PUBLIC LAW BOARD NO. 7766

Brotherhood of Maintenance
of Way Employes Division - IBT

and

New Orleans Public Belt Railroad

Award No: 01

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Claimant S. DeJean by letter dated April 30, 2015 for violation of General Regulations Rule GR-4 and General Rules, Section E, Rule 5 in connection with allegations that he failed to report to work and protect his assignment on April 9, 2015 was based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File NOPB518JF15 NOP).

2. As a consequence of the violation referred to in Part 1 above, the Carrier shall remove '... the charges and the alleged violation of General Regulations, Rule GR-4 (GCOR) and General Rules, Section E, Rule 5 (NOPB) and Rule 1.15, from the Claimant's personnel record and the removal of the discipline of termination, with all seniority rights unimpaired, to be paid and compensated for all lost time beginning on April 9, 2015, through and including on a continuous basis until this matter is settled at the Claimant's respective straight rate of pay and any and all overtime that the Claimant would have acquired if he had not been unjustly removed from active service, and all lost time to be credited toward Railroad Retirement, vacation, hospitalization, and any and all expenses the Claimant may have acquired to include mileage at the current negotiated rate of $.57.5 cents a mile, from the Claimant's place of residence, 228 S. Dupre Street, New Orleans Louisiana, 70119 to the New Orleans Public Belt Railroad, main office, 4822 Tchoupitoulas Street, New Orleans Louisiana 70115-1645and (sic) returning to his place of residence....' (Employes' Exhibit 'A-3')."

FINDINGS:

Public Law Board No. 7766, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction of the dispute herein; the parties were given due notice of hearing before this Board and they participated therein.

The Claimant was disciplined pursuant to a Notice of Investigation dated April 10, 2015, and an Investigation held on April 23, 2015 (after one (1) postponement) "to ascertain the facts and determine your responsibility, if any, in connection with your failure to report for duty at the designated time and place and failure to protect your job on Thursday April 9, 2015."

In a discipline letter dated April 30, 2015, the Carrier found that "substantial evidence established your failure to comply with General Regulations Rule GR-4 (GCOR) and General Rules, Section E, Rule 5 (NOPB). Based on your prior disciplinary record and for your violation of the aforementioned rules, you are hereby **dismissed** in all capacities from the service of New Orleans Public Belt Railroad."

The Organization appealed the discipline and the Carrier denied the appeals. The dispute was not resolved during a settlement conference and progressed to arbitration. This matter is now before the Board for final and binding resolution. The Board has carefully reviewed the entire record in this case, including the arguments and awards provided in support of the parties' respective positions, whether or not specifically addressed herein.

The Board finds the Organization's procedural objections unpersuasive. The Carrier's Notice of Investigation gave sufficient notice, as required by, and in compliance with, Agreement Rule 16, Section B(1). The scope of the Investigation was properly limited to the April 9, 2015 incident. Evidence of Claimant's placement on NOPB Attendance Policy Levels 1, 2 and 3 was used to establish Claimant's progression to Level 4, not to establish Claimant's culpability for the April 9, 2015 incident.

Claimant was a Trackman with approximately two (2) years of service on the date in question. His work schedule was Monday to Thursday, reporting time 0600 hours. Claimant was scheduled to report for work on Thursday, April 9, 2015 at 0600 hours. During the evening of

April 8, 2015, Claimant telephoned his supervisor, informing the supervisor that he (Claimant) needed to leave work at noon the next day (April 9) to bring his son to the dentist. The supervisor responded that Claimant should report to work the next day, and the supervisor would discuss the day's workload with the supervisor's assistant, to see if Claimant's request to leave at noon could be granted.

Despite the opportunity afforded to Claimant during the telephone call the evening of April 8th, and contrary to his supervisor's instruction, Claimant did not report for work, at all, on April 9, 2015. Moreover, Claimant took no action to protect his position on April 9th. He failed to telephone anyone to inform the Carrier that he would not be reporting to work that day, would be late, or to request the day (or any part of it) off. The record proves the Carrier's claim that Claimant was a "no call, no show" on April 9, 2015. Claimant testified that he knew he was supposed to report to work at 0600 on April 9, 2015, and made a conscious decision not to report to work, and to not notify the Carrier.

The Carrier concluded from the Investigation testimony of both the Claimant and his supervisor, that Claimant did not inform the supervisor that the son's dentist visit was an emergency. The Organization argues that Claimant did inform his supervisor it was an emergency, and only these two (2) individuals were on the phone call, so only they know what was actually said. Thus, argues the Organization, it is one person's word versus another person's word. The Board has scoured the Investigation transcript and finds no evidence, not even from Claimant's testimony, that Claimant informed his supervisor of any emergency or urgency. Claimant testified *he* considered this to be an emergency, but nowhere did he testify that he imparted this information to his supervisor. Claimant simply requested to leave at noon the next day to take his son to the dentist; nothing more, nothing less.

The Organization asserts the Carrier arbitrarily refused Claimant's family emergency request, forcing Claimant to choose between a family emergency and his job. However, the record establishes that Claimant made no representation of an emergency, that the Carrier had no knowledge of an emergency, and that the supervisor did not act or exercise judgment as if he or the Carrier, "have a license to practice medicine . . . [or as if the supervisor is] a qualified dentist." The record establishes that even though the Carrier had no knowledge of emergency, and Claimant

was requesting, on short notice, to leave work at noon the next day, the supervisor instructed Claimant to report at his usual 0600 time, and his request would be discussed with the supervisor's assistant, in conjunction with the day's workload. Instead of reporting for work normally, as instructed, Claimant no-called, no-showed on April 9, 2015. Claimant provided no reason, excuse or justification for not reporting to work, or notifying the Carrier, at all, on April 9, 2015. Had Claimant reported to work as instructed, it is quite possible he would have worked from 0600 to 1200, and been allowed to leave work early to take his son to the dentist. There is no evidence in the record, nor suggestion, to the contrary. The Board notes the supervisor's unrebutted testimony that had Claimant stated on April 8th that it was an emergency, he would not have required Claimant to come to work at all on April 9, 2015.

Thus, the record establishes, by substantial evidence – including Claimant's clear admissions, that Claimant had knowledge of the rules and attendance policy, failed to report for duty at the designated time and place, and failed to protect his job on Thursday April 9, 2015, intentionally, and as charged. Documented Level 4 Attendance Policy violations are "subject to dismissal". The Carrier in this case elected to dismiss Claimant from his employment for this documented Level 4 Attendance Policy violation.

Claimant's length of service and disciplinary history do not provide a basis for mitigation of penalty. In his two (2) years of service, prior to this incident of April 9, 2015, Claimant had 10 layoffs between February 17 and July 21, 2014, as well as three (3) instances of tardiness between January 8 and May 16, 2015, resulting in a Level 1 Letter of Record (conference) dated July 23, 2014. Claimant received a Level 2 Letter of Record (reprimand), dated September 24, 2015, for tardiness on September 17 and 23, 2015. Claimant received a Level 3 Letter of Record (suspension), dated March 19, 2015, for layoffs on March 12 and 16, and tardiness on March 19, 2015. The Board rejects the Organization's assertion that because Claimant elected to serve a full 15-day suspension for the Level 3 penalty, he ceased to be at Level 3 prior to the April 9, 2015 violation. The Organization provided no support for this argument.

There is substantial evidence in the record to uphold the Carrier's discipline determination. The Organization's defenses are not persuasive. The discipline assessed by the Carrier was not

arbitrary, capricious, or an abuse of discretion under the facts and circumstances of this record, and will therefore not be disturbed by this Board.

AWARD:

Claim denied.

Robert Grey
Neutral Member
Dated: 11/20/17

Erica Beck
Carrier Member
Dated: 11/20/17

Andrew Mulford
Labor Member
Dated: 11/20/17