

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43076
Docket No. MW-44280
18-3-NRAB-00003-170327**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(National Railroad Passenger Corporation (Amtrak) -
(Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. J. Nelson by letter dated September 16, 2016 was excessive and in violation of the Agreement (Carrier’s File NEC-BMWE-SD-5456D AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall rescind the aforesaid dismissal decision and Claimant J. Nelson shall be reinstated to service immediately with full seniority unimpaired and compensated for all lost wages and benefits resulting from his improper termination.”**

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 notice dated June 30, 2016, the Claimant was directed to attend a formal Investigation and hearing on charges that the Claimant allegedly had violated Carrier's Standards of Excellence and its Attendance Policy by being excessively absent during the twelve-month period prior to and including June 27, 2016. The Investigation was conducted, after a postponement, on September 8, 2016. By letter dated September 15, 2016, the Claimant was informed that he had been found guilty as charged, and that he was being dismissed from the Carrier's service. The Organization filed the instant claim on behalf of the Claimant, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because the Claimant was afforded a fair and impartial Investigation, because substantial evidence establishes that the Claimant is guilty as charged, because there is no merit or mitigating value to the Organization's arguments, because the requested remedy is inappropriate, and because the discipline imposed was commensurate with the proven offense and was not arbitrary, capricious, or excessive. The Organization contends that the instant claim should be sustained in its entirety because the Claimant's absences were for justifiable reasons or reasons beyond his control, because the Carrier failed to prove the Claimant's responsibility in connection with all of the charges at issue, because the Carrier failed to inform the Claimant of prior warnings about his attendance that had been assessed against his record, because the Carrier failed to meet its burden of proof, because the Carrier has not demonstrated that the totality of circumstances required the Claimant's dismissal, and because the discipline imposed was arbitrary, unwarranted, and an abuse of the Carrier's discretion.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating the Carrier's Attendance Policy when he had four occurrences of absence in a thirty-day period prior to and including June 27, 2016; and then six occurrences of absence in the ninety-day period prior to and including June 27, 2016; and eleven days of absence in the twelve-month period prior to and including June 27, 2016. All of those absences combined violated the Carrier's No-Fault Attendance Policy and the Carrier's Standards of Excellence.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case had accumulated a great number of disciplines for absenteeism over the past few years. In 2014, he received a verbal counseling and later in 2014, he received a written Letter of Instruction. The Claimant had received a reprimand in late 2014, as well as a ten-day suspension with five days served and five days held in abeyance in July of 2015. That can only be considered a very poor record. However, the Claimant in this case had a number of mitigating factors that led to his absences in this most recent chain of events. The Claimant explained his absences for every day, including having to care for his mother and not knowing about FMLA. The Claimant clearly deserved discipline, but the Board finds that the Carrier acted unreasonably and arbitrarily when it terminated the Claimant's employment after nine years of seniority with the Carrier. Consequently, the Board finds that the Carrier acted unreasonably and arbitrarily when it terminated the Claimant's employment. We order that the Claimant be reinstated to service but without back pay. The period of time that the Claimant was off work shall be considered a lengthy disciplinary suspension. The Claimant should also be further warned by the Carrier that any further incidents of absenteeism or violations of the Carrier's Attendance Policy will most assuredly result in his removal from service.

AWARD

Claim sustained in accordance with the Findings.

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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 2nd day of May 2018.