

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 31

Case No. 31

System Docket No. BMW-D-217

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant Leonard Hughes 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.

(b) Claimant Hughes shall be reinstated into Carrier's service with all seniority entitlements and shall be compensated for all lost wages, including overtime benefits which would accrue to him, as provided for in Rule 15 of the Scheduled Agreement.

FINDINGS

The Carrier has in effect in its Maintenance of Way Department an Excessive Absenteeism Policy covering absence, lateness or leaving early. When three "incidents" occur within a 30-day period, an employee becomes subject to a disciplinary system with

progressively more severe penalties for repeated "incidents" within succeeding 30-day periods.

The record is clear that the Claimant was counseled on September 9, 1993 for the first violation. He received a warning on October 13, 1993. He waived a hearing and accepted five day's suspension on December 7, 1993 as the result of his third offense.

The fourth step in the Policy carries the penalty of dismissal from service. At issue here are incidents occurring between December 14, 1993 and January 8, 1994, the period immediately following the third "incident" for which he had received a five-day suspension. The record shows that the Claimant was absent on December 14 and January 8; left early on December 30; and was tardy for reporting to work on four dates. As a result of this, the Claimant was subject to an investigative hearing and was thereafter dismissed from service, as provided in the four-step Policy.

Despite objections from the Organization, the Board finds it entirely proper for the Carrier to refer to the Claimant's previous counseling, warning letter, and five-day suspension under the Policy. Obviously, this is essential to provide support for the Carrier's dismissal action.

The Organization suggests that the Policy has not, in the past, been uniformly applied. However, the legitimacy of the Excessive Absenteeism Policy is not challenged in this dispute. The Board recognizes that the Policy is based on the number of incidents involved, without examination as to the reasons for such occurrences. Here, however, the Board concludes that the

circumstances do warrant some mitigation of the penalty. The offenses all occurred within a four-month period, indicating that the absences, etc. were of some common and perhaps temporary cause. The Claimant ascribed his tardiness incidents in part to care for an ill brother. All these latenesses were of 10 minutes or less. One of the absences, according to the Claimant, was on a day when he could not operate his car under adverse snow conditions.

The Board determines that there is good cause here to deviate from the Policy in this instance. However, this does not in any way serve as a precedent as to application of the Policy's four steps. The Board concludes that the Claimant shall be offered reinstatement with seniority unimpaired, but without back pay or retroactive benefits. This is conditioned, however, on the basis that the Claimant will continue to be treated as having passed the Policy's first three steps. If this condition is not acceptable to the Organization and the Claimant, then the dismissal action will remain in effect.

A W A R D

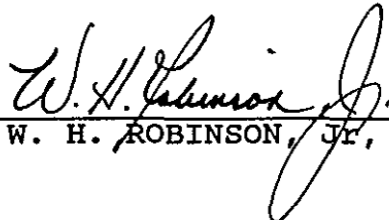
Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.



HERBERT L. MARX, Jr., Chairman and Neutral Member



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 10-6-94