AWARD NO. 11
CASE NO. 31

SPECIAL BOARD OF ADJUSTMENT NO. 944

PARTIES TO DISPUTE ) INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS

) METRO-NORTH COMMUTER RAILROAD

STATEMENT OF CLAIM:

"1. That, in violation of the current Agreement, Laborer J. Egger was unjustly suspended for 90 days from service of the Carrier following a trial held on December 30, 1988.

2. That, accordingly, the Carrier be ordered to reimburse Laborer J. Egger for 90 days lost wages."

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The Claimant, an employee of the Carrier for 10 years, was given a 90-day suspension from service following a company hearing and a determination by the Carrier that he was guilty as charged of the following offense: "Being absent on November 30, December 1, 2, 3 and 4, 1988, which, in light of your previous record, represents excessive absenteeism."

There is no question that the Claimant had personally reported off by telephone to the Car Department account alleged sickness on November 30, 1988 and December 1, 1988, or two of the dates in question.

In regard to the other dates of charge, i.e., December 2, 3 and 4, 1988, the Claimant asserted at the company hearing that he had his girlfriend, who is also an employee of the Carrier, report him off sick on each such date.

Contrary to the Claimant's contentions, the Carrier's principal witness said that the Carrier had not received any communication from the Claimant's girlfriend about the Claimant not being able to report for work account sickness, or any other reason, as concerned these latter dates of charge.

At the company hearing the Claimant asked if there was any way to get a postponement to have his girlfriend testify. This request was denied by the hearing officer. He noted that the trial had already been rescheduled from December 9 to December 30, 1988 as

the result of the Claimant having failed to appear on the earlier date scheduled for the hearing and that the Claimant, having been initially notified that he had the right to produce witnesses on his behalf, had sufficient time to have meantime arranged for the presence of any desired witness. This Board finds no valid reason to dispute the decision of the hearing officer or to hold that such action constituted reversible error as concerns a right to a fair and impartial hearing.

The Claimant contended that he had not arranged for the presence of such a witness because he read the charge as being related to his merely being absent from work and not to a failure to have called in to report such absences.

This Board finds no merit in the Claimant's argument. In this respect, we find it significant that at the company hearing, in defense of his position on the charge, the Claimant said: "I called in the first two days but my doctor put me on medication for ear infections and it made me sleep a lot so the clerk in the Harmon Shop who I've lived with for 8 years, called in every day for me." Clearly, this statement by the Claimant recognized the charge as being related to his failure to have called in or given the Carrier required notice of any intended absences from work on the days in question.

The Claimant also offered argument that he could not call in to the Carrier because his doctor had put him on medication for ear infections. In support of his contention, the Claimant offered a medical return to duty statement from a physician at the Ossining Open Door Health Center. This statement, dated December 6, 1988, was issued two days following the last date of absence from work. It reports that the Claimant was "examined in a state of illness" and that the nature of the problem was "infected sinuses." Although a notation says that such illness "started on November 30, 1988," there is nothing to show that the Claimant had sought or received any medical treatment, much less medication, on this earlier date. Moreover, even assuming arguendo that the Claimant was on medication, this Board fails to comprehend the basis for the argument that the taking of medication for infected ears or infected sinuses prevented the Claimant from calling in to report off sick.

In the circumstances of record, it is evident that the Claimant had failed to properly notify the Carrier of his intended absences from work on at least three of the five dates of charge.

Turning to the extent of discipline. The Claimant has an extensive discipline record. He had been given several past warnings about an unsatisfactory attendance record. He had been assessed discipline on 10 separate occasions for absenteeism and other rules violations. In the past year alone he had been assessed a 40-day and 7-day suspension from service and had also been given a 45-day record suspension, all in connection with his attendance

problems. Accordingly, a 90-day suspension for the instant offense was not excessive or unreasonable.

The above determination on the claim notwithstanding, the Board feels compelled to comment upon one particular argument advanced by the Carrier in its defense against the claim, lest the Board's findings here be misconstrued.

There is no question, as concerns a part of the Carrier argument, that it is correct or right when it says that the act of calling in does not legitimatize an absence. Such action only establishes that the employee gave notice that he would not be reporting for work at a particular time or date. It does not relieve an employee from being required or directed to justify any such absence.

This Board does not agree, however, with the further Carrier contention that even if it was to be found that proper notification and support documentation of a sickness had been provided for each of the dates covered by the charge, that "whether the absences were legitimate is irrelevant" since the Claimant had been guilty of excessive absenteeism in the past, and any failure to report for work constituted a furtherance of such excessive absenteeism and therefore a proper basis for the administration of discipline.

Certainly, there may be some instances where prolonged absences, such as those related to a long-term sickness, when viewed in the light of a past record of excessive absenteeism, has the effect of making such an individual a part-time employee, and the Carrier may take appropriate action to remove such an employee from service. We say this, because no carrier is obligated to keep in its employment an employee who cannot effectively be available for work more than on a part-time basis.

This Board does not believe, however, that because an employee who had in the past been found guilty of excessive absenteeism has reason to subsequently report off from work as a result of a legitimate short-term illness, that such absence in and of itself necessarily gives rise to that employee again being guilty of excessive absenteeism. In this respect, we think it must be recognized that almost all employees are going to have occasion to be excused from a work obligation to attend to an occasional family problem or to be off work account occasional sickness or injury. Furthermore, if an employee has served disciplinary sentences for past periods of unauthorized absences from work, it would be tantamount to placing that employee in double jeopardy to both cite and discipline him again for the same past periods of absence.

This does not mean that after proving an instant charge of unauthorized absence from work, that an employee's past discipline record may not be properly considered in determining the extent of an appropriate penalty. As this Board has indicated above,

that past record may well be taken into account once it has been determined that the employee is guilty of the current, or more recent charge of record.

AWARD:

Claim denied.

Robert E. Peterson, Chairman
and Neutral Member

Margaret M. Connor
Carrier Member

George J. Francisco, Jr.
Organization Member

New York, NY
June 9, 1990