

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33572
Docket No. MW-34445
99-3-98-3-66**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Louisville and Nashville
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) day suspension] imposed upon Mr. M. Clark for being absent without permission on January 28, 1997 and excessively absent during the months of November and December, 1996 and the month of January, 1997 was unwarranted, without just and sufficient cause and exceedingly harsh [System File 17 (1)(97)/12(97-451) LNR].**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant’s record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.”**

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 is assigned as a Blue Hat Switch Tender at the Carrier's Birmingham, Alabama facility. At the time of the events giving rise to this dispute, the Claimant had worked for the Carrier for 23 years and had a clean disciplinary record. By letter dated January 31, 1997, the Carrier directed the Claimant to attend an Investigation on February 5, 1997 in connection with the charge that he was absent without proper authority and failed to protect his assignment on January 28, 1997. In addition, the Claimant was charged with chronic and excessive absenteeism for absences on the following dates: November 11-15, 1996, December 10-27, 1996, January 13-17, 1997, and January 27, 1997. Following the Investigation, the Claimant was assessed a ten day actual suspension.

At the Investigation, Roadmaster Smith testified that when he arrived at his office on the morning of Monday, January 27, 1997, there was a message from the Claimant on the telephone recorder advising that the Claimant was having car problems in Chattanooga, Tennessee, and that he wanted to mark off for a personal day. It is undisputed that the Claimant failed to report for work on January 27 and 28, 1997. The Carrier contends that even if the Claimant properly reported off on Monday, January 27, he failed to give the proper notice or report for work on Tuesday, January 28, 1997 and, therefore, was subject to discipline.

The Claimant testified that the message he left on the Carrier's telephone recorder requested two days off, not one. He testified that he had traveled to Chattanooga to visit his daughter who had been hospitalized. The Claimant testified that he left Chattanooga on Sunday, January 26, 1997, so that he could report for work at Birmingham at his regular starting time, but he experienced car trouble along the way. The Claimant further testified that his vehicle could not be repaired until Tuesday, January 28, 1997 and thus he was unable to report for two of his regularly scheduled shifts.

With regard to the charge of excessive absenteeism, again there is no dispute that the Claimant was absent from work on the dates set forth in the notice of charges. The dispute centers around whether the Claimant was given permission to be off on those dates and whether the legitimacy of the reasons underlying the Claimant's absences was properly taken into consideration. The Claimant testified that the absences on the dates

in question were due to a number of personal difficulties, including illnesses and hospitalizations of family members.

The Carrier contends that the Claimant was afforded a fair Hearing, and that the evidence adduced at that Investigation established that the Claimant was guilty of the charges assessed against him. The Carrier argues that there is substantial evidence that the Claimant did not seek permission to be absent and did not protect his assignment on January 28, 1997. Further, the total number of absences during the period November 1996 through January 1997 established a pattern of excessive absenteeism. Notwithstanding the legitimacy of those absences, the Carrier maintains that it has the right to expect regular attendance of its employees. The assessed disciplinary penalty was fully warranted in light of the proven wrongdoing.

The Organization contends that it is incumbent upon the Carrier to substantiate the charges upon which discipline is based. In this case, the Carrier's determination to discipline the Claimant is based on the testimony of a single witness - the Roadmaster - who provided contradictory testimony. By contrast, the Claimant's testimony that he was absent from work on January 27 and 28, 1997 because of car problems stands unrefuted. Similarly, the Claimant's testimony that he had permission to be absent on the dates in question based on illness and other family problems should have been credited. With regard to the penalty assessed, the Organization argues that the Claimant has had an unblemished work record for 23 years. The ten day suspension did not take that mitigating circumstance into account, nor was it a reasonable level of progressive discipline in light of the absence of any prior discipline.

The Board reviewed the record evidence in its entirety. It is apparent that there is a narrow threshold issue of credibility as to whether the Claimant requested one or two personal days when he reported to the Carrier about the car problems he was experiencing. Prior Awards emphasize that the Board is neither authorized nor constituted to make credibility determinations, but instead inquires as to whether the evidence adduced at the Hearing reasonably supports a finding of the Claimant's culpability. See Third Division Awards 32332, 32452. In the instant case, we find no basis for the Board to disturb the determination of the Hearing Officer that the Claimant reported off only for January 27, 1997 and thus failed to protect his assignment on January 28, 1997.

If that were the sole basis for the discipline assessed, we would agree with the Organization's contention that the ten day suspension was inconsistent with well-established precepts of progressive discipline and unduly harsh, particularly given the Claimant's long and exemplary work record. However, the second charge of excessive absenteeism was also proved by substantial evidence. There are a number of Awards that support the principle that the Carrier has the right to discipline employees for excessive absenteeism, even when the reasons for such absences are legitimate or excused for acknowledged illness. The underlying rationale is that the Carrier must be able to discipline an employee who has accumulated so many absences that he has effectively ceased to be considered a dependable employee. See Third Division Award 28875; Second Division Awards 12308, 7852, 5049.

That is what occurred in this case. During the period of time in question, the Claimant was absent 24 out of 46 scheduled workdays. When the Claimant's excessive absenteeism is considered in conjunction with his failure to protect his assignment, the Board must conclude that the assessment of a ten day suspension was not arbitrary or capricious. Absent any evidence that the decision on the two charges was improper, discriminatory or unreasonable, we must rule to deny the claim.

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 20th day of October 1999.