

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44848
Docket No. MW-46605
23-3-NRAB-00003-210582**

The Third Division consisted of the regular members and in addition Referee Melinda Gordon 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 (dismissal) imposed upon Mr. T. Judkins, IV, by letter dated November 23, 2020, in connection with his alleged failure to report an arrest and two (2) convictions, as company policy requires, alleged dishonesty during an interview with the Office of Inspector General (OIG) and alleged violation of the Carrier’s drug and alcohol policy was arbitrary, excessive and constituted a violation of the Agreement (Carrier’s File BMW-159027-D NRP).**
- (2) As a consequence of the violation referred to in Part (1) above, we request that the Carrier must remove the dismissal charge from Claimant T. Judkins IV ’s personal record and that the Carrier make the Claimant whole during his time away from the Carrier.”**

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 Carrier accuses Claimant T. Judkins IV (“Claimant”) of failing to comply with the Carrier’s company policy requiring reporting all arrests and convictions. When questioned by the Office of the Inspector General (“OIG”) about his prior arrest and convictions, OIG characterized Claimant’s responses as less than forthcoming. The Carrier asserts that Claimant’s actions violated the Carrier’s Drug and Alcohol Policy and Amtrak’s Standard of Excellence.

The following facts are not in dispute. Claimant’s seniority date is February 15, 2012. By letter dated October 8, 2020, Claimant was notified of the charges against him and instructed to appear for a formal investigation (“hearing”) on October 15, 2020. The Carrier granted the Brotherhood of Maintenance of Way Employees (“Organization”) request to postpone the October 15, 2020, hearing, rescheduling it for October 27, 2020. However, effective October 15, 2020, the Carrier removed the Claimant from the payroll.

On October 27, 2020, the hearing was “recessed” due to the Organization’s insistence on recording the hearing. By letter dated November 10, 2020, the Carrier notified the Claimant and the Organization to appear for a rescheduled hearing. The Carrier rescheduled the hearing for November 13, 2020.

The Carrier submitted evidence that on November 11, 2020, the Claimant and the Organization received notice of the rescheduled hearing date. The Claimant and the Organization did not appear at the November 13, 2020, hearing. The hearing proceeded in absentia. Claimant received notice of his termination from Amtrak on November 23, 2020.

The Organization and Claimant raise a myriad of procedural arguments. The Board will address them as follows. First, Claimant asserts that his removal from the Carrier’s payroll violated Collective Bargaining Agreement (“CBA”) Rule 15. Rule 15 provides as follows:

An employee held out of service pursuant to this rule shall remain under pay a though he were in actual service on his regular position unless medically disqualified. Compensation under this rule shall continue until

the decision is rendered following the trial/investigation, except that if the employee or his duly accredited representative requests a postponement of the employee's trial/investigation, the employee will not be compensated for the period of the postponement. In the event of such a postponement, Amtrak shall attempt to reschedule the trial/investigation to commence within fifteen (15) days of the postponement. If the trial/investigation cannot be rescheduled within that time, through no fault of the employee or his representative, compensation will again be paid after the fifteen (15) day period. (Emphasis added).

The Carrier scheduled the investigation for October 15, 2020. Claimant requested that the Carrier postpone the hearing to a later date. Pursuant to the clear and unambiguous language of Rule 15, Claimant's pay ceased. A new hearing, scheduled for October 27, 2020, was within the fifteen (15) day period articulated by CBA Rule 15. However, the hearing was "recessed" by the hearing officer due to the Organization's recording of the hearing. The CBA is silent as to what occurs in this circumstance.

The Carrier scheduled another hearing for November 13, 2020, seventeen days after the "recessed" October 27, 2020, hearing. CBA Rule 15 is silent as to whether a Claimant should be returned to the payroll when a hearing is "recessed." Moreover, the language in Rule 15 only requires that the Carrier "shall attempt to reschedule the trial/investigation within fifteen (15) days of the postponement." Further, the evidence in this unique case supports a conclusion that the Organization's insistence on recording the hearing resulted in the hearing being "recessed" or postponed.

Further, CBA Rule 37 only obligates the Carrier to record and produce a hearing transcript. The CBA does not extend recording or transcript production rights to the charged party or the Organization. The Organization's conduct at the hearing was the equivalent of requesting a postponement of the hearing. As such, Claimant's return to the payroll would violate CBA Rule 15. Accordingly, Claimant's request is denied. The Board notes that its interpretation of Rule 15 is limited to this case's unique facts and evidence. Subsequent Board's may view the interpretation of whether or not a "recess" is equivalent to a postponement pursuant to CBA Rule 15 on a case-by-case basis.

Claimant's assertion that the Carrier's charges are untimely pursuant to CBA Rule 15.2 is without merit. Rule 15.2 of the CBA states that "...No charge shall be made that involves any offense of which the Company has had actual knowledge

thirty (30) calendar days or more, except where a civil action or a criminal proceeding results from the offense, in which event the charge may be made within thirty (30) days of the final judgment.”

In this matter, OIG received an anonymous tip regarding Claimant’s alleged misconduct on July 4, 2020. OIG reported its findings to the Carrier on October 5, 2020. Claimant received the charges on October 8, 2020. OIG, an agency independent of the Carrier, turned over its findings to the Carrier on October 5, 2020. The Carrier complied with its obligation pursuant to CBA Rule 15.2 by preferring charges and a notice of investigation against the Claimant on October 8, 2020, well within the thirty (30) day period.

Claimant’s last procedural argument asserts that the Carrier failed to provide notice of the hearing rescheduled for November 13, 2020. Claimant asserts that the hearing proceeded in absentia in violation of his due process rights.

The evidence established that a letter dated November 10, 2020, was delivered to Claimant and the Organization on November 11, 2020. Neither the Claimant nor the Organization appeared at the hearing. The Charging Officer was unsuccessful in telephonically contacting the Claimant and the Organization from the hearing room. Neither the Claimant nor the Organization responded to the hearing officer’s phone call.

It is well established that an employee’s failure to appear at a hearing is at their peril, and such an employee must live with the consequences. Further, the hearing notice Claimant received warned him that if he failed to appear, the hearing would proceed in absentia.

Notwithstanding the Board’s denial of Claimant’s procedural application, the Carrier potentially could have avoided the issue of the hearing proceeding in absentia by providing greater notice to the Claimant and his representative. The Board is cognizant of the extremely short notice period at issue in this case. The evidence established that the Claimant and the Organization received notice of the November 13, 2020, hearing date on November 11, 2020. If Claimant or the Organization had requested a postponement of the hearing and the Carrier denied the request, the Board may have reached a different conclusion. However, the unique facts of this case, where the Carrier could document that both the Claimant and the Organization received notice of the hearing, that neither refuted being served or attempted

contacting the Carrier to reschedule the hearing, Claimant's procedural argument must fail.

The Organization raises additional procedural arguments alleging that the Carrier violated Claimant's due process rights by conducting the hearing(s) virtually. The CBA between the parties does not preclude virtual or telephonic hearings. During the COVID-19 pandemic, federal and state courts and other quasi-judicial forums widely adopted virtual hearings. Notwithstanding the Organization's procedural arguments, there was no assertion that the hearing officer misinterpreted the evidence or that the Carrier's use of a virtual hearing(s) resulted in any prejudice to the Claimant.

Lastly, there was no evidence to support Claimant's position that he previously reported his two arrests and convictions to his supervisor. Claimant's arrest records included unemployment fraud and drug possession. Claimant's failure to be forthcoming with OIG regarding the details of his arrests and convictions undermines his assertion. Initially Claimant asserted dismissal of the charges. He conceded his misconduct to OIG only after being presented with documentary evidence of his convictions. The Carrier proved by substantial evidence Claimant was terminated from his position for cause.

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 10th day of March 2023.