

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41558
Docket No. SG-41771
13-3-NRAB-00003-110236**

The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Massachusetts Bay Commuter Railroad

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Massachusetts Bay Commuter Railroad:

Claim on behalf of E. V. Sottile, for him to be restored to his previous position with compensation for all time and benefits lost and any reference to this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 57, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on April 21, 2010. Carrier’s File No. BRS 03/0610. General Chairman’s File No. AEGC-120-10-01. BRS File Case No. 14496-MBCR.”

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 was dismissed from service on April 30, 2010 for dishonesty when he allegedly falsified and misrepresented the reasons for his absence from work on November 6 and 9, 2009, and for engaging in outside employment affecting his availability for work on the dates in question. The Carrier maintains that the Claimant violated specific sections of Rule 7, Exclusive Service, and Rule 8, Prohibited Acts, of the Agreement when he directed the Clerk-Timekeeper to assign Code 33, which represents an absence under the Family Medical Leave Act ("FMLA") and engaged in outside employment while on the approved medical leave. The medical leave provided to the Claimant was based on his FMLA application that was approved by the Carrier on September 18, 2009 for the care of his daughter. The record indicates that on November 6 and 9, 2009, the Claimant was working for his father in California. The reason that the Claimant sought to use the medical leave, contends the Carrier, was so he would not lose holiday pay.

The Organization claims several procedural errors prevented the Claimant from receiving a fair and impartial Investigation. It asserts that Rule 56 of the Agreement obligates the Carrier to provide "reasonable advance notice" of the Investigation on the property from the date of the charges and that the Local Chairman was not notified in accordance with the Rule. Further, alleges the Organization, the Carrier violated Rule 57 of the Agreement when it failed to schedule the Investigation within 30 days of the Supervisor's first knowledge of the Claimant's alleged misconduct.

In reference to the actual charges, the Organization strenuously argues that the Claimant testified that he did not request time off for reasons covered by his approved intermittent leave under the FMLA, but instead asked for leave without pay. Therefore, it claims, the Claimant did not violate Rule 8, which pertains to approved leaves, nor did he violate Rule 7, which addresses outside employment that affects an employee's attendance. Because the Claimant believed he was approved for personal time without pay, he would not have been engaged in outside employment that would violate Rule 7. In addition, maintains the Organization, the Carrier failed to meet its burden of proof establishing facts and substantial evidence in support of the charges. The Carrier's witnesses, asserts the Organization, were biased and provided uncorroborated testimony.

In first addressing the procedural objections raised in the record by the Organization, we find that such claims are unwarranted. The Organization, after four postponements, had between December 3, 2009 and April 21, 2010 to prepare for the

Investigation. In addition, the record is clear that the appropriate officers of the Organization were given proper notice of the charges and Investigation. Lastly, we find that the Investigation commenced within the meaning of Rule 57 of the Agreement. The record shows that the Supervisor became aware of the Claimant's misrepresentations on November 11, 2009 after reviewing his timecards and realized that he was on medical leave and not on personal or vacation leave. The Investigation was first scheduled for December 8, 2009, which is within the 30 days proscribed by Rule 57.

A review of the merits of the allegations in the record reveals that the Carrier presented reliable and credible evidence in support of the charges of dishonesty and violations of its Rules. The core issue before the Board is whether there is substantial evidence in the record that the Claimant applied for and received medical leave for December 6 and 9, 2009 while he was engaged in outside employment that interfered with his attendance at work. The record contains sufficient evidence that the Clerk-Timekeeper informed the Claimant that he did not have enough personal leave time for the days off that he requested. The Claimant directed Clerk-Timekeeper to designate the time off as a "Code 33," which is used for approved leave under the FMLA, when he knew he was going to California to work for his father. The record is clear that the "intermittent" leave that was approved by the Carrier was for the Claimant's care of his daughter.

In discipline cases the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. As described above the record contains substantial evidence in support of the Carrier's charges. Further, there is nothing in the record that the Carrier was in some way arbitrary, nor is there an indication of an abuse of discretion in determining discipline. There is also nothing in the record that would move the Board to replace the judgment made by the Carrier regarding the credibility of witnesses with our own. The testimony of the Carrier's witnesses was reliable and consistent, whereas the Claimant's testimony was vague and elusive. Absent any substantial evidence that the Carrier's findings of credibility are arbitrary, we have no basis to ignore its conclusion. The Board sits in review of the Carrier's findings made on the property and does not make de novo findings. Because the testimony of the Carrier's witnesses is in conflict with that of the Claimant, the Carrier's determination in finding the testimony of the Clerk-Timekeeper, along with that of the other witnesses, more credible than that of the Claimant, absent evidence of bias toward the Claimant, must be accepted. The Organization's valiant effort to convince the Board that the Carrier

was retaliating against the Claimant because of his activities in California when working for his father is not supported with credible or reliable evidence.

In cases where dishonesty is proven, and where such conduct violates the Carrier's Rules, such as is the case here, the penalty of dismissal cannot be modified by an act of leniency by the Board, absent evidence of an abuse of discretion. The Carrier is entitled to rely on the honesty of its employees so it can ensure the integrity of its operation. This is true even where it may be a first offense or when it involves an employee with many years of service, as does the Claimant here. The record also indicates that the Claimant does have prior discipline of a serious nature, despite the Organization's assertions.

The Board here finds that the Carrier met its burden of proof with substantial evidence and, therefore, its decision to dismiss the Claimant is upheld.

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 18th day of March 2013.