

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44708
Docket No. MW-46396
22-3-NRAB-00003-210165**

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: (
(Keolis Commuter Services, LLC

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. W. Barber, by letter dated March 18, 2020, for alleged violation of Keolis Code of Conduct: Rule 1 - Knowledge of Rules, Rule 2 - Courtesy and Professional Conduct, Rule 4 - Absence for Duty, Rule 8 - Behavioral Expectations for KeolisCS Employees and Prohibited Behaviors, Rule 9 - Safety, Rule 15- Obeying Instructions, Directions and Orders, Rule 17 - Attending to Duties, the Keolis Attendance Policy-AWOL and the Dignity in the Workplace policy in connection with allegations that he was acting in a disrespectful and unprofessional manner to Human Resources Business Partner Director L. Reardon on February 25, 2020; that he was AWOL for the day and received compensation for time not worked on February 26, 2020; and that he was AWOL and seen not performing any work related duties on February 28, 2020 was arbitrary, excessive and in violation of the Agreement (Carrier’s File BMWWE 20.109 KLS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Barber shall now be fully exonerated of all charges, placed back into service effective immediately with seniority unimpaired, fully compensated for any missed straight time, overtime, double time wages, credits for vacation and all other benefits.”**

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, Truck Driver Wardell Barber, has been employed by the Carrier since July 1, 2014. He was dismissed on March 18, 2020, for violating the Carrier's Code of Conduct and Attendance Policy after being "Absent Without Leave" ("AWOL") on February 24, 26, and 28, 2020. The Carrier also alleged the Claimant engaged in an unprofessional manner with its Human Resources Director. A Notice of Formal Investigation was issued on March 2, 2020, for a hearing to be held on March 6, 2020. Following a postponement, the hearing was held on March 12, 2020.

In discipline cases, as the one before the Board here, 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. Upon review of all the evidence presented, the Board here finds that the Claimant violated the Carrier's Code of Conduct and Attendance Policy when he failed to perform his assigned tasks and neglected his duties by leaving the worksite.

Track Foreman Eric McKinnon and Track Roadmaster Kevin Ford provide credible and reliable testimony that the Claimant did not perform his assigned task and was absent from his work site under false pretenses. Moreover, the Claimant admits he was in his car for the eight hours and was sleeping on duty. Given the testimony in the record, the Board need not go further in its review and finds that the Carrier has established its burden of proof.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. Nothing in the record here indicates that the Carrier was arbitrary or capricious in assessing the penalty imposed. The Claimant acknowledges he was placed on a final warning on September 20, 2019, which was assessed after numerous violations of the Attendance Policy.

Legions of arbitration awards have found that where not restricted by the Agreement the Carrier may use its discretion to apply attendance standards and procedures. The record here confirms that the Claimant was no stranger to the Carrier's Attendance Policy and was provided with many opportunities to correct his attendance abuse. He was afforded the proscribed progressive steps of the Attendance Policy to no avail. The Claimant's recidivism and flagrant disregard for the Carrier's rules regarding AWOLs supports its conclusion to impose the penalty of dismissal.

In summary, we have reviewed and carefully weighed all arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. The Carrier has provided substantial evidence the Claimant violated its rules, and we find that the penalty imposed is not 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 4th day of March 2022.