

**PUBLIC LAW BOARD NO. 5564**

**Case No. /Award No. 121**  
**Carrier File No.: 8-2021-21**  
**Organization File No.: C-22-M-D070-1**  
**Claimant: K. McGee**

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

**STATEMENT OF CLAIM:**

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

**1. The Carrier’s discipline (dismissal) of Mr. K. McGee, by letter dated August 5, 2021, for alleged violation of Metra Engineering Department Special Instructions Version 4.00 Rule # 1.1 - General Attendance and Metra Employee Code of Conduct Policy Rule ‘Q’ was arbitrary, unwarranted, without the Carrier having met its burden of proof and in violation of the Agreement (System File C-22-M-D070-1/8-2021-21 NRC).**

**2. As a consequence of the violation referred to in Part 1 above, Claimant K. McGee shall now ‘... be reinstated to service with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits. The Claimant shall be made whole for all financial losses as a result of the violation, including compensation for:**

**1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service);**

- 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service;**
- 3) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the Claimant not been removed from service;**
- 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service. All notations of this dismissal should be removed from all carrier records, due to the Carrier's arbitrary, capricious, and excessive discipline leading to the Claimant being improperly dismissed. Also as remedy for the violation, the dismissal shall be set aside and the Claimant shall be made whole for all financial and benefit losses as a result of the violation. Any benefits lost, including vacation and health insurance benefits (including coverage under the railroad industry National Plan), shall be restored.\*\*\*' (Employees' Exhibit 'A-2')"**

**FACTS:**

**At approximately 5:20 or 5:30 a.m. on the morning of July 18, 2021, Claimant's autistic son experienced a panic attack requiring Claimant's immediate attention. The panic attack was described by Claimant as involving loud screaming, scratching, banging on things, banging his head into the wall, breaking things, throwing toys everywhere, smothering himself and breaking down doors.**

**Claimant attempted to call the Carrier prior to the start of his shift to report that he would be absent. However, his phone had been turned off because of non-payment. In the midst of the ensuing chaos, Claimant attempted to pay his phone bill and was successful at 6:03 a.m., which was after Claimant's scheduled start time. Claimant contacted Manager Rangel at 8:19 a.m. and explained the reason for his late reporting in a voicemail message.**

**Following Investigation, the Carrier found Claimant had violated Metra Engineering Department Special Instructions Version 4.00 Rule # 1.1 - General Attendance and Metra Employee Code of Conduct Policy Rule "Q" and, in view of his record, dismissed him from service. The Organization protested his dismissal, and the resulting claim was processed through the grievance procedure to consideration by the instant Board.**

**CARRIER POSITION:**

Claimant requested and was approved for a personal leave of absence which began on December 15, 2020. He subsequently returned to service on July 1, 2021 as a Trackman. On July 18, 2021, Claimant failed to report to his assignment, and also failed to notify his supervisor before the start time of his shift. After only about 20 months of service, Claimant was already at Step 4 of the Carrier's Discipline Progression due to previous attendance violations. These facts are not contested, and the Carrier maintains it is not required to provide any additional proof.

**ORGANIZATION POSITION:**

As the Organization sees it, the Carrier denied Claimant his due process right to a fair and impartial hearing when Hearing Officer Sorenson failed to make any determination of fact relative to the Claimant's case. Hearing Officer Sorenson made no credibility determination, nor did he have any hand in the ultimate penalty imposed. The Organization further maintains the Carrier further failed to meet its burden of proof to substantiate the level of discipline imposed.

The Carrier did not produce any copy of the waiver the Claimant allegedly signed and thus failed to meet its burden of proof that Claimant was correctly progressed from Level 4 to Level 5 – Dismissal. Consequently, as the Carrier has not met its burden to substantiate the level of discipline imposed, the discipline must be deemed arbitrary, disparate and excessive. Claimant directly challenged the waiver on October 26, 2018 on the basis that he was on an approved leave of absence, and therefore the waiver should not have been included in his discipline record. When the improper discipline of October 26, 2018 is removed, Claimant was improperly progressed under the Carrier's disciplinary policy.

As the Organization sees it, the unique circumstances of this case should operate as mitigating circumstances, rendering the Carrier's choice of penalty overly harsh and unreasonable.

**DECISION:**

This record establishes that Claimant failed to report for work on July 18, 2021, and further failed to notify his supervisor prior to start of shift that he would be absent. Though he clearly had good reason to stay at home with his son, it was his responsibility to notify his supervisor of his absence before the shift started. In this regard, it was his obligation to have access to a working telephone, and because he

failed to do this, he was unable to notify his supervisor in a timely fashion. This means he was in violation of the rule requiring him to do so. Despite the empathy the Board feels for Claimant, it is not within our discretion to negate discipline due to leniency; that discretion is reserved to the Carrier.

Claimant's Personnel Record was labelled Exhibit E as an attachment to the Carrier's submission. It was also labelled Exhibit E at the Investigation. This record shows that Claimant received a Step 4 suspension for violation of Code of Conduct Rule Q, Special Instruction 1, which addresses attendance. This discipline was issued on September 9, 2019. Under the Discipline Policy for Contract Employees, the review period at Step 4 is 36 months.

This establishes that Claimant's next violation within the review period would be a Step 5 Dismissal. The July 18, 2021 incident here concerned occurred within the applicable review period. Insofar as Claimant indeed went on to again violate the Carrier's Attendance Policy after a Step 4 suspension, the discipline taken was progressive in nature and in accordance with applicable policy.

**AWARD:**

The claim is denied.

July 13, 2023



Patricia T. Bittel, Neutral Member



John Schlismann, Labor Member



Sylwia Dutka, Carrier Member