Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39925
Docket No. MW-39888
09-3-NRAB-00003-070044
(07-3-44)

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

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline [ten (10) days' withheld from service held in abeyance for a period of six (6) months and foreman disqualification through May of 2007] imposed upon Mr. J. Ornelas under date of May 25, 2006 was unwarranted, excessive and in violation of the Agreement (Carrier's File BMWE-527D NRP).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Ornelas shall '. . . now be reinstated to his former position with seniority and all other rights restored unimpaired, compensated for net wage and benefit loss suffered by him since his removal from said position, and that the alleged charges be expunged from his personal 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 January 4, 2006, the Carrier notified the Claimant to appear for a formal Investigation on January 13, 2005. The notice charged the Claimant with violations of Amtrak's Standards of Excellence provisions regarding attendance to duties, teamwork and attendance policy progressive discipline with respect to having 11 or more days absent in a 12 month period. It specified that after last being charged for excessive absenteeism on May 20, 2005, the Claimant was absent on: May 17 and 31, 2005; June 5, 10, 13, and 28, 2005; July 10, 23 and 28, 2005; August 1, 2, 8, 19, and 31, 2005; September 26, 2005; October 6 and 19, 2005; November 9, 2005; and December 6, 7, and 8, 2005. The Hearing was postponed to and held on March 16, 2006. On March 22, 2006, the Carrier notified the Claimant that the Hearing Officer had found him guilty of the charges and that he was assessed a ten-day suspension deferred for six months and a one-year disqualification from holding any position as Foreman.

There is no dispute that the Claimant was absent on the dates charged. The Organization contends, however, that eight of the dates were absences taken under the Family Medical Leave Act and cannot count against the Claimant's attendance record. The Claimant was approved for intermittent FMLA leave for the period August 1, 2005, through January 22, 2006. One of the dates that the Claimant claimed to be FMLA protected, July 28, 2005, fell outside the period of his FMLA intermittent leave. Furthermore, the record made it clear that the Claimant failed to mark off properly or supply proper documentation for any of the dates. The Claimant did not turn in time cards for any of the dates until after the notice of charges was issued. At the Hearing, he alluded to a doctor's note purporting to excuse the dates, but the note was not offered into evidence, thereby precluding the Hearing Officer from considering it and precluding the Board from considering it in

determining whether the Hearing Officer's finding of guilt was supported by substantial evidence.

The Organization contends that several of the dates charged are coded "A" as opposed to "U" for unexcused, and therefore should not be counted against the Claimant's record. But the record makes clear that the coding of "A" merely indicates that the employee called in to report his absence, whereas the coding "U" indicates a failure to call in. The coding "A" does not preclude the counting of the absence against the employee's record. We conclude that the Carrier proved the charges by substantial evidence.

The Claimant was previously issued a three-day deferred suspension for the same offense. The penalty imposed was in keeping with progressive discipline and 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 31st day of August 2009.