

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43080
Docket No. MW-44346
18-3-NRAB-00003-170414**

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. Ortiz by letter dated October 7, 2016 was arbitrary, unwarranted and in violation of the Agreement (System File NEC-BMWE-SD-5467D 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. Ortiz shall be reinstated to service immediately with full seniority unimpaired and compensated for all lost wages including but not limited to overtime 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 July 15, 2015, 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 in connection with the absences that he incurred during a one-year period ending on July 1, 2015. The Investigation was conducted, after a postponement, on September 29, 2016. By letter dated October 7, 2016, the Claimant was informed that he was being dismissed from the Carrier's service after being found guilty as charged. 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 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 Carrier's decision to discharge the Claimant was unfair under the totality of the circumstances, because the Carrier's dismissal of the Claimant was without just cause, because the Carrier failed to inform the Claimant of his FMLA rights as the Claimant dealt with serious family issues, because the Claimant had valid reasons for his absences during the time period in question, because the Claimant's absences would have been covered by FMLA, because the Carrier subjected the Claimant to disparately harsh and discriminatory treatment, because the Carrier failed to meet its burden of proof, because the Carrier failed to properly consider mitigating circumstances, because the Carrier has failed to apply an appropriately progressive discipline policy, and because the discipline imposed was unduly harsh, excessive, and clearly an abuse of managerial 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 and Standards of Excellence when he was absent from his assignment on eleven or more days during

the period July 30, 2014, through July 1, 2015. In that period, the Claimant had three occurrences of absence in thirty days and seven occurrences of absence in ninety days. The Claimant's behavior clearly violated the Carrier's Standards of Excellence and Attendance Policy with that significant number of absences.

Once this 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.

Although the Claimant in this case had previously received a reprimand and a ten-day suspension for excessive absenteeism, in this case the Claimant, although guilty of violating the rules, had numerous mitigating factors that led to his absences. The Claimant had lost his wife and had to care for his son, among other issues. Consequently, this Board finds that the Carrier acted unreasonably and arbitrarily when it terminated the Claimant's employment. We order that the Claimant be reinstated to employment but without back pay. The period of time that the Claimant was off work shall be considered a lengthy disciplinary suspension for his rule violations.

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 2nd day of May 2018.