

**PUBLIC LAW BOARD NO. 5564**

**Case No. /Award No. 119**  
**Carrier File No.: 8-2021-7**  
**Organization File No.: DM-2132-MT-101**  
**Claimant: M. Ramirez**

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**NORTHEAST ILLINOIS REGIONAL** )  
**COMMUTER RAILROAD CORPORATION** )  
 )  
**-and-** )  
 )  
**BROTHERHOOD OF MAINTENANCE** )  
**OF WAY EMPLOYEES DIVISION- IBT** )  
**RAIL CONFERENCE** )  
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**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- 1. The Carrier’s discipline [thirty (30) day record suspension with a thirty-six (36) month review period] of Mr. M. Ramirez, by letter dated January 29, 2021, for alleged violation of Metra’s Code of Conduct Rule ‘B’ Paragraph #1, Rule ‘L’ First Sentence, Rule ‘N’ Item #1 and the Covid-19 Safety Acknowledgement form dated 9/11/2020 was arbitrary, unwarranted, without the Carrier having met its burden of proof and in violation of the Agreement (System File DM-2132-Metra-101/8-2021-7 NRC).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant M. Ramirez shall now have all charges dropped, be made whole for all wage loss and be provided all protections and remedies provided for under the Agreement.”**

**FACTS:**

**The Carrier served Claimant with a Notice of Investigation dated December 23, 2020 regarding the possibility of his having reported to work for 5 days with COVID-19 symptoms, the dates at issue being December 5, 6, 10, 11 and 12, 2020.**

Claimant testified that he did not experience COVID-19 symptoms on December 5, 6, 10, 11 or 12, 2020 (TR 55) and that any symptoms he may have experienced were only on his rest days, having resolved prior to the start of his workday. The Carrier maintains it received information regarding Claimant having a close contact on December 13, 2020 (TR 51), at which time he was put under quarantine. He subsequently tested negative on December 16.

Applicable provisions of the parties' Agreement state as follows in pertinent part:

**RULE 32. HEARINGS - DISCIPLINE AND UNJUST TREATMENT.**

(a) An employee who has been in the service sixty (60) calendar days or more will not be disciplined or dismissed without a proper hearing as provided for in paragraph (d), below, unless such employee shall waive formal hearing and accept discipline in writing (sample waiver form on the next page) witnessed by his representative. Suspension from service pending charges and hearing is permissible in major offenses.

(b) Whenever charges are preferred against an employee, they will be filed in writing within ten (10) days from the date the Carrier has knowledge of the alleged offense, with copy to the General Chairman. Such notice shall specify the specific charges against the employee.

\* \* \*

(d) An employee against whom charges are preferred, or who may consider himself unjustly treated, shall be granted a fair and impartial hearing by a designated official of the Carrier which shall take place within ten (10) days after notice is served, either under paragraph (b) or paragraph (c), above. A charged employee shall be given reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented by the duly-accredited representatives of the employees. All witnesses except the one testifying will be excluded from the hearing both before and after testifying. Only evidence and statements bearing directly upon the specific charges against the employee which have been subject to cross examination will be used in assessing discipline against the employee. A decision in writing will be rendered within twenty (20) days from the close of the hearing. A copy of the transcript of evidence taken at the hearing, and a copy of the decision, will be furnished (sic) the employee affected and his duly-accredited representative.

**(e) If the decision rendered is in favor of the employee, his record shall be cleared of the charge, and if suspended or dismissed, he will be reinstated to his former position with seniority unimpaired and shall be compensated in the amount he would have earned had he continued in the service, less the amount earned in other employment.**

**(f) If the decision is not satisfactory, the employee shall have the right of appeal in the usual manner up to and including the highest official designated by the Carrier to whom appeals may be made as provided in Rule 33. If the charge against the employee is sustained and he is dismissed and later reinstated, the manner of his exercising his seniority will be subject to agreement between the General Chairman and the Carrier.**

#### **CARRIER POSITION:**

**On December 13, 2020, as part of its COVID-19 contact tracing protocol, the Carrier's Medical Department contacted Claimant regarding his potential close contact exposure to another employee who was symptomatic. Claimant was asked whether he was experiencing or experienced any COVID-like symptoms and, if so, on what dates. During this call, Claimant disclosed that he had started having headaches beginning on December 5; and that he also experienced cough, sore throat, fever, diarrhea, fatigue, congestion, and a runny nose over the dates of December 6-13, 2020. He had reported to work during this period.**

**The Carrier asserts Claimant admitted during the Investigation that he came to work while experiencing symptoms of the COVID-19 virus, even though he was aware of the Carrier's safety rules and regulations regarding COVID-19. Claimant maintains that he did not believe that his symptoms were due to COVID-19; the Carrier contends this is irrelevant. Even if Claimant had tested negative for COVID-19 on December 16, 2020 (though no evidence was provided to corroborate this testimony), that would not have absolved him for improperly reporting to work between December 5–13. The December 16 test result provided no probative value on what his status was two weeks prior. As the Carrier sees it, any credibility decision regarding his status has been rendered by the Hearing Officer, and is not subject to review by the Board.**

**ORGANIZATION POSITION:**

**The Organization contends the Hearing Officer held dual roles in a prejudicial denial of due process, and also entered Claimant's discipline record into the record prior to a determination of guilt.**

**As the Organization sees it, the Carrier produced no witness with firsthand knowledge of Claimant's condition during the period he was allegedly experiencing COVID-19 symptoms. Supervisor B. Iskra testified that he did not observe Claimant's alleged symptoms, and Medical Officer Lang did not speak with Claimant.**

**Instead, the Carrier's entire case is built upon temporary staffer Noah's conversation with Claimant. Noah did not provide testimony at the Investigation, leaving Claimant's direct testimony unrefuted by the Carrier. All hearsay testimony provided by Medical Officer Lang regarding what Claimant allegedly told temporary staffer Noah was unsubstantiated.**

**DECISION:**

**We do not find a procedural flaw sufficient to support sustaining this claim without more. The documents entered by the Hearing Officer are neutral on their face: the rules pertaining to the charge and the personnel record of the Claimant. Claims have been sustained based on the wording of the rule alleged to have been violated. Likewise, the Carrier is not obliged to wait until there is a finding of culpability before entering a claimant's personnel record because this is not feasible. The decisions of both culpability and penalty are made based on the same record, and that record needs to be complete. Mitigating circumstances such as longevity and/or special training or qualifications can often be found in an employee's personnel record, meaning their admission can benefit either party. We find no wrongdoing in the Hearing Officer's conduct here.**

**The Organization objects to Manager of Medical Services N. Lang's description of information given her by temporary staffer Noah regarding his conversation with Claimant. The basis of this objection is hearsay. Certainly, what Claimant told Noah, then what Noah told Lang is clearly not direct "eyewitness" testimony. However, the rules of evidence have exceptions. The exceptions are based on the circumstances surrounding the statement at issue, and the relative reliability of that statement given the circumstances.**

**Records kept in the ordinary course of business are widely recognized as an exception to the hearsay rule. However, in this case, Noah did not record his**

conversation with Claimant, so there is no memo which could be designated as a document kept in the ordinary course of business. Instead, it appears that Noah told Lang about the conversation. This telling is made less reliable by going through two people, but is also more reliable because it was a communication regarding the business of the medical department. Neither Noah nor Lang had any reason to falsify medical information; both had every reason to safeguard its accuracy.

With these considerations in mind, we do not find that Hearing Officer Winchester abused his authority when he overruled the Organization's objection to Lang's rendition of Noah's conversation with Claimant. There were sufficient reasons for crediting its validity in a non-court setting.

This brings us to the fact that Winchester found Lang's testimony more credible than Claimant's. It is clear from the record that Claimant had the classic symptoms of Covid-19 during a period of days which included work days. His symptoms started as soon as December 5. However, Claimant did not contact the Carrier. Indeed, it was the Medical Department that contacted him on December 13.

Given these facts, this Board is not in a position to second-guess the Hearing Officer's credibility decision in this case.

**AWARD:**

The claim is denied.

July 13, 2023



Patricia T. Bittel, Neutral Member



John Schlismann, Employee Member



Sylwia Dutka, Carrier Member