

PUBLIC LAW BOARD NO. 6832

PARTIES TO THE DISPUTE:

MASSACHUSETTS BAY COMMUTER RAILROAD

- and -

BROTHERHOOD OF MAINTENANCE OF WAY DIVISION,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

STATEMENT OF CLAIM:

"I appeal to you the discipline case of James Kelly (Carrier File 04159) who was dismissed following a hearing on May 12, 2005 and a decision and discipline notice dated May 20, 2005 from Messrs: Herz and Nevero."

OPINION OF BOARD: Ms. James Kelley ("Claimant") was first employed by Amtrak in its Maintenance of Way Department on December 14, 1998 at Boston, MA. He became a new employee of MBCR, effective July 1, 2003, when Massachusetts Bay Commuter Railroad ("MBCR" or "Carrier") succeeded Amtrak as operator of the commuter railroad system for the Massachusetts Bay Transit Authority. He worked in the in the Engineering (Maintenance of Way) Department until his dismissal from service, effective May 20, 2005. Following a properly noticed hearing at which he appeared with representation, Carrier terminated the Claimant's employment for alleged recidivist violations of the Carrier's Attendance Policy, notwithstanding prior progressive discipline.

Among the policies and rules of MBCR which governed the Claimant's employment were the following:

Attending to Duties

MBCR's success depends on using all available resources in the most efficient and productive way possible. As an MBCR employee, you have an obligation to perform all duties properly and in accordance with the standards set for your particular position. This requires you to remain alert to your duties at all times. Any activity or behavior that distracts or prevents you from attending to duties is unacceptable. In addition, employees will not disrupt or interfere with other employees in the performance of their duties.

It is essential for all of us to report to work on time and perform required duties during our assigned hours. If you know you will be late for work or absent you must inform your supervisor as much as possible ahead of time. Be sure you are familiar with any specific attendance requirements for your location or job. Another such policy which was promulgated effective July 1, 2003 was an Attendance Policy. This policy (which may be found at Appendix A, page 69) advises all employees:

4. Essentially, attendance at the expected times, places, and for the duration of assigned hours is a basic component of the employment relationship. MBCR expects employees to adhere to this principle and is not tolerant of absenteeism. Under any circumstance or duration, absenteeism has an adverse impact on the quality of service MBCR endeavors to provide to its customers. Absenteeism poses an unnecessary cost burden upon the company and places additional burdens upon other co-workers and managers who must work under strict time constraints.

The Absenteeism Policy sets forth a clear definition of an "occurrence of absence" for purposes of the policy, as well as a progressive Discipline Policy for Absenteeism. This 5-step discipline policy consists of the following steps:

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|---------|--------------------|
| Step 1: | Verbal Counseling |
| Step 2: | Written Counseling |
| Step 3: | 3-day Suspension |
| Step 4: | 10-day Suspension |
| Step 5: | Dismissal |

Of the 83 available work days in 2003, Claimant was absent 25 days (30%) and of the 249 available work days in 2004, Claimant was absent 62 days (25%). Step 1 verbal counseling had no effect and on August 2, 2004, a Step 2 written counseling memo was issued, which was followed up with a meeting between Claimant and his supervisor. When the Claimant's attendance still did not improve, he was assessed a 3-day "overhead" suspension on February 10, 2005 under Step 3 of the progressive discipline policy. Carrier agreed to waive the actual serving of that suspension in consideration of an improved record in the subsequent 1 year of active service, but the Claimant's record still did not improve.

In the 30 days following February 1, 2005 (the last date comprehended by the 3-day suspension), Claimant was absent from work 6 days, 4 of them without excuse or authorization,

Accordingly, in lieu of a formal investigation, Claimant executed another waiver on March 7, 2005, wherein he accepted a suspension of 10 days under Step 4 of the progressive discipline policy. This waiver also activated the deferred 3-day suspension from Step 3 and triggered the following written "Formal Warning" from his supervisor that the Claimant was vulnerable to Step 5 dismissal for his next attendance policy infraction:

If you are found to be in violation of the Attendance Policy again, and if the proven violation occurs within a one (1) year period of your active service, it will result in your dismissal from service in all capacities. However, to provide incentive, I will return you to Step # 3 of the discipline progression if you can complete the one (1) year period without violating the Policy.

I am providing another copy of the MBCR Attendance Policy to you so that you are absolutely clear with respect to your responsibility to come to work when required, and to work a full day unless given authority otherwise.

Within a week of signing the above waiver, Claimant was absent from again for the entire work week March 14-18, 2005. Claimant was then absent again on March 25, 2005 (the Friday before his rest days) and for the entire work week of March 28-April 1, 2005. On none of these dates did Claimant contact his supervisor, Roadmaster Dana Rodricks, to secure permission to be off. Instead, he called a B&B Clerk headquartered in the Roadmaster's office, either on his office line or on his cell phone, and asked him to relay a message to Rodricks that he would not be to work those dates. At some point, the Claimant also provided his supervisor with a note indicating he had been "under a doctor's care" on his unexcused absence dates of March 15, 16, 17, 18, and March 30-April 1; however, the absences of March 14, 25, 28 and 29, 2005 were not so documented.

Following a formal investigation on due notice, at which the Claimant appeared with BMW representation, Carrier found him culpable of violating the Attendance Policy while on a Step 4 waiver and invoked Step 5 to terminate his employment. (The Hearing Officer dismissed a related charge of "pattern absenteeism" for insufficiency of proof).

The investigative record shows that just days after receiving a Step 4 formal warning that further unauthorized absences would result in his dismissal, the Claimant was absent without properly notifying his supervisor and receiving permission to be absent on 11 days during the period March 14-April, 2005. The testimony of both Claimant and Roadmaster Rodricks confirms that that Claimant never sought nor was granted approval from his supervisor to be absent on any of those dates of absence, whether "documented" or otherwise. In that regard, the Attendance Policy makes a very clear distinction between "notification" of an absence and "approval" of such absence:

Mere notification to the company of an absence for any of the above reasons (that require approval) does not constitute an approved absence unless specifically granted by the appropriate supervisor. Employees are required to know the names, phone numbers of those managers authorized

Further, even if *arguendo* "medical documentation" had been a relevant factor, the unexcused absences of March 14, 25, 28 and 29, 2005 were not even so "documented" until after the charges were filed, when the Claimant presented papers suggesting that he had been receiving out-patient treatment for undisclosed reasons on some of those dates at St. Elizabeth's Medical Center. That appears to be the basis for the Organization Representative's plea during the appeal process that the Carrier grant the Claimant some consideration for allegedly "receiving help" for certain (unspecified) "unfortunate circumstances" which may have contributed to his abysmal attendance record. However, as we pointed out in Award No. 1 of this Board, leniency reinstatement in such cases is a management prerogative and cannot properly be imposed by arbitral fiat. See Third Division Award 15566. See also Third Division Awards 9775, 11914, 12104, 13116, 14800. In the final analysis, we can find no basis in the record before us for disturbing the Carrier's dismissal decision in this case.

PLB NO. 6832

AWARD NO. 2
NMB CASE NO. 2
UNION CASE NO. 02
COMPANY CASE NO. MBCR-BMWE-06d/0605

AWARD

Claim denied.



Dana Edward Eischen, Chairman



Union Member



Company Member