Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44700
Docket No. MW- 46195
22-3-NRAB-00003-200752

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

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Keolis Commuter Services, LLC

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline [five (5) day suspension and one (1) year final warning] imposed upon Mr. W. Barber, by letter dated September 20, 2019, for alleged violation of Code of Conduct Rule I, Knowledge of the Rules, Rule 4, Absence from Duty, Rule 8, Attendance, Rule 17, Attending to Duties and Keolis Attendance Policy, Excessive Absenteeism and Absent without Leave in connection with reporting late one (1) time, off sick four (4) times and AWOL three (3) times and failing to report for duty on July 3, 5 and 6, 2019 was arbitrary, excessive and in violation of the Agreement (Carrier's File BMWE /2019 19.310 KLS).

(2) As a consequence of the violation referred to in Part (1) above, the Organization requests that all charges against Mr. Barber in this instant discipline be dismissed immediately, he be made whole for his five (5) day suspension (including any applicable straight time, overtime and double time wages), he receive any credits for vacation and all other benefits. Mr. Barber shall also be placed back to Step 2 of the Attendance Policy."

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 Board makes the following additional findings, upon consideration of the record as a whole and giving due deference to the original finder of fact:

Claimant W. Barber had been employed within the Carrier's Maintenance of Way Department as a track employee since July 1, 2014, when Keolis CS assumed the operation and maintenance of the commuter rail service under agreement with the Massachusetts Bay Transportation Authority ("MBTA"), and the responsibilities of the collective bargaining agreement then in effect between MBTA and the Organization. At the time of the incident involved herein, Claimant was assigned and working as a crossing tender.

The Claimant is subject to the Carrier's Attendance Policy, which addresses the various occurrences that are considered an attendance infraction. The Policy defines "a late arrival or early departure," an "absence from a work assignment, or any part of an assignment" or a "failure to report for duty" as an absence. Furthermore, an employee is considered absent without leave (or "AWOL", a.k.a. "no call, no show") under the following conditions

> **when he/she neither reports for duty at the assigned time and location, nor informs the designated manager/supervisor that he/she will not report for duty one (1) hour before the scheduled start of the shift. An employee is AWOL if he/she requests leave and is denied the time off**

> **and then fails to report for duty. Further, an employee is AWOL if he/she fails to remain on duty for his/her entire tour of duty.**

(*Id.*, bold emphasis in original, underline emphasis added). Lastly "excessive absence" is defined, measured from the date of the first absence, as "[a] third (3rd) Occurrence of Absence within a period of thirty (30) calendar days…"; "[a] fifth (5th) Occurrence of Absence within a period of ninety (90) calendar days…"; [a]n eighth (8th) Occurrence of Absence within a period of one hundred eighty (180) calendar days…; and [a] twelfth (12th) Occurrence of Absence within a period of twelve (12) months…" (*Id.*)

The Carrier's Attendance Policy also sets out the progressive discipline for attendance related violations, as follows:

> **Progression Action**
> **First Step Written Reprimand (and formal Charge Letter)**
> **Second Step One (1) Day Suspension**
> **Third Step Three (3) Day Suspension**
> **Fourth Step Five (5) Day Suspension and Final Warning**
> **Fifth Step Dismissal**
> **(*Id.*)**

On August 22, 2019, the Carrier conducted review of the Claimant's attendance record, and learned that the Claimant had had more than five absence occurrences within 90 days, giving rise to a charge of "excessive absences". The Claimant's absence occurrences were as follows:

> **05/05/2019 Code 60 Sick Unpaid**
> **06/07/2019 Code 60 Sick Unpaid**
> **06/16/2019 Code 67 Late Arrival**
> **06/30/2019 Code 60 Sick Unpaid**
> **07/03/2019 Code 61 AWOL**
> **07/05/2019 Code 61 AWOL**
> **07/06/2019 Code 61 AWOL**
> **07/10/2019 Code 60 Sick Unpaid**

The Claimant's AWOL occurrences centered around the Fourth of July holiday weekend. The Claimant had requested use of his vacation time for those days,

but his Supervisor rejected the request on grounds that it is one of the busiest travel weekends.

After a duly noticed on-property hearing, the Hearing Officer determined that the Claimant was guilty of excessive absences. Thereafter, by letter dated September 20, 2019, the Carrier adopted the Hearing Officer's findings and imposed a five (5) day suspension and one (1) year final warning upon the Claimant. The Organization timely filed a claim to challenge the discipline under the Railway Labor Act, 45 USC §§ 151, *et seq*., which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

The Carrier argues that the Claimant was aware of his attendance obligations and the penalties for their violation, having had several instances of discipline over the years related to time and attendance. On March 27, 2015, he entered a waiver based upon several attendance infractions at that time, under which he was placed on Step 1 of the Attendance Policy discipline progression. Then on April 20, 2018, Claimant was moved to Step Two of the Attendance Policy discipline progression and suspended for a day, after he had five (5) attendance infractions from November-December 2017. The Carrier also argues that the five (5) day suspension was justified because the Claimant has engaged in excessive absences in this case, including three occurrences of AWOLs (and possibly two days of unpaid sick leave) in which the Claimant obviously decided to take those days off after his request for vacation around the Fourth of July weekend was denied. At the time, the Claimant was already at Step 2 and the egregious nature of the AWOL justified skipping a step in the discipline progression, to Step 4. The Carrier further asserts that it followed its attendance policy to the letter and there is no basis under the record to mitigate the penalty.

The Organization argues that the Claimant was denied a fair and impartial investigation, because he is being disciplined for misconduct that occurred more than 30 days before the notice of investigation, in violation of Rule 15. The Organization further argues that the Carrier failed to meet its burden of proof, and that the discipline issued was arbitrary and unwarranted. At his on-property hearing, however, the Claimant asserted that the real issue is that his vacation request was denied. The record also contains a number of materials related to Claimant's claims

that he has been subject to a 10-year pattern of harassment by his crew members and/or HR.

The Carrier responds that the Organization's procedural defenses (discussed next) are without merit, because it was not until August 22 that the Carrier first learned the Claimant had engaged in excessive absences; and the Attendance Policy clearly contemplates discipline for a separate charge of "excessive absences" based on absences that are older than 30 days.

Upon consideration of the whole record developed on-property, the Board finds and concludes as follows. As a threshold matter, the Claimant's various procedural claims are all without merit, and he was not denied a fair hearing. *See, e.g.*, PLB No. 7660, Award No.16, *BMWE and Union Pacific Railroad Co. [former Southern Pacific Transportation Company (Western Lines)]* (Newman 2016) (holding that the merits of a claim are not to be considered if the Carrier is guilty of failing to provide an employee a fair and impartial investigation as required by Rule 15 of the Agreement).

There was substantial evidence that the charges were timely; and the Hearing Officer had reasonable grounds to favor that evidence over the Claimant's arguments to the contrary, since the latter were not particularly persuasive or supported by the record. Although time is submitted to the supervisor and entered by payroll on a weekly basis, payroll or HR personnel inspect it carefully only once a month. Nor does the existence of a subsequent consolidated attendance report, in and of itself, evidence that the August 22, 2019 date cited by the Carrier was "simply manufactured" as the Claimant asserts. Moreover, charges of "excessive absence" are obviously not barred by the 30-day time limit, since such a charge is defined under the Carrier's rules based on the number of occurrences in 30, 90 or more days.

Nor does the record reflect improper behavior by the Hearing Officer. The Claimant asserted during the on-property hearing that the Hearing Officer was "making him uncomfortable" because she was asking him questions. It is evident reading the transcript, however, that the Claimant was a "runaway witness", as he would not give direct, responsive answers to clear, concise questions. As such, it is evident upon review of the transcript that the Hearing Officer reasonably took control of the questioning for a brief period to ensure the adequacy of the record and her understanding thereof, as would many if not most neutrals in that situation. Such conduct did not create an appearance of impropriety under the circumstances and

does not warrant dismissal. *Disting*. PLB No. 7660, Award No. 31, *BMWE and Union Pacific Railroad Co. [former Southern Pacific Transportation Company (Western Lines)]* (Newman 2016) (dismissing a case in which the Hearing Officer met privately with the Carrier witnesses for 20 minutes before the hearing).

As to the merits, the Board finds and concludes that the on-property hearing established "direct, positive, material and relevant evidence" from which the Hearing Officer could reasonably conclude that the Claimant engaged in excessive absences as charged. *See* Third Div. Award 24412, *BMWE and Consol. Rail Corp. (formerly The NY, New Haven and Hartford Rail Co.)* (Cables 1983); *see also* Third Div. Award 21372, *BMWE and The Texas and Pacific Railway Co.* (Cables 1977) (the Carrier must "demonstrate convincingly that an employe is guilty of the offense"). In particular, he essentially admitted to going AWOL over the Fourth of July weekend because his leave request was improperly denied, which is expressly prohibited under the Carrier's attendance rules.

Lastly, the Board considers whether termination was nonetheless excessive based upon the on-property record. *See* Third Div. Award 19488, *Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express & Station Employees and The Baltimore and Ohio Railroad Co.* (Brent 1972) ("the severity of punishment must be reasonably related to the gravity of the offense"). However, having reviewed the record and determined that the Hearing Officer's findings were supported by substantial and convincing evidence, the Board's role in this regard is fairly constrained.

Specifically, the Board may only overturn or mitigate the penalty chosen for proven misconduct if the record shows that the Carrier abused its discretion in selecting the penalty it did. *See* Third Div. Award No. 33432, *BMWE and CSX Transportation, Inc.* (Bierig 1999) (where the charges are sustained, the Board is "not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion"); and *See* PLB 5596, Case No. 17, *Port Authority Trans-Hudson Corporation* (Ref. T. Rinaldo 2004) ("the question of leniency is one for the Carrier to address").

Here, the Claimant engaged in egregious behavior of AWOL and excessive absences, and this was an enduring problem with him. Worse, he took it upon himself to go AWOL in protest that his vacation had been denied. Admittedly, there is some

troubling information in the record regarding the handling of and determination on the Claimant's vacation request: he submitted the request weeks in advance; did not do it sooner because the forms were not made available to him as a crossing tender; and thereafter, his supervisor apparently lost the paperwork.[1] However, it is axiomatic that an employee must "obey now, grieve later". The Claimant could have filed a claim at the time to challenge the vacation denial – he was not, however, empowered or authorized to simply go AWOL in protest. That he chose to do so reflects incredibly poorly on both his work record and his amenability to correction by lesser discipline. Under all of these facts and other in the record, the Board cannot conclude that a five (5) day suspension and even a one-year final warning were arbitrary, capricious, unreasonable 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 28th day of January 2022.

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[1] There may also have been irregularities in entering the Claimant's sick leave requests as unpaid, as he testified that he used the time to care for his sick mother and it is undisputed that he had vacation time available that he would have preferred to use. These claims were not established by substantial evidence for purposes of mitigation in this matter, however.