

NATIONAL MEDIATION BOARD
WASHINGTON, DC

SPECIAL BOARD OF ADJUSTMENT 986

NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK) – NORTHEAST CONFERENCE (“CARRIER”)

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

NMB Case No. 281
Employee: Jason Ornelas

Neutral Member: Barbara Zausner
Carrier Member: Richard Palmer
Organization Member: Jed Dodd

STATEMENT OF CLAIM

- 1- The dismissal of Claimant Mr. J. Ornelas for alleged violation(s) of Amtrak’s Standards of Excellence, Attending to Duties section; Professional and Personal Conduct – Teamwork section; and of the National System Attendance Policy for all Amtrak Agreement-Governed Employees, Section D, Progressive Counseling and Discipline, is excessive, unwarranted and in violation of the Agreement (System File BMW-540-D).
- 2- As a consequence of the violation referenced in Part I above, Mr. Ornelas shall be immediately returned to service, the alleged charges shall be expunged from his personal record and that he shall be compensated for all straight time and overtime, and benefits lost from May 24, 2007 and continuing until this violation ceases to exist.

FINDINGS

Upon the whole record and on the evidence, the Board finds that the parties herein are Carrier and Employer within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

The Claimant, Jason Ornelas, was an Assistant Foreman. He was absent from duty on November 1, 6, 7, 27, and December 4, 2006. The absences, when added to his prior record, exceeded ten days and constituted excessive absenteeism. His prior record of discipline includes a written warning, a three day suspension, a ten day suspension and an Alcohol and Drug Waiver agreement signed by the Claimant on July 5, 2006.

According to the Carrier, Mr. Ornelas “clearly was advised that his absences were unacceptable and that future violations would result in more serious discipline up to and including dismissal.” It cites the National System Attendance Policy under which certain excused absences are not counted as occurrences. The Claimants absences for “assignments” with EAP do not fall into that category. Further, the Claimant did not qualify for FMLA. The Carrier points to numerous awards of this Board holding that the Carrier may dismiss employees for excessive absenteeism.

The Organization points out that the Claimant was enrolled in the EAP and participated in classes under that program. His daughter was

diagnosed with a heart murmur that required numerous doctor's appointments and examinations. The Claimant's wife had to have emergency surgery for gallbladder problems. Those factors resulted in many of the Claimant's absences. The Organization contends the Claimant contacted his supervisor and requested permission for the absences.

During the investigation, the Claimant provided documentation to substantiate his absences in 2006. There is no dispute about the number of absences or the fact that the Claimant was excessively absent. Nevertheless, the Organization argues that dismissal is inappropriate under the circumstances. The Claimant's absences were justifiable.

In Case 100, SBA No. 986, Neutral Board Member Meyers observed that following progressive discipline and a failure of an employee to correct his record, "a Carrier has a right to decide that an employee who cannot show up for work can be discharged." Such a decision is not arbitrary, capricious or unreasonable. Cases 138, 150, 153 and 167 of this Board were decided similarly.

Awards submitted by the Claimant are distinguishable. Award 7754 speaks to absences "validly justified and excused for good and sufficient reason." The absences at issue were appropriately counted as occurrences under the policy. In Award 19589, the form of the charge "signifie[d] that if the person accused can show that he was not responsible for the absences because of reasons beyond his control ... he

would not be subject to discipline.” The Board found for the claimant in the absence of proof of the charge.

The record in this case establishes that the Claimant is guilty of the charges. Despite counseling and progressive discipline, the Claimant was unable to conform his attendance record with the Carrier’s requirements. At some point, an employer has the right to determine that an employee is unable or unwilling to meet its attendance requirements and to dismiss the employee on that basis. Nothing in this record supports the Organization’s request to set aside the disciplinary action.

AWARD

The claim is denied.



Barbara Zausner, Neutral Board Member
May 31, 2010



For the Carrier
Richard F. Palmer, Director – Labor Relations



For the Organization
Jed Dodd, General Chairman