

BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 123

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2017-00005

Claimant: S. JOHNSON

STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

1. The discipline [five (5) day actual suspension] imposed upon Mr. S. Johnson for alleged violation of the Attendance Guidelines dated January 9, 2017 in connection with information indicating absence on October 28, 2016 was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2017-00005 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Johnson's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement."

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein. Carrier received a notification of investigation that provided in relevant part:

The investigation is being held to develop the facts and to determine your responsibility, if any, in connection with information indicating that your absence on October 28, 2016 when considered with the 12 weeks including and immediately preceding October 28, 2016 may be in violation of requirements of the Attendance Guidelines.

Following postponement, the investigation was conducted on December 13, 2016. Claimant was advised by a December 23, 2016, letter:

The record contains credible testimony and substantial evidence proving that you violated the Attendance Guidelines. In consideration of the incident, the proven rules violations, and your past discipline record, you are hereby assessed the following discipline:

5 Days Actual Suspension from Service

(January 9, 2017 through January 13, 2017)

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

The Carrier asserts that the two absences in August did not result in a violation of the Attendance Guidelines. Claimant was not in violation as a result of those absences on their own. However, the August absences were considered together with the October 28, 2019 absence, which, when considered with other absences (i.e. the unexcused August absences) during the twelve-week rolling review period, resulted in a violation of the Attendance Guidelines. Claimant was disciplined for all the unexcused absences in the twelve-week period, prior to and including his October 28, 2016 absence, which triggered the attendance policy violation. Claimant is required to report for duty and when he has excessive absences within the rolling review period, the policy is violated. The suspension was appropriate to the misconduct.

The Organization asserts that it was error for the Carrier to reject the physician's note for Grievant's care for two August dates he was absent. The Carrier considered those two dates when issuing discipline, but the Carrier witness could not explain how an ill employee could be excused from reporting. The Claimant presented a valid excuse for the two August dates, but it was ignored by the Carrier.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the

decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

Here the Carrier argues that all the unexcused absences in the twelve-week review period immediately preceding and including the October 28, 2016 date should be considered because that is the date that impacted the rolling attendance policy. Carrier's argument misses the mark. The Carrier is using all the dates in the rolling period to establish the violation. Absent the earlier dates, the attendance policy is not implicated. Therefore, it cannot concentrate on the sole October 28 date. Moreover, had Claimant reported to work while sick, he would have violated the Carrier's rules about being alert and attentive. General Rule C provides, in relevant part: "Alert and Attentive: Employees must be alert and attentive when performing their duties, taking care to prevent injury to themselves or others."

The Organization continues that the Carrier violated Rule 23 A, which requires the Carrier to grant a leave of absence:

- A. Employees unable to work because of personal injury or illness will, upon presentation of proper documentation, be granted a leave of absence for the period of time during which they are unable to work.

In evidence is the note from Claimant's treating physician, Dr. Baker at Essentia Health, dated August 9, 2016, which provided:

This is to certify that the above-named individual is under my care and is unable to work at this time. He has an upper respiratory infection. He missed work yesterday, today and might miss tomorrow, based upon his rate of recover.

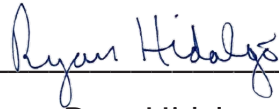
The Carrier's witness for the attendance policy could not adequately explain why this note was insufficient to excuse Claimant due to a documented illness. The record establishes that Claimant was ill with a short-term illness. He could not report for work on August 8 and August 9, 2016. It was error for the Carrier to consider the August dates as unexcused for the purposes of the attendance policy.

Claim sustained.
In Dissent:

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John K Ingoldsby

Carrier Member

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Ryan Hidalgo

Organization Member

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Brian Clauss

Neutral Member

Dated: 12-18-20