

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43616
Docket No. MW-44604
19-3-NRAB-00003-180034**

The Third Division consisted of the regular members and in addition Referee Michael Capone 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 [ten (10) day suspension] imposed upon Mr. C. Hayes by letter dated October 26, 2016 was arbitrary, unreasonable and excessive (System File NEC-BMWE-SD-5473D AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Hayes’ record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.”**

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, Colin Hayes, has been employed by the Carrier since 1998 and holds the position of Equipment Operator. The Claimant was notified on May 27, 2016 that a hearing and investigation was scheduled for violating the Carrier's Standards of Excellence pertaining to Attending to Duties and the Carrier's National System Attendance Policy (hereinafter referred to as the "Policy"), including the following Specification:

"A current review of Mr. Hayes' attendance record for the 12-month period prior to and including 5/15/2016 shows that he was absent from duty on the following dates:

May 15, 2016
April 20, 24, 25, 26, 27, 2016

The foregoing dates represent and demonstrate that Mr. Hayes was absent, late arrival/ early departure on three (3) occurrences in the thirty (30) days prior to and including 5/15/2016. It is clear that Mr. Hayes is currently in violation of the threshold for excessive absenteeism as outlined within Amtrak's National System Attendance Policy."

After several postponements the hearing was held on October 17, 2016. On October 26, 2016, the Claimant was notified that he was assessed a ten-day suspension. The Carrier denied subsequent appeals by the Organization and issued a final written decision sustaining the suspension on March 7, 2017. The Organization rejected the Carrier's decision and filed its notice of intent with the Third Division on September 8, 2017. The claim is now properly before the Board for adjudication.

The Carrier maintains that the record establishes the Claimant violated the Policy and that the discipline imposed is appropriate. It asserts that the documentary evidence and witness testimony, including the Claimant's own statement during the hearing and investigation, constitutes substantial evidence that he was absent on the dates charged and was not covered by an approved leave of absence under the Family Medical Leave Act ("FMLA"). The Carrier avers that the Claimant has amassed a poor disciplinary record and therefore the ten-day suspension is not excessive.

The Organization argues that the record confirms the Claimant had a legitimate medical condition that prevented him from appearing for work on the dates charged. It maintains that his documented medical condition caused his absence from work in the preceding year, which made him ineligible for a leave under the FMLA since he had not worked the requisite number of hours to qualify. The Organization asserts that the Claimant received an approved FMLA leave as soon as he was eligible based on the same medical condition. The Organization further alleges that the Carrier has treated the Claimant disparately when compared to other employees facing similar charges who were not disciplined once the medical documentation verified their absences.

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. The Board does not find any procedural errors that nullify the need to review the merits of the dispute. Our review of the evidence and testimony finds that there is substantial evidence in the record that the Claimant violated the Carrier's Policy when he was absent from work as charged.

The record supports the Carrier's decision to impose discipline for the Claimant's absences. There is no dispute that the Claimant was absent and that the number of absences violated the Carrier's Policy.

Once the Board has determined that there is substantial evidence to support the charges, we must decide if the discipline imposed is unreasonable, arbitrary, or capricious. The Claimant has a history of excessive absenteeism and has been previously disciplined. We recognize that leniency is reserved to the Carrier, except where we find an abuse of discretion or that the discipline is excessive. A review of the record indicates that the ten-day suspension is unwarranted when considering the specific circumstances involving the Claimant. The Board takes into consideration that the Claimant has approximately 20 years of service and a serious medical condition. While the Board recognizes that arbitral precedent upholds the Carrier's expectation that employees fulfill their obligation to be fit and ready to work when scheduled, we also find that given the facts and circumstances presented, the suspension is excessive considering the Carrier policy of progressive discipline for these types of charges.

The specific facts in this matter, as they relate to the documented medical

condition and the previous disciplinary record, lead to our conclusion that the ten-day suspension be reduced to a five-day suspension without pay. Any future violations of the Carrier's Policy shall be grounds for severe discipline, up to and including dismissal.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that while the Carrier has established with substantial evidence that the Claimant violated its Policy, the ten-day suspension is reduced to a five-day suspension without pay.

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 17th day of May 2019.