

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33494
Docket No. MW-34605
99-3-98-3-253**

The Third Division consisted of the regular members and in addition Referee Sandra Gilbert Pike when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline [thirty (30) day suspension and dismissal from service] imposed upon Trackman B. Jenkins for alleged unauthorized absenteeism on June 11 through 26, 1996 and insubordination on July 31, 1996 and continued absenteeism on July 19 through August 13, 1996 was unwarranted, without just and sufficient cause and an abuse of the Carrier’s discretion (System Dockets MW-4547-D and MW-4548-D).

(2) As a consequence of the violations referred to in Part (1) above, the Claimant shall receive the remedy prescribed by the parties in Rule 27, Section 4.”

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 July 26, 1996 Claimant was instructed that he had been absent without permission since July 11, 1996, that he should report to work within 5 days of the date of the letter and that he must provide a doctor's excuse for the days absent and that failure to comply would result in disciplinary action. Letter was received by Claimant on July 31, 1996, after the time of the scheduled meeting that same day. Claimant called the division office on July 31, 1996 and scheduled a meeting on this matter for August 6, 1996.

By letter dated July 28, 1996, Claimant was notified that he was charged with being absent without permission on June 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25 and 26, 1996 and with excessive absenteeism.

A second letter instructed Claimant to appear for an Investigation on September 11, 1996 at 1:00 P.M. on charges of insubordination on July 31, 1996 for failing to provide medical documentation and failure to work and for being absent without permission on July 18, 19, 22, 23, 24, 25, 29, 30, 31, August 1, 2, 5, 7, 8, 9, 12, and 13, 1996.

Ultimately hearings were held on October 9, 1996, the first at 10:00 A.M., the second at 12:00 P.M. A notice of Discipline was issued on October 21, 1996 notifying Claimant that he had been found guilty and was assessed discipline of 30 days actual suspension for unauthorized absence on June 11, 12, 13, 14, 17, 18, 24, 25, and 26, 1996. A second notice of Discipline was issued the next day, on October 22, 1996 notifying Claimant that he had been found guilty and was dismissed in connection with his insubordination on July 31, 1996 and excessive absenteeism and having been absent without permission on July 19, 22, 23, 24, 25, 26, 29, 30, 31, August 1, 2, 6, 7, 8, 9, 12, and 13, 1996.

RE: The First Hearing held October 9, 1996 at 10:00 A.M.

The Organization argues that the Claimant cannot be found guilty because Claimant had justifiable reason to be absent on the dates in question. On June 11, 1996, Claimant went to care for his terminally ill brother. Claimant testified that after attempting to call his supervisor, he left a message with the assignment clerk on June 11, 1996. The Carrier shows no record of any telephone calls or notice regarding this absence prior to Claimant's notification on June 17, 1996 that his brother had died. We note that the notice of Discipline issued October 21, 1996 assessed discipline for

unauthorized absence on June 11, 12, 13, 14, 17, 18, 24, 25, and 26, 1996 but did not include a finding of guilt for unauthorized absence on June 19, 20 and 21, 1996, days which Carrier allowed for bereavement leave. Although offered in the subsequent hearing, additional evidence was not offered at this hearing regarding the reasons for the absences after June 22, 1996 or whether the Carrier had been given notice of the absences.

Second Division Award 7754 stated:

“... a principle well established by this Board, and that every employee has “a duty and obligation to report timely for his assignment and to work all the hours of his assignment each and every day it works unless his absence is validly justified and excused for good and sufficient reason such as illness, death of a family member or other matters which, in applying the rule of common sense and human understanding, would clearly justify his absence.”

The terminal illness and death of Claimant's brother was clearly beyond his control. We find these reasons justifiable reason for absence between June 11, 1996 and the allowed bereavement days. We also find the bereavement days authorized absence. We find no authorization or notice to Carrier regarding absence for June 24, 25, and 26. It is the opinion of this Board that despite the unfortunate circumstances, that the Claimant was properly found guilty of unauthorized absence for June 24, 25, and 26. Even after consideration of the prior record of discipline and warnings for absences, in light of the mitigating circumstances and in light the excused absence for a portion of the days with which Claimant was charged, the Board is persuaded that under the particular facts of this case, the discipline assessed was harsh and excessive. One days suspension would have been sufficient.

RE: The Second Hearing held October 9, 1996 at 12:00 P.M.

The Organization argues that there was no insubordination caused by Claimant's failure to attend a hearing on July 31, 1996. We find this argument persuasive. Insubordination has been defined as the refusal to recognize authority or not submitting to authority. Third Division Award 4449. The notice dated July 26, 1996 requiring Claimant to appear within five days of such notice was not received by Claimant until July 31, 1996. Claimant immediately called and rescheduled the meeting. We find no insubordination under these circumstances.

The Organization argues that Claimant cannot be found guilty because Claimant had justifiable reason to be absent due to illness on the dates in question. The Organization also claims that Carrier was aware of the Claimant's medical problem and that Claimant could not have returned to work without a medical release to do so. The Organization argues that Claimant should be exonerated because he was in counseling.

The Carrier argues that Claimant was absent without authorization on the dates charges, that Claimant failed to notify his Supervisor, and that these and prior absences together constitute excessive absenteeism sufficient to warrant the discipline of dismissal. The record establishes that Carrier was aware of a medical problem on July 17, 1996 but does not establish awareness or notice that Claimant be absent from work. There is no evidence in the record to indicate that Claimant was not sick. However, there is evidence that Claimant did not notify Carrier of his inability to work. Documentation of a medical excuse for prior absence and statement that Claimant would be unable to return to work indefinitely was provided by Claimant on August 6, 1996. The Carrier argues that Claimant's seeking counseling for personal problems suffered during the time period of his absence does not excuse Claimant from giving proper notice and providing medical documentation to the Carrier in a timely manner.

In Second Division Award 8568, the Board stated that: "Even if Claimant had a valid medical excuse, he was still under an obligation to timely report his problem to the carrier."

In Second Division Award 8115 the Board stated that: "Even if the physician's note is taken into account, it does not address to the Claimant's principle wrongdoing -- his failure to notify the Carrier in advance and/or during the period of his absence."

In Public Law Board No. 2945, Award 24, the Board stated that "... the weight of arbitral authority holds that excessive absenteeism of an Employee, even if caused by genuine illness, is subject to discipline by Management up to and including termination, because, the Employer is entitled to have its work needs accommodated by the Employee force ... the suspension serves to give the Employee notice that a final phase has begun in which he or she must correct the problem of absenteeism in order to avoid discharge; and because, in those situations which ultimately arrive at a terminal action for excessive absenteeism, the Carrier will be required to demonstrate to most arbitral authority that the doctrine of progressive discipline has been applied prior to termination." See also Second Division Award 11114.

This Board finds that the record substantiates the charges of absence without authorization on July 19, 20, 22, 23, 24, 25, 29, 30, 31, August 1, and 2. Since Claimant supplied Carrier with a medical slip stating that he would be off work indefinitely on August 6, 1996, we cannot agree with the charges of unauthorized absence beyond that date. The Board has ruled on numerous occasions that an employee's past record may be taken into consideration when assessing the quantum of discipline. See Third Division Award 26265 and Third Division Award 26266.

The discipline imposed by letter dated October 26, 1996 in response to the hearing on October 9, 1996 at 10:00 A.M. will not be considered by this Board as a step in progressive discipline in this case. Two Hearings held back to back in one day cannot accomplish the goals of progressive discipline i.e to give the Employee notice that he or she must correct the problem to avoid discharge. Without considering the discipline assessed on October 26, 1996, the record, none the less, establishes that the Claimant had a prior record of discipline for absences in September and October of 1995 and warnings for unauthorized absences and late starts in June and September of 1995 prior to these two hearings. Thus this Board finds that the Carrier satisfied the limited obligations it had to attempt to correct Claimant's attendance through progressive discipline.

This Board finds that sufficient evidence exists to sustain a finding of guilt on the part of Claimant for excessive absence and that such excessive absence was complicated by Claimant's failure to properly notify the Carrier. However, on the record as a whole, this Board is persuaded that under the particular facts of this case, the discipline assessed is harsh and excessive. Carrier shall reinstate the Claimant without back pay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of September 1999.

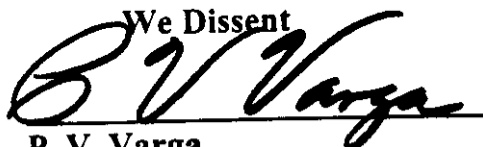
**Carrier Members' Dissent
to Third Division Award 33494 (docket MW-34605)
(Referee Pike)**


The simple fact is that Mr. Jenkins was absent without permission for several days between June 11 and June 26, 1996. While the terminal illness of his brother was beyond his control, Mr. Jenkins' knowledge and responsibility to advise the Carrier was well within his control. His absence prior to June 17, 1996 was never explained.

Claimant was again absent without permission beginning July 11, 1996. On July 17th, Claimant called his supervisor and advised that he would report the next day with a medical note. Neither happened. Based on the possibility that Claimant might have a medical problem, Carrier, on July 26, 1996 - advised Claimant to report for work or advise why not. Such was ignored.

As is noted in the Awards quoted at page 4 of this Award, employees are under an obligation to report their absences. However, this Majority was apparently misled by the fact that Claimant attended two Investigations on the same date. Such is nothing new in this Industry. Individuals who commit multiple infractions may have multiple hearings concerning those matters under the requirements of the contract and/or the convenience of the parties.

Claimant has a less than adequate record of absenteeism, note Award 33493 adopted by this same Majority. With these facts and this record we find the Majority's conclusion that this discipline was, "harsh and excessive" unavailing. As a result of this action we have no doubt that we will see Mr. Jenkins again under similar circumstances.

We Dissent

P. V. Varga


M. W. Fingerhut


M. C. Lesnik