NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 990

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THE LONG ISLAND RAILROAD COMPANY	:	Award No. 30 Re: L. Havens
"Carrier"	:	
- and -	:	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS	:	
"Organization	:	

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APPEARANCES

For the Carrier
Donna Simonie, Esq., Director of Labor Relations
John J. Tinghino, Labor Relations Representative

For the Organization
Robert M. Evers, BLE General Chairman
Robert L. Willis, BLE Committeeman
George H. Resch, BLE Secretary-Treasurer

BEFORE: HOWARD C. EDELMAN, ESQ., NEUTRAL MEMBER
S.M. DRAYZEN, CARRIER MEMBER
ROBERT M. EVERS, ORGANIZATION MEMBER

BACKGROUND

Engineer L. Havens was assessed a five day suspension in connection with lost guarantees on December 23, 1996; May 26, 1997; June 7, 1997; and June 29, 1997. The Organization timely submitted a claim on behalf of Engineer L. Havens. The Carrier rejected it. Thereafter, the claim was appealed to the Carrier's highest appeal officer and, subsequently, to this Board.

A hearing was held before us on May 20, 1999. At its conclusion, the record was closed. These findings follow.

QUESTION AT ISSUE

As indicated in the Organization's Statement of Claim, the issue to be decided is:

> Did the Long Island Rail Road violate the Brotherhood of Locomotive Engineer's Collective Bargaining Agreement when it implemented an "Absence Control Policy for Represented Employees" for purposes of progressive discipline?
>
> Did the Long Island Rail Road violate the Brotherhood of Locomotive Engineer's Collective Bargaining Agreement when it imposed five (5) days suspension on Engineer L.D. Havens in connection with:
>
> **"violation of the Absence Control Policy to wit: You had Lost Guarantees on 12/23/96, 5/26/97, 6/7/97 and 6/29/97."**

POSITIONS OF THE PARTIES

The Carrier contends that it properly suspended Engineer L. Havens for five (5) days in connection with four lost guarantees. It did so, it points out, as a result of an Absence Control Policy which it implemented on December 1, 1995. That policy, the Carrier acknowledges, establishes a point system whereby absences are assigned various point designations. As certain thresholds are reached, employees are progressively disciplined, the Carrier points out. Since Engineer Havens accumulated 36 points during the period in question, he was properly assess a five day suspension pursuant to the ACP, the Carrier insists.

Moreover, the Carrier argues that the policy itself is fair and reasonable. It notes that the policy has been in effect for approximately three and one-half years for all represented employees on the property. No other organization has challenged the ACP, the Carrier points out. Hence, it suggests, the BLE is now estopped under the doctrine of laches from asserting this claim.

In addition, the Carrier contends that numerous Public Law Boards have upheld similar absence control policies. For example, it notes that in PLB No. 3625, Award No. 97, the Board found:

> We have held, as have a long line of Awards in this industry, that the Carrier may establish, absent contractual restriction, reasonable policies with

> respect to the employee attendance at the workplace...Moreover, and here we again follow a long line of arbitral decisions in this industry which have held that, in determining whether absenteeism is no longer acceptable, the Carrier may properly consider all types of absences regardless of duration or excusability.

Consequently, it asserts, precedent demonstrates that it properly instituted the ACP in question.

Furthermore, the Carrier submits that its implementation of the ACP did not violate any provision of the BLE Collective Bargaining Agreement. It acknowledges that Article 3(c) of the Agreement sets forth the circumstances under which guarantees may be forfeited. However, it insists, Article 3(c) and Article 29 are mutually exclusive. Thus, the Carrier contends, it is free to progressively discipline employees in addition to the penalties imposed pursuant to Article 3(c).

The Carrier also acknowledges that Article 29(a) requires an employee to be charged within fifteen (15) days after the offense became known to the Carrier and that Engineer Havens was charged more than fifteen (15) days after June 29, 1997, the last day of the four incidents involved in this dispute. However, it points out, Article 29(a) requires that charges be brought within fifteen (15) days "unless otherwise provided..." In the Carrier's words, this phrase affords it "a clear

and unambiguous right to apply discipline in a manner which conformed to the dictates of the Absence Control Policy." Carrier's Submission, p. 11. Thus, it insists, it did not violate the Collective Bargaining Agreement by charging Claimant when it did.

For these reasons, the Carrier submits that the ACP and its application to Engineer L. Havens was proper. Accordingly, it asks that the Organization's claim be denied.

The Organization asserts that the Carrier improperly implemented the ACP. It insists that imposing discipline on a "point system" basis constitutes a departure from long established past practice and violates the Federal Railway Act. Hence, the Organization submits, the Carrier was without legal authority to institute this policy.

In this context, the Organization maintains that Article 3 sets forth the circumstances under which guarantees may be lost. To impose discipline in addition to lost guarantees is to place its members in "double jeopardy," the Organization urges.

In addition, the Organization argues, Article 29(a) requires that charges be brought within fifteen (15) days after Carrier knew of the event giving rise to them. Engineer Havens was charged far more than fifteen (15) days after the last incident involving a lost guarantee,

the Organization insists. Therefore, its claim must be sustained on this basis alone, it urges.

Finally, the Organization alleges that the Carrier cannot be permitted to implement an ACP which, in its view, removes any consideration of individual or mitigating circumstances. Accordingly, and for these and related reasons, it asks that its claim be upheld and that Engineer Havens be made whole for five (5) days' pay.

DISCUSSION AND FINDINGS

Upon review of the record, the undersigned Neutral Member is convinced that the Organization's claim must be sustained. This determination is based upon an analysis of Article 29(a) and its relationship to the facts of this case.

Article 29(a) encompasses the procedure to be utilized when discipline is to be imposed. It provides, in relevant part, that the disciplinary investigation "...shall be held within fifteen (15) calendar days after the occurrence of the offense...or within fifteen (15) calendar days after the commission of the offense becomes known to the Carrier, except as otherwise provided."

The charges in this case allege lost guarantees on December 23, 1996; May 26, 1997; June 7, 1997 and June 29, 1997. Claimant was not charged until August 12, 1997

or over one month after the last offense. Clearly, this time period exceeds the fifteen day requirement set forth in Article 29(a).

Moreover, there is no doubt that Carrier was aware of Claimant's lost guarantee on June 29, 1997. In this regard, the trial transcript indicates:

R.M.Evers

Q. When was Carrier made aware, or did they know, that Mr. Havens wasn't paid the guarantees on 12/23/96, 5/26/97, 6/7/97 and 6/29/97?

R.D. Bendick

A. Were they aware that he was not paid?

R.M. Evers

Q. When were they aware that he committed these alleged offenses or violations of the Absence Control Policy?

R.D. Bendick

A. I would assume the same day, Mr. Havens was called for a job or did not work that day.

R.M. Evers

Q. Is there any other documentation that crew management services uses to establish whether a guarantee was lost in any particular given day, or for that matter, a guarantee paid for any particular date in question?

R.D. Bendick

A. There are numerous documents. There is off-duty report, your call sheet, you have your lost guarantee report.

R.M. Evers

Q. So Carrier had documentation on 12/23/96, 5/26/97, 6/7/97 and 6/29/97 that Mr. Havens lost the guarantee?

R.D. Bendick

A. That's correct. (pp 6-7)

This record conclusively establishes that Carrier knew of Claimant's lost guarantees on June 29, 1997; yet it did not charge him until August 12, 1997, in clear violation of the fifteen (15) day time limit set forth in Article 29(a).

The Board notes Carrier's contention that the phrase "except as otherwise provided," permitted it to charge Claimant when it did. We do not agree.

The ACP does not contain any other time period during which employees may be charged after their offense became known to the Carrier. Thus, even if, "as otherwise provided" were interpreted to mean time limits greater than set forth in Article 29(a), there is no place where such increased time limits are set forth.

Moreover, this Board has grave doubt as to the ability of the Carrier to unilaterally adopt a procedure which contravenes the clear language of Article 29(a). Since that provision was bilaterally negotiated, the unilateral implementation of a time limit which exceeds those set forth therein is unlikely to withstand scrutiny, we are convinced.

The Carrier also asserted that its departmental time keeping records are reviewed monthly by its Information Services Department which generates a list of employees who violated the ACP. See Carrier's submission pp 11-12. This may be so. However, that procedure does not rise to the level of "except as otherwise provided." Obviously, a procedure which violates the clear language of the Collective Bargaining Agreement must fail. Thus, the Carrier's reliance upon its internal processes is misplaced, we find

This finding should not be misinterpreted. We are not invalidating the entire ACP despite the Organization's contention that we should do so. Indeed, we are expressing no opinion as to whether its substantive provisions do or do not violate the Collective Bargaining Agreement. Instead, we conclude that by charging Claimant more than fifteen (15) days after the last offense became known to the Carrier, it violated the clear language of Article 29(a). Accordingly, and for these reasons only, the Organization's claim must be sustained.

FINDINGS

The Special Board of Adjustment No. 990, upon the whole record and all of the evidence, finds and holds: That the Carrier and Employee Organization involved in this dispute are respectively Carrier and Employee Organization within the meaning of the Railway Labor Act, as approved June 21, 1934; that the Special Board of Adjustment No. 990 has jurisdiction of the dispute involved herein; and, that the claim will be sustained.

AWARD

Claim sustained.

Howard C. Edelman
HOWARD C. EDELMAN, CHAIRMAN

August 6, 1999
DATE

CONCUR ✓

DISSENT _____

Robertha Evans

Employee Organization Member

7-21-99
DATE

CONCUR _____

DISSENT ✓

_____ 8/3/99

Carrier Member DATE