SPECIAL BOARD OF ADJUSTMENT NO. 956

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	AWARD NO. 138
and	)	CASE NO. 138
NEW JERSEY TRANSIT RAIL OPERATIONS, INC.	)	

STATEMENT OF CLAIM:

The Organization requests that the discipline assessed to Mr. K. McWarchol be expunged from his record, and that he be made whole for all financial losses suffered in connection with this discipline.

FINDINGS:

Special Board of Adjustment No. 956, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

The Claimant was charged with a violation of Carrier's attendance policy following several occurrences in October and November 2005 in which he arrived late or left early from work. A hearing on the matter was held on January 27, 2006. Claimant was subsequently assessed a ten-day suspension.

In any disciplinary matter, the Board undertakes a two-pronged analysis. First, we must determine whether substantial evidence supports the misconduct charged. If the test of substantial evidence has been met, then the Board's second task is to ascertain whether the discipline imposed was reasonable. Generally, the Board does not overturn the assessment of discipline absent a finding that Carrier's action was arbitrary, capricious or an abuse of discretion.

The transcript of the investigation clearly establishes that the Claimant arrived late at his assigned location on October 20 and November 14, 2005. Moreover, he left his assigned work location before the end of his tour of duty on November 17, 2005. Despite claims of discrimination and harassment, we agree with the Carrier's conclusion and find no evidence of such arbitrary conduct other than Claimant's unsupported assertions made at the hearing. Moreover, Claimant provided no evidence of having secured authorization or permission to be late or leave early on the dates charged. Accordingly, the Board concludes that substantial

evidence is present in sufficient degree to establish that Claimant is guilty as charged.

Turning our attention now to the discipline imposed, we note that the Carrier's attendance policy adheres to a system of progressive discipline when an employee fails to maintain a regular work schedule. A verbal warning is followed by a written warning. If there is a subsequent occurrence within a six month period, a formal investigation is initiated. At that point, the employee "may proceed with the formal investigation or waive investigation in accordance with contractual disciplinary rules." Any subsequent occurrence within six months results in a discipline investigation, with no option for the employee to choose a waiver. An employee who completes six months of service without an occurrence reverts to the previous level of the attendance policy.

The record before the Board shows that this is the fourth incidence of discipline issued to the Claimant for attendance related infractions over a period of two years. On November 19, 2004, Carrier verbally counseled the Claimant for excessive absenteeism. A written warning was issued to the Claimant on February 8, 2005 for the same misconduct. Claimant incurred no attendance occurrences during the next six months, so his record reverted to a written warning when, on October 14, 2005, he again incurred an excessive level of absenteeism. The propriety of the previous disciplinary actions was not grieved and is not open to review in these proceedings.

Carrier contends that, in issuing a ten-day suspension in the instant case, it properly took into account not only the Claimant's prior attendance record, but also a five-day deferred suspension issued to the Claimant on November 2, 2005 for failure to report an injury. Carrier argues that there is no contractual provision which would prohibit such an assessment and that various infractions involving attendance, safety and work performance can all be considered on the same progressive discipline ladder. Indeed, an employee's prior discipline record is entered into an investigation transcript for the very purpose of determining what degree of discipline is appropriate in light of the proven offense and the assorted infractions which may be listed on an employee's record.

Carrier further argues that it was under no obligation to offer the Claimant a waiver of investigation. Carrier asserts that it has the option to handle a disciplinary matter by proceeding to investigation or offering a waiver. In this case, Carrier maintains that it determined that a disciplinary investigation was the best course of action. There is no basis for a finding that such a determination was improper, in the Carrier's view.

The Organization argues that attendance infractions should be subject to progressive discipline in accordance with the Carrier's attendance policy and cannot be mixed with disciplinary penalties for others sorts of misconduct. In this regard, the Organization submits that the ten-day suspension issued to the Claimant was unreasonable and conflicts with Rule 26, Section 5 of the Agreement, which states: "It is understood and agreed that this rule does not apply to any discipline assessed for absenteeism, late starts or early quits."

In addition, the Organization contends that employees similarly situated to the Claimant have been offered waivers for attendance infractions. Thus, the Organization maintains that the Claimant has been disparately treated – a factor that should weigh heavily in the Board's assessment as to the propriety of the discipline assessed.

The Board is not persuaded by the Organization's contention that the Carrier was precluded from considering Claimant's record in its entirety when determining the quantum of discipline to be imposed. The attendance policy includes no such prohibition. On the contrary, it states that occurrences beyond the written warning level are subject to formal investigation "in accordance with contractual disciplinary rules." Having reviewed Rule 26 – the discipline rule – in its entirety, we find no basis for a finding that discipline for attendance infractions must be on a separate ladder of corrective discipline. Section 5, relied upon by the Organization, refers only to the means by which discipline is expunged and does not address the issue now before us. Therefore, we are forced to conclude that the Organization's position must be rejected.

More persuasive, however, is the argument advanced by the Organization that Claimant should have been afforded the option of a waiver of investigation. As we read the record, Claimant was at the third step of discipline for attendance, since an earlier occurrence had reverted back to a second step written warning. When implementing that disciplinary step, the attendance policy provides that "the employee may proceed with the formal investigation or waive investigation in accordance with contractual disciplinary rules." The Organization presented six examples where employees at the third step accepted a waiver after having received an oral and written warning for attendance infractions. This option should similarly have been afforded to the Claimant, we find.

The Carrier's reliance on Rule 26 does not change the result. Section 2 (a) provides:

> An employee may be disciplined by reprimand or suspension without a hearing, when the involved employee, his union representative and the

authorized official of the Company agree, in writing, to the responsibility of the employee and the discipline to be imposed.

Carrier states that it "opted to conduct a trial, which is within its purview and in compliance with the collective bargaining agreement." However, no explanation was forthcoming as to why other employees were given the option to consider a waiver while the Claimant was not given that same option. We agree with the Organization that Carrier's action in this regard was arbitrary, and while we cannot say that the disciplinary outcome would have been any different had Claimant waived his right to an investigation, we believe he should have been afforded that option, consistent with the attendance policy and the Agreement.

This defect in the handling of the matter must be taken into consideration in assessing the reasonableness of the penalty. On balance, the Board finds that the ten-day suspension shall be reduced to a five-day suspension.

AWARD

Claim sustained in accordance with the Findings.

Ann S. Kenis

ANN S. KENIS
Neutral Member

Phillip B. Charles
Carrier Member

William L. Capik
Organization Member

Dated this day of , 2006.