impartial Hearing because the same person served as both the Charging Officer and the Investigating Officer. The Organization asserts that not only did this violate the Agreement, but it is clear that the Investigation decision was based solely on the Investigating Officer's memorandum. Essentially, one person preferred charges against the Claimant, conducted the Investigation, and imposed the discipline of dismissal. Moreover, the Investigating Officer failed to act as an impartial fact finder. Pointing to prior Awards, the Organization insists that by utilizing the same person as both charging and investigating officer, the Carrier violated the Agreement and deprived the Claimant of a fair and impartial Investigation.

The Organization specifically points out that the Investigating Officer improperly expanded the scope of the Investigation by allowing testimony and evidence about absences that were not specified in the Carrier's letters. The Organization emphasizes that this demonstrated bias, and it clearly deprived the Claimant and the Organization of the opportunity to properly prepare a defense against such allegations. The Organization asserts that allegations relating to dates other than July 3 or July 10 cannot be considered in resolving this case.

The Organization maintains that a review of the record demonstrates that there is no dispute that the Claimant was approved to leave work on July 3, 2006, to obtain medical attention because he was experiencing blurred vision, and the Carrier received the doctor's note that verified such medical attention. The

Organization emphasizes that the Carrier cannot reasonably contend that the Claimant's leaving work on July 3 was without approval or otherwise unexcused.

The Organization asserts that as to the July 10 absence, the Claimant called and notified his supervisor prior to his starting time that he was ill and unable to report for work that day; the supervisor acknowledged this advisement and stated that it was "okay." The Organization therefore contends that there is no substantial or credible evidence to support the Carrier's conclusion that the absences on either July 3 or July 10 should be considered unexcused, nor is there any support for the assignment of two points for each absence. Moreover, there is no evidence that the Claimant was informed, on either of these dates, that his absence was unauthorized or unexcused.

Citing prior Awards, the Organization argues that under the circumstances, there is no question that the discipline assessed was arbitrary and in violation of the Agreement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Board reviewed the procedural arguments raised by the Organization, and finds them to be without merit. Although the manner in which the Hearing was held by the Hearing Officer left a great deal to be desired, the Board finds that the Claimant and his Organization representative were given sufficient opportunity to present the case on behalf of the Claimant.

The Board reviewed the evidence and testimony and finds that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating the Carrier's attendance requirements on July 3 and 10, 2006. The record reveals that the Claimant left early without supervisor permission on July 3; on July 10, the Claimant did not show up for work. The Claimant did call in before the start of duty on July 10, but he was issued two points because neither of the absences were "excused." The Claimant did bring in a doctor certificate for July 3, but that was not sufficient for the Carrier to change the absence to an "excused" absence.

The record reveals that in January 2006, the Claimant was facing serious discipline for attendance-related matters and he entered into a Last Chance Agreement wherein he waived his rights to appeal the specific incidents involved in that case and also agreed that:

“ . . . this notice shall serve as my ‘last chance warning.’ Should another incident occur and the evidence at the investigation reveals that this latest incident is not excused, I have been advised the next step in the District’s Discipline policy is termination.”

That waiver of Investigation dealt with the Claimant’s Rule violations during the period of December 19 through 27, 2005.

This latest incident less than six months after the Claimant signed the Last Chance Agreement made the Claimant eligible for discharge. The Claimant was no longer eligible for a waiver of the Investigation; and at the Investigation, the Carrier proved that the Claimant had incurred two unexcused absences on July 3 and 10, 2006.

Consequently, the Board finds that the Claimant failed to live up to the terms of the Last Chance Agreement that he entered into in January 2006. It is fundamental that attendance is extremely important in the railroad industry, as it is in most areas of employment. The Claimant was given sufficient opportunity to correct his attendance deficiencies, and the Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant’s employment in this case. Therefore, the claim must be denied.

AWARD

Claim denied.

Form 1
Page 6

Award No. 39695
Docket No. MW-40199
09-3-NRAB-00003-070460
(07-3-460)

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 26th day of May 2009.