

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35758
Docket No. MS-35632
01-3-99-3-627**

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

(Johnny Mims

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporations (Amtrak)

STATEMENT OF CLAIM:

“This is to serve notice, as required by the Uniform Rules of Procedure of the National Railroad Adjustment Board effective May 16, 1994, of my intention to file Ex Parte Submission within 75 days covering an unadjusted dispute between me and National Railroad Passenger Corporation, 210 S. Canal Street, Chicago, IL. 60606 involving the following:

This refers to the above referenced case listed for discussion in Vice Chairmen C. Perry Rapiers letter dated May 10, 1999. The decision of the Director Engineering (Ronald K. Meyers) was unsatisfactory to I, Johnny Mims and Union.

The Carrier (Amtrak) charged I, Johnny Mims with failure to follow the “Attending to Duties” Standard in Amtrak’s Standards of Excellence and failure to follow the Amtrak Intercity’s Operations Support Department “Absenteeism Policy for Operations Support - July 1, 1997” as outlined in the Carrier’s (Amtrak) Notice of Investigation dated April 15, 1999.

The Carrier (Amtrak) charged I, Johnny Mims for being absent on February 25 & 26, 1999, March 15, 17, 23 & 24, 1999. Formal investigation was held May 4, 1999 and discipline of “termination effective immediately” was assessed by the Director Engineering (Ronald K. Meyers) in letter dated May 5, 1999.

The Carrier (Amtrak) failed in its burden of proof to: (1) demonstrate that the charges was founded, (2) that the trial was impartial and (3) that the

discipline was fair and not capricious. Not one of the dates charged in the Carrier's (Amtrak) notice of investigation was an un-excused absence. Carrier's (Amtrak) exhibits "H", "I", "J", "K", "L", and "M" indicate that I, Johnny Mims had excused absences.

The Carrier (Amtrak) was fully aware of my situation concerning my newly born premature twins, Kapreacia & Kashaun who needed constant medical attention resulting from premature birth. The Carrier's (Amtrak) was also aware of my fiancée, Alfreda D. Penn, mother of my kids, Kapreachia & Kashaun medical condition and the necessity of her perpetual care for cancer. Union exhibit "1" letters from various healthcare professionals attest to the demands of myself, Johnny Mims to aid and support in the medical care of my fiancée and my suffering childrens. I, Johnny Mims requested a family leave of absence which was ignored and denied by the Carrier (Amtrak) because we was not legally bonded. I, Johnny Mims continued today to agonize over the death of my fiancée who pass May 25, 1999 and over the health of my premature twins, also in trying to keep my JOB!!!

I, Johnny Mims, was torn between the two commitments and made every attempt to fulfill the obligations of my job and my family, which I lost a part of both. I, Johnny Mims should have been commended for my loyalty and devotion to my ailing family and my job, both my family and job are near and dear to me, but instead the Carrier (Amtrak) charged and dismissed me for attending to what has been a family loss instead.

I, Johnny Mims reiterates its contention as set forth during the Carrier's (Amtrak) formal investigations. The Carrier (Amtrak) failed to prove the charge. The discipline imposed is excessive, capricious and without just cause. I, Johnny Mims should be restored to full duty with unimpaired seniority and should be compensated for all time loss as a result of the discipline."

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, a Trackman at the Harrison Lake Interlocking Project, worked on the third shift (11:00 P.M. to 7:00 A.M.) at the time in issue. He received a Notice of Formal Investigation dated April 15, 1999, charging him with failing to follow the "Attending to Duty" Standard in the Carrier's Standards of Excellence and failing to follow the Absenteeism Policy for Operations Support, effective July 1, 1997, which defines unacceptable absenteeism as three or more periods of time lost within a 30 day period. After formal Hearing held on May 4, 1999, the Claimant was found guilty of the charges based upon his having four incidents of absence within a 30 day period; (1) February 25 and 26, (2) March 15, (3) March 17 and (4) March 23 and 24, 1999. He was removed from service based, in part, upon his past disciplinary record of four instances of unacceptable absenteeism including a ten day suspension which was upheld in Special Board of Adjustment No. 986, Case 198, and a removal which was modified to a long term suspension (nine months) in Special Board of Adjustment No. 986, Case 200 in November 1998.

The Claimant alleges that his dismissal was unfair and capricious, that the Carrier failed to prove the charge of excessive absenteeism against him and that extenuating circumstances existed concerning the health of his family members requiring his absence on the charged dates to attend to their care, which should not be relied upon to take away his livelihood. The Claimant noted that his fiancée (Alfreda Penn) was undergoing treatment for breast cancer at the time and his newborn twins were receiving therapy for complications associated with their premature birth, both requiring his presence to care for them when necessary. He offered medical notes from various physicians explaining the conditions of his family members and the role the Claimant played in their care and treatment, which required his being away from work for periods of time. The record reveals that the Claimant filed an application under the Family Medical Leave Act (FMLA) for time off to care for Alfreda Penn, the Claimant's

wife, on April 15, 1999, which was denied by the Carrier on April 22, 1999 because the spouse's name on the Claimant's personnel record did not match Ms. Penn's.

The Carrier contends that the Claimant's attendance record was very poor, and that he had been repeatedly warned of both the requirements of the attendance policy and his shortcomings. It asserts that there is no doubt that the Claimant was absent on the dates charged, constituting a violation of the Attendance Policy, and that his past record supports the penalty imposed. The Carrier argues that the reasons for excessive absenteeism are not pertinent, citing Special Board of Adjustment No. 986, Case 167; Third Division Award 31342, and that, in any event, the Claimant did not show any relationship between his family members' treatments which would normally be administered during business hours and his absences during the third shift on the dates in issue. The Carrier notes that the Claimant did not even apply for FMLA leave until after receiving the notice of charges, and that his absences in February and March 1999 were not approved for such leave.

After a careful review of the record, the Board is of the opinion that, while the Carrier proved that the Claimant had absences in excess of three incidents within a 30 day period in February and March 1999 in violation of the applicable attendance policy, there are mitigating circumstances in this case which make the imposition of the discharge penalty unduly harsh. First, there is no doubt that the Claimant called supervision before each of the cited absences, and that they were therefore noted as "excused" absences. Second, medical documentation provides substantiation for the Claimant's testimony that he was going through an extremely demanding time caring for family members who could not care for themselves, and that his presence was required to attend to both his fiancé and his children on the cited dates. Third, the Claimant's testimony that the Carrier was made aware of these circumstances at the time and understood the reason he was off work was not challenged by his supervisor or the Carrier. Fourth, despite the fact that the Carrier's letter denying the Claimant's application for FMLA coverage notes that "clarification" of the Claimant's spousal relationship was necessary, there is no evidence that the Carrier considered the Claimant's situation as explained during the Investigation in determining whether FMLA leave should be granted or sought additional information from him. Further, even if the Claimant did not technically qualify for FMLA leave, the Carrier made no effort to grant him another form of leave which would have enabled him to protect his job while caring for his family.

In the Board's opinion, all of these factors mitigate against the Claimant's termination in this case, despite his record of progressive discipline for unacceptable absenteeism. However, we do not think it appropriate to reward the Claimant for a proven violation of the attendance policy by granting him pay for the time he was off. Accordingly, the Claimant should be returned to service with seniority but without backpay, and his termination should be converted to a lengthy suspension.

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 24th day of October, 2001.