

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40446
Docket No. SG-39551
10-3-NRAB-00003-060339
(06-3-339)

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(
(Northeast Illinois Regional Commuter Railroad
(Corporation (Metra)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Northeast Illinois Regional Commuter Rail Corp. (Metra):

Claim on behalf of O. K. Coney, for reinstatement to his former position with compensation for all lost pay and benefits restored and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 53, when it issued the harsh and excessive discipline of dismissal against the Claimant in a letter dated August 4, 2005, without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on May 17, 2005, concluding on July 29, 2005. Carrier compounded this violation by failing to abide by the time limit provisions of Rule 53. Carrier's File No. 11-13-498. General Chairman's File No. 10-D-05. BRS File Case No. 13597-NIRC.”

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 May 9, 2005, the Carrier directed the Claimant to report for a formal Investigation on May 17 concerning the following charge:

“You are hereby instructed to attend a formal investigation which will be held on Tuesday, May 17, 2005 at 9:00 a.m. in the office of Director of Engineering, 2067 W. 123rd Street, Blue Island, IL. The purpose of this investigation is to develop the facts, determine the cause and [assess] responsibility, if any, with your alleged excessive absenteeism. Our records indicate that over the past twelve month period beginning April 26, 2004 you have been absent from work a total of 124 days. Our records show that you were absent from your assignment on the following 53 days in 2004:

April - 28, 29, 30

May - 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 21, 24, 25, 26, 27, 28, 31

June - 1, 2, 3, 4, 7, 8, 9, 10, 11

July - 13, 14, 20, 21, 28

August - 10, 11, 13, 17, 20, 24

September - 3, 6, 8, 29, 30

October - 6, 8

November - 22, 24

December - 20, 28, 30, 31

Our records also indicate you were absent from your assignment on the following additional 71 days in 2005:

January - 24, 31

February - 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28

March - 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30

April - 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30

May - 1, 2, 3, 4, 7, 8

You are therefore charged with alleged excessive absenteeism for missing over 50% of your scheduled work assignments over the past 12 months. Excessive absenteeism is a violation of 'Engineering Department Special Instructions,' dated January 1, 2004 and January 1, 2005, Instruction #1 specifically:

'All employees must be punctual, maintain a satisfactory attendance record and cover their assignments as scheduled in order for NIRC/Metra to provide reliable and efficient service. Excessive absences, lateness and/or early quits, are costly, disruptive to our business operations and place an unfair burden on other employees.'

'Employees must report at a designated time and place as described by Job Bulletin and assignment.'"

The Claimant's Hearing commenced May 17, was recessed and continued on May 24, was again recessed and continued the next day and concluded on July 29, 2005. On August 4, 2005, the Claimant was notified that he had been found guilty as charged and was dismissed.

It is the position of the Organization that the record indicates that the Claimant previously had received discipline for missing work on May 18, 19, and 20, 2004, as well as on January 22, 23, 25, 26, 27, 29 and 30, 2005. The Organization argued that the majority of the alleged dates should not be included in the charge because they were already addressed in prior Investigations subjecting the Claimant to double jeopardy. The Organization further objected to the fact that the charges were revised. It concluded that the discipline should be set aside and the claim sustained as presented.

The Carrier argued that it was proven at the formal Investigation that the Claimant was absent 50% of the time between April 28, 2004 and May 8, 2005, and he offered no mitigating reasons with proof as to why he was not at work. Furthermore, it argued that the record indicates that the degree of discipline assessed was not excessive taking into account his past poor work record. In closing it stated that the dismissal was appropriate and should not be disturbed.

The Board thoroughly reviewed the transcript and the record evidence which constituted the third of three cases involving the Claimant. In this case, as in the previous two cases addressed by the Board, the Claimant did not appear at the onset of the Hearing which commenced on May 17, 2005. The Hearing was recessed and continued on May 24 and the Claimant appeared and was present until its conclusion.

The Organization argued that several dates listed in the instant Notice of Investigation should not be included because they were addressed in prior Investigations. It is a thoughtful argument on behalf of the Claimant, but a careful scrutiny of the record reveals that it is incorrect because none of the dates cited in the charges was connected with time served for discipline, nor is any date which the Claimant was alleged to have been absent without authority listed.

We will next address the Organization's argument that revision of the Notice of Investigation was improper. The record substantiates that the initial Notice of Investigation was dated May 9, 2005, and was subsequently revised on May 12, to include dates in May 2005. Additionally, some other dates were removed while others were added to the list. There is no prohibition in Rule 53 against the revision of charges if done for the purpose of correction provided it is done within the time limits. The charges were exact and timely reissued. Therefore, it was not a violation of the Agreement (Award 1 of Public Law Board No. 4955).

The Board, having determined that the Claimant was not denied his Agreement due process rights, turns its attention to the merits. Our review of the record indicates that on the dates listed in the Notice of Investigation the Claimant was never on medical leave, nor did he make a formal request for such. However, even assuming for the sake of argument that he had been legitimately off on some of the dates listed, employees can be disciplined for excessive absenteeism even if advance notice for the absence has been given, and even if absent for legitimate reasons (Second Division Award 9865). Whether the Claimant thought he had valid reasons to miss work on some of the dates

included within the charges does not relieve him from the fact that an employee is expected to work on a regular basis; otherwise, he may be subject to discipline. The Claimant's attendance record over the aforementioned time period was unsatisfactory; it reflects the fact that he had essentially become a part-time employee because he was absent in excess of 50 percent of the time. It is clear that the Carrier met its burden of proof that the Claimant was guilty of excessive absenteeism.

The only issue remaining is whether dismissal was proper. The Claimant had approximately 16 years of seniority at the time of the incident with a less than stellar work record. Despite the fact that he had substantial time with the Carrier, his personal record shows that he had been dismissed twice before (the first time in January 1993 and the second time in November 1998). In addition, he had a long list of other disciplinary actions administered against him. The Carrier attempted to use progressive discipline to alter the Claimant's behavior to no avail and in this instance he was again at the Step 5 Level under the Carrier's Progressive Discipline Policy which mandates dismissal. Therefore, the Board finds and holds that termination in this instance was appropriate because it 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 14th day of May 2010.