

**Special Board of Adjustment 928**

Award no. 492 and 493

**Parties to the Dispute:**

**Brotherhood of Locomotive Engineers and Trainmen**

**and**

**National Railroad Passenger Corporation (AMTRAK)**

**(John Rossi – Claimant)**

Two matters are consolidated in this award as follows:

**Statement of Claim:**

Claim presented by the Brotherhood of Locomotive Engineers and Trainmen (“Organization”) on behalf of Amtrak Passenger Engineer John A. Rossi (“Claimant”) for the rescinding of the discipline imposed of: ”termination of your employment with the National Railroad Passenger Corporation” as stated in the dismissal letter dated January 11, 2007, under the signature of J.D. Wall - General Superintendent, Southern Division, with full compensation for time lost, full credit toward vacation entitlement, health and welfare credits during the period held out of work, and clearing of Claimant’s personal record as to any reference relative to the alleged violation.

**Findings:**

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934. Special Board of Adjustment 928 has jurisdiction over the parties and the dispute involved herein.

At the time of the incident that led to the suspension in this matter, Claimant was a Passenger Engineer for over approximately 9 years with 19 years of service with the Carrier.

A review of the record shows that the following facts are not in dispute. Claimant contacted Crew Management Services on December 7, 2006, and stated that he wanted to mark off his assignment. CMS brought a Trainmaster in via three-way calling and the Trainmaster told Claimant that he could not mark off as there was nobody to fill the positions. He also told Claimant that a doctor’s note would be required prior to returning to work. Claimant instructed

CMS to mark him up and ended the call. Claimant marked up on December 10, 2006, through the computerized system. Claimant did not produce a doctor's note and was not allowed to mark up. These events gave rise to the matter in Docket 493.

On December 22, 2006, a written notice to appear in the office of the Miami Crew Base on December 27, 2006 for a conference with the Assistant Superintendent Tom Fortune regarding Claimant's absence was sent to Claimant. Claimant contacted the Road Foreman on December 23, 2006, and advised that he could not attend. Claimant was told to contact Assistant Superintendent Stokes and was given a cellular phone number by the Road Foreman. The Road Foreman was in the Miami Crew Base office on December 26 and 27. Claimant did not appear. These events gave rise to the matter in Docket 492

Claimant was sent two Notices of Formal Investigation dated December 28, 2006, regarding the matter that is before this Board in Docket 492 and Docket 493. That advised that an investigation would be held "to develop the facts and determine your responsibility, if any, in connection with the following [incident]. Claimant was notified that two charges would be investigated in each matter.

The two hearings were held on January 3, 2007. The Carrier notified Claimant in letters dated January 11, 2007, that the Charges were sustained. Claimant was assessed the discipline of termination from service in separate letters on the same date.

The Organization argues that the charged violations must fail because the Claimant was prejudged and he was also disparately treated. The disparate treatment occurred when Claimant was told to bring a physician's note when he returned to work after marking off. As to the substantive matters, the Organization claims that no infraction occurred because the Claimant legitimately laid off in compliance with Rule 12 and that the investigation underlying Docket 492 was nothing more than a vendetta against Claimant.

The Carrier counters that Claimant committed the infractions. Because he did not testify in the investigation underlying Docket 493, he cannot claim that the Carrier's evidence was contradicted. Further, he had notice to appear at the Miami Crew Base office and did not appear. Claimant's excuse, while conveniently timed, does not explain why he could not contact the appropriate Carrier manager. Because of the proof of Claimant's infractions, the Carrier contends that the only issue for the Board is the imposed discipline.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

After a review of the record, the Board finds that there were no procedural defects which void the discipline. A review of the record shows that Claimant was offered a full and fair hearing in both investigations. The Organizations claim of prejudgment is not convincing where the requirement of a doctor's note is the evidence offered in support of a claim of prejudgment. Requesting a doctor's note from an employee who marks off, absent more, is not evidence of prejudgment. To the contrary, it can be a legitimate inquiry by the Carrier. Absent more, and the record discloses nothing more in support of the Carrier prejudging Claimant, the request for a doctor's note does not support the claim of prejudgment. Similarly, there is no evidence in the record to show that there was a vendetta against Claimant or that requesting a doctor's note showed that he was subjected to disparate treatment.

Claimant was required to produce a doctor's note prior to returning to work after marking off. Instead, Claimant marked up on the call-in system and did not produce a doctor's note. When told that he would be required to provide documentation, Claimant marked back off and did not provide documentation. He then failed to appear at a meeting called to discuss his absences. There is substantial evidence in the record to show that Claimant was absent from duty without permission. There was also substantial evidence in the record to show that Claimant was insubordinate by failing to notify or appear at a meeting called to discuss his absence. His defenses, that he could not drive because of medication are unsupported and do not address why he did not phone or mail the Carrier manager who called the meeting. Accordingly, this Board finds that there was substantial evidence in the record to sustain the charges.

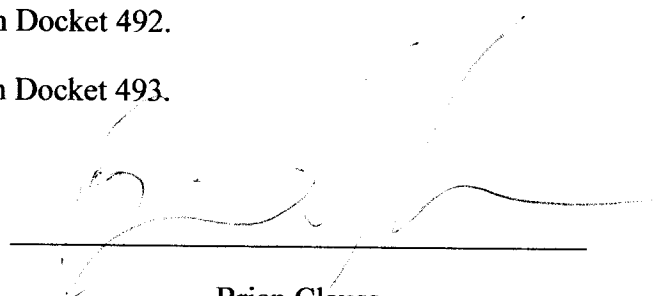
The Organization contends that the discipline was excessive in light of the offense and a vendetta in the Southern Division against Claimant. The proof of the vendetta lies in Claimant's disciplinary history after relocating to the Southern Division. According to the Organization, Claimant had only minor discipline prior to coming to the Southern Division. Once in the Division, the discipline became serious. The Organization sees the discipline as evidence of a vendetta. This Board finds that discipline, standing alone, does not equate with a vendetta. The claim of a Carrier vendetta against is unsupported by the evidence.

Claimant has a substantial disciplinary history, including a prior insubordination. After a review of the evidence submitted and the arguments before this Board by the parties, this Board makes the following finding: There is nothing in the record that shows the Carrier to be acting unreasonably, arbitrarily or capriciously by dismissing the Claimant from service. The imposed discipline did not constitute an abuse of the Carrier's discretion.

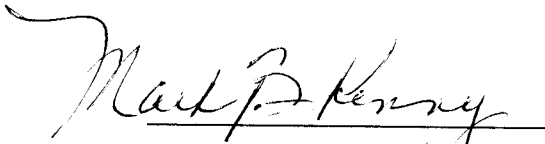
**Award:**

Claim is denied in Docket 492.

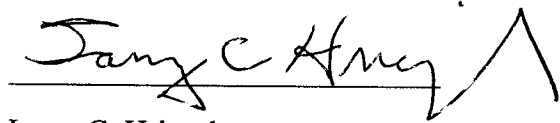
Claim is denied in Docket 493.



Brian Clauss  
Chairman and Neutral Member



Mark B. Kenny  
General Chairman  
BLET  
Organization Member



Larry C. Hriczak  
Director, Labor Relations  
AMTRAK  
Carrier Member

Dated this 11<sup>th</sup> day of JULY 2008