Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13445
Docket No. 13291
99-2-97-2-65

The Second Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(Brotherhood Railway Carmen, Division of Transportation
(Communications International Union
PARTIES TO DISPUTE: (
(The Springfield Terminal Railway Company

STATEMENT OF CLAIM:

1. "That the Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13 when they arbitrarily assessed Carman Sylvantus Moses with a formal reprimand as a result of an investigation held on November 18, 1996.

2. That, accordingly, the Springfield Terminal Railway Company be ordered to remove the formal reprimand from the file and record of Carman Sylvantus Moses."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On November 5, 1996, Claimant was notified to appear for an Investigation on November 18, 1996. The notice charged Claimant with, "Excessive absenteeism highlighted by the 48 hours missed from January 1, 1996 through November 5, 1996." The hearing was held as scheduled. On December 13, 1996, Claimant was advised that he had been found guilty of the charge and that he was assessed a formal reprimand.

Carrier's case against Claimant rested on a comparison of the number of hours that he missed to the average number of hours missed by employees in the shop. During the period in question, slightly over ten months, Claimant missed 48 hours of work, compared to a shop average of 29.72 hours.

The Organization raises several arguments on Claimant's behalf. Chief among them is that Claimant's entire absenteeism during the period in question consisted of contractual sick days. Rule 16 of the applicable Agreement provides:

"16.1 Employees will be granted sick leave each calendar year as follows:

1 year of seniority ..... 1 Sick Leave Day
5 years of seniority..... .2 Sick Leave Days
10 years of seniority ..... .3 Sick Leave Days
15 years of seniority ..... .4 Sick Leave Days

16.2 Sick leave days provided above which remain unused at the end of each calendar year may be added to the employees' 'bank' on the first day of the next calendar year. The maximum number of 'bank' sick leave days will be 20 so that at any given time employees may have a sick leave entitlement of 24 days (maximum 20 'bank' sick leave days plus the maximum 4 sick leave days in the new calendar year).

16.3 Payment for sick leave days will be 8 hours at 75% of the straight time hourly rate . . . .

. . . . .

16.5 The Carrier may require satisfactory evidence in the form of a letter or certificate from a physician confirming the employees' sickness if employees are off sick for more than 3 consecutive working days."

Carrier contends that it properly counted Claimant's contractual sick days against him. Carrier maintains that the reasons for Claimant's absence were irrelevant. Carrier cites numerous awards which it argues support its position.

There are numerous Awards which hold that a Carrier may discipline employees for excessive absenteeism, even though the absences may be for legitimate reasons, such as illness. Most of these Awards, however, do not indicate that the days off were contractually provided for sick days. Two awards cited by Carrier, Fourth Division Award No. 4985 and SBA 910, Award No. 32, merit further discussion.

In Fourth Division Award No. 4985, the Board considered a claim that the Carrier had unjustly disqualified the claimant from his supervisory position due to excessive absenteeism. The Board denied the claim, observing that the claimant missed more than 28 days per year in sickness from 1990 to 1992 and missed 13.8 days in 1989 before he earned any sick leave.

In SBA No. 910, Award No. 32, the Board stated:

> "After due study of the record . . . the Board rejects the Organization contention that in determining the question of excessive absenteeism, the Carrier is precluded from taking into account absences which occur beyond the scope of the time limits rule of the applicable Agreement, or which have been made the subject of prior discipline.
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> "Although the Board recognizes that some Employees have difficulty in understanding that these types of absences, as well as excused absences, may be taken into account by Carrier's assessment of whether an Employee's overall attendance is satisfactory, the Board observes that there is no question about the Carrier's right to insist that each Employee shall maintain a reasonably satisfactory attendance record and that the Carrier is entitled to separate from employment those Employees who cannot meet this requirement. For example, an Employee being off with permission for a limited period, or being off under sick pay, means that the Employee is entitled to be absent due to these particular circumstances; however, the existence of these permissive types of absences does not mean that the Carrier must be blind to these particular absences in determining

whether the Employee's overall record is good enough to warrant his being retained in service. . . ."

Thus, in SBA 910, Award No. 32, the Board's comments concerning contractual sick days appear to be dicta, used as an example to explain the Board's ultimate holding that Carrier could consider the Claimant's overall record of absenteeism, even though some of the absences predated the contractual time limits and were the subject of prior discipline. Furthermore, in both SBA 910, Award No. 32 and Fourth Division Award 4895, contractual sick days were part of a record of absenteeism that was clearly excessive when measured against an absolute standard of reasonableness. Indeed, in SBA 910, Award No. 32, the Board observed that in February, April and May of 1983, the claimant had marked off sick seventeen days, was absent with permission two days, and missed calls or was absent without permission thirty-one days. In other words, the record reflected an employee who almost never came to work, and the majority of whose absenteeism was completely inexcusable. Similarly, in Fourth Division Award 4985, the claimant had accumulated a considerable number of absences before he even earned any contractual sick leave.

Most importantly, in both awards on which Carrier relies, the Claimants' attendance records were judged against an absolute standard of excessiveness. Their absenteeism records were clearly unreasonable and any employee should have been on notice that such absenteeism was excessive and rendered him subject to discipline. In the instant case, however, Carrier makes no argument that Claimant's absenteeism was excessive when measured against an absolute standard of reasonableness. Rather, the sole basis for Carrier's judgment that Claimant's absenteeism was excessive was a comparison to the shop average. Had the shop average been higher, Claimant would not have been charged.

Claimant could not have known the shop average at the time he took his contractual sick days. Thus, at the time he exercised a contractual benefit, Claimant had no way of knowing that by so doing he would be jeopardizing his disciplinary record. Carrier argues that the provision for paid sick days did not entitle Claimant to take those days off, We agree but only to a limited extent -- the provision for paid sick days did not entitle Claimant to take the days off at will or on a whim. However, they did entitle him to days off with pay when he was legitimately ill and disabled from working. Carrier does not challenge the legitimacy of Claimant's claims to have been ill on the days in question.

Given the way Carrier's attendance control policy operates, an employee who takes a contractually entitled sick leave day does so completely at his own risk that, at a later date, Carrier will determine that Claimant's absences exceeded the shop average and will charge the employee with excessive absenteeism. Under these circumstances, we find persuasive those awards which hold that a carrier may not penalize an employee for exercising a contractual right and, therefore, may not base a charge of excessive absenteeism on properly used contractual sick days. See, e.g., SBA 1056, Award No. 10; Special Board of Arbitration (CSX and TCU), Case No. 1; SBA 958, Award Nos. 54, 55.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 25th day of August 1999.

Carrier Members' Dissent
to Awards 13445, 13446, 13447, 13448,
Dockets 13291, 13296, 13305, 13307
Referee Malin

Claimants, in each of these Dockets, has an absenteeism rate that was substantially above that for his shop (ranging from 41 to 200% above the shop average). Carrier's method of calculating absences was in existence prior to the negotiation of Rule 16. Claimants had been counseled and, when that didn't have an effect, they were issued minor discipline. There was and is nothing improper with the Carrier taking steps to counsel its employees. While the Majority does acknowledge that

> "[T] here are numerous Awards which hold that a Carrier may discipline employees for excessive absenteeism, even though the absences may be for legitimate reasons"

it finds here that Carrier's standard is now unwarranted. One can only question why being absent more than four times the average for his shop does not merit the Carrier's action. Further, each of these individuals had a prior history of absenteeism.

Rule 16 provided for compensation for sick days. As Carrier noted this benefit did not change the basis on which it had historically considered absenteeism. Yet, these decisions conclude that absenteeism doesn't result when compensation is allowed. You are still absent and work is not being performed.

For the same reasons expressed in the Carrier Members' Dissents to Awards 13402, 13403, 12420, 13421 and 13426, we voice our objection to the disposition made in these cases.

We Dissent.

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik