

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39921
Docket No. MW-39559
09-3-NRAB-00003-060348
(06-3-348)**

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

**(Brotherhood of Maintenance of Way Employees 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 [three (3) days’ suspension deferred for a period of six (6) months and disqualification from holding a foreman position for a period of one (1) year] imposed upon Foreman J. Ornelas under date of June 1, 2005 was unwarranted, excessive and in violation of the Agreement (Carrier’s File BMW-519D 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 May 20, 2005, the Carrier notified the Claimant to appear for a formal Investigation on May 26, 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 a verbal counseling and a letter of counseling, the Claimant was absent on: January 13 and 24, 2005; February 13, 14, 15, and 16, 2005; March 10, 20 and 29, 2005; April 18 and 28, 2005; and May 10 and 25, 2005. The Hearing was convened as scheduled. The Claimant failed to appear and the Hearing proceeded in absentia over the Organization's objection. On June 1, 2005, the Carrier notified the Claimant that the Hearing Officer had found him guilty of the charges and that he was assessed a three-day suspension deferred for six months and a one-year disqualification from holding any position as Foreman. During handling on the property, the disqualification was reduced to six months.

Rule 15, paragraph 2 of the Agreement provides:

"No charge shall be made that involves any offense of which the Company has had actual knowledge thirty (30) calendar days or more, except where a civil action or criminal proceeding results from the offence, in which event the charge may be made within thirty (30) days of the final judgment."

The Organization contends that to the extent that the charges alleged absences prior to April 20, 2005, i.e., 30 days prior to the May 20, 2005 notice, the charges were not timely. Thus, in the Organization's view, the only portion of the

charges that was timely concerned the alleged absences on April 28 and May 10 and 25, 2005. We do not agree. As recognized in Special Board of Adjustment No. 986, Case 11, "By its very nature, excessive absenteeism is a cumulative offense; and, thereby, absences prior to 30 days from the date of the notice of investigation are eligible to be included in the charge of excessive absenteeism." In the instant case, the charge concerned the accumulation of 11 or more absences in a 12 month period. The 11th absence allegedly took place on April 28, 2005, within 30 days of the notice of charges. We conclude that the notice was timely.

The Organization contends that the Carrier violated the Agreement by proceeding with the Hearing in absentia. We do not agree. The record reflects that the notice was sent via Federal Express to the Claimant's residence on May 20 and was received at the Claimant's residence on May 23, 2005. The Claimant did not contact the Carrier or the Organization to request a postponement of the Investigation and the Claimant's representative, upon inquiry from the Carrier, indicated that he tried to contact the Claimant that morning without success. The record contains no evidence justifying the Claimant's failure to attend the Investigation. We conclude that the Carrier acted properly in proceeding with the Hearing in absentia.

The Organization contends that the Hearing Officer was biased against the Claimant. The Organization bases its contention on the Hearing Officer's comments in denying the Organization's objection to proceeding in absentia. The Hearing Officer stated:

"And based on the Federal Express tracking number and also based on the fact that this is an attendance issue, and I've got a big problem with an employee up for an attendance issue and doesn't attend his own investigation when the facts surrounding it shows that he obviously did receive the Notice of Formal Investigation and also given the fact that the investigation was supposed to be at 9:30 and it is now 10:20, as I indicated at the beginning, there was plenty of time for Mr. Ornelas to get here or to contact somebody."

The Organization argues that the above quoted ruling reflects that the Hearing Officer had pre-judged the Claimant's guilty. We do not agree. The Hearing Officer's reference to the Claimant being "up for an attendance issue," while perhaps a poor choice of words, does not mean that the Hearing Officer had already determined that the Claimant was guilty of the charges. We understand "up for an attendance issue" to mean "charged with an attendance violation," and as such merely states the facts of the charges and does not reflect pre-judgment. The remainder of the Hearing Officer's statement was accurate. The Claimant did not attend the Hearing, the time was already 50 minutes after the scheduled start of the Hearing and the Federal Express record showed that the notice had been received at the Claimant's residence.

The evidence clearly established that the Claimant was in fact absent on the dates charged. The Carrier clearly proved the charge by substantial evidence. 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.