

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41453
Docket No. SG-41393
12-3-NRAB-00003-100281

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Port Authority Trans-Hudson Corporation)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Port Authority Trans-Hudson:

Claim on behalf of C. Bala, for compensate (sic) for all lost wages, and all mention of this matter be removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Article X (Discipline - Hearings) when it failed to provide a fair and impartial investigation evident when Carrier issued the harsh and excessive discipline of a three workday suspension from service without pay, and three days held in abeyance for one year, as a result of an investigation held on January 8, 2009. BRS File Case No. 14429-PATH.”

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 June 23, 2008, Signal Repairman I Christopher Bala notified the Carrier that he would be absent from work. The Claimant indeed was absent until October 31, 2008 – a total of 95 days. The Claimant was charged and a Hearing was held on the property on January 8, 2009. The charge letter specified that the Hearing was to “investigate charges that you violated Rules J.1 and J.3 of the PATH Book of Rules.”

Rule J.1 of the PATH Book of Rules states:

“Employees must maintain a satisfactory attendance record. PATH has the discretion in establishing the length of time an employee may be absent due to injury or illness before disciplinary action is taken.”

Rule J.3 of the PATH Book of Rules states:

“Unexplained or unauthorized absences, repeated or excessive absenteeism, lateness, or making a false report of injury or illness will be cause for disciplinary action.”

After the Investigation, on January 26, 2009, the Carrier assessed the Claimant a six-day suspension without pay. Three days of the suspension were served starting on February 2, 2009. The remaining three days were held in abeyance for one year from the date of the discipline letter.

The Organization first asserts that the Carrier exhibited pre-judgment in the Charge Letter when it stated “. . . for an investigation of the charge that you violated” It contends that the phrase “you violated” clearly indicates that the Claimant had already been determined to be guilty prior to the Investigation being held. It further contends that this finding of guilt by the Carrier in its initial letter involves the exact charges for which a fair and impartial Investigation was supposed to be held, in accordance with the Collective Bargaining Agreement (which requires fairness and impartiality in the proceedings). The Organization asserts that it is evident that the above-quoted statement establishes prejudgment.

In this industry, unlike others, it is the accepted practice that a Carrier officer is charged with the responsibility of conducting the investigation into an incident. Most collective bargaining agreements require, as is the case here, that this be done in a fair and impartial manner. Boards, such as this one, then sit as an appellate tribunal to review any assessment of discipline resulting from such processes. It is true that the wording of a charge letter can be indicative of lack of fairness or impartiality. Many tribunal Awards have so held. Each case, however, turns on the specific wording of the charge letter. Words such as “when you falsified” or “when you did . . .” have been enough to call into question the fairness and impartiality of the process. Many carriers have taken to writing charge letters which say “. . . when you are alleged to have. . .” or words along such lines.

In the instant case, the Carrier’s charge letter said “. . . for an investigation of the charge that you violated” From our vantage point, a plain reading of those words does not indicate pre-judgment. It is clear that the purpose of the Claimant’s Hearing was to investigate the charges in question. These words do not, in our opinion, reveal a lack of fairness or impartiality.

For these reasons, the preliminary objection by the Organization must fail. As a result, we now turn to the merits of the case.

There is no dispute that the Claimant was off work for a legitimate medical reason. The Carrier asserts that the discipline was assessed due to the Claimant’s excessive absenteeism, not as a result of unexplained or unauthorized absences. There is also no dispute before the Board that the Claimant was absent from work on an average of 36 days per year every year since he was hired in 1990. The Claimant has been counseled about his excessive absenteeism on 16 occasions during his employment period.

It is well established that an employee has an obligation to work on a full-time basis. While absenteeism for legitimate medical reasons is allowable, being excessively absent is not. In this case, the Carrier’s records establish the Claimant’s pattern of excessive absenteeism, for which the Carrier has counseled the Claimant extensively.

In view of all of the circumstances, the Board finds that the discipline assessed is neither in violation of the Agreement, nor excessive. Accordingly, the claim before the Board is denied.

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 16th day of October 2012.