

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
MASSACHUSETTS BAY COMMUTER RAILROAD**

Case No. 45

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. Carrier's dismissal of Claimant Marvin Morgan was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Scheduled Agreement.
2. Claimant Morgan shall be reinstated to his position with the Company with his seniority unimpaired and be compensated for all lost wages and benefits which would accrue to him as provided for in the Scheduled Agreement and his record cleared of the charge."

FINDINGS:

By notice dated March 21, 2011, the Claimant was directed to attend a formal investigation and hearing on charges that he allegedly had incurred a total of ten AWOLs during the period from January through March, 2011, in violation of the Carrier's Attendance Policy. The investigation was conducted, after a postponement, on April 4, 2011. By letter dated April 14, 2011, the Claimant was informed that as a result of the hearing, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization filed the instant claim on behalf of the Claimant, challenging the Carrier's decision to discipline the Claimant. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because the Carrier proved that the Claimant was guilty as charged of violating the Attendance Policy, because the Claimant demonstrated a clear pattern of being AWOL from work,

because the alleged mitigating circumstances did not prevent the Claimant from calling in, and because the discipline imposed was proportionate to the serious nature of the Claimant's violations. The Organization contends that the instant claim should be sustained in its entirety because the Claimant was unable to call until after the starting time due to circumstances beyond his control, because the Claimant was not AWOL in that he did call in as soon as he was able to, and because the Claimant complied with Rule 16 of the Schedule Agreement.

The parties being unable to resolve their dispute, this matter came before this Board.

This 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 not following the Carrier's attendance policy when he was absent without leave on ten separate occasions between January 25, 2011, and March 18, 2011. All ten dates have been shown in the Carrier records as "AWOL - No call, No show."

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. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The record reveals that the Claimant had attendance problems in the past and that in April of 2010, the Claimant signed a waiver document containing a "final warning." That document includes the following language:

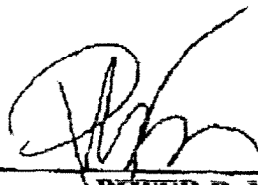
In accordance with Step #4 of the Discipline Progression contained in the

Attendance Policy for attendance-related offenses, this will constitute a "Final Warning" for you to directly modify your heretofore unacceptable habits as they apply to your attendance at work. Another proven offense committed within a 9-month period could result in your dismissal from service. Conversely, 2 years of active services with a discipline-free record will allow you to revert to Step #1 of the Discipline Progression. You are hereby instructed to review the MBCR Attendance Policy and the applicable rules from the MBCR Code of Conduct as they apply to your attendance.

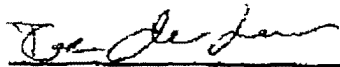
Given that previous history, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant after ten AWOLs in less than a two-month period after signing the waiver containing the warning. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



CARRIER MEMBER

DATED: 10/25/11

 I DESENT

ORGANIZATION MEMBER

DATED: 10/26/11