

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13577

Docket No. 13424

01-2-99-2-17

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the Committee of the Union that:

- 1. That the Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13 when they arbitrarily assessed a five (5) working day suspension to Carman Richard A. Dixon as a result of an investigation held on February 18, 1998.**
- 2. That, accordingly, the Springfield Terminal Railway company be ordered to compensate Carman Richard A. Dixon in the amount of eight (8) hours pay for each workday he was withheld from service commencing March 23, 1998 through and including March 27, 1998.”**

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.

Claimant R. A. Dixon held a position as a Carman at the Carrier's Car Repair Facility, Waterville, Maine, when this dispute arose. The record reveals that he missed 64.25 hours of work in calendar year 1997. The average time lost for all personnel in his shop during that period was 44.75 hours.¹ From the Carrier's standpoint, the Claimant's rate of absenteeism in 1997 was a continuation of an established pattern of poor attendance. Prior to the January 22, 1998 issuance of Notice of Hearing in this case he had been counseled once, received a written cautionary letter in January 1996 for attendance in 1995 and been issued a written reprimand in 1997 for unsatisfactory attendance in 1996. A more emphatic message regarding the need for immediate improvement was required, and the five-day suspension in that context was fully warranted. That action is now before the Board for consideration.

The Organization advances several arguments in support of its challenge. First, it argues that so long as the employee's absence is regular in all respects - he has marked off properly, has a doctor's note or valid excuse and there is no issue as to the legitimacy of the illness - it should not be counted in the Company's tally. Second, in this instance the Carrier has failed to give account to the fact that much of the time the Claimant missed was attributable to a serious respiratory infection, complicated by his diabetes. Third, some of the time missed was compensable as contractual sick days, and therefore should not be included in determining excessive absences. Fourth, the Organization asserts that the Claimant's diabetes is a condition covered by the American with Disabilities Act and accordingly should not be referred to in compiling his attendance record. And lastly, several procedural arguments are put forth, including the Carrier's failure to provide shop average information and untimely issuance of the Notice of Hearing.

The Claimant is a 56-year-old, 31-year employee. It is undisputed that in the 11 months from January through November 1997, he missed 8.25 hours as a result of illness. Charging Officer Berkshire concedes that prior to the one instance of illness in December of that year, when the Claimant missed 56 hours as a result of an acute respiratory illness, his sick leave usage was well below the Shop Average of 38.75 hours

¹ Vacation and personal leave days are excluded in both instances.

for that period. It was thus his attendance in December that brought him into the Carrier's crosshairs.

The record appears to suggest that beyond published Rule GR-N, the Carrier maintains an informal Absenteeism Policy.² Waterville Car Shop Manager S. C. Berkshire described its application to the Claimant in this instance as follows:

"The shop average for lost time for 1997 for the year was forty-four and three quarter hours. This time lost of Mr. Dixon's does not include vacations or personal leave days or any authorized time by the Carrier. Mr. Dixon's missed time was more than the shop average and was considered excessive and that's why we're here today."

Notwithstanding the above description, it is reasonably clear on this record that reliance on Shop Average may not be the Carrier's sole standard or framework for evaluating "excessive" absences; it also appears to make allowances for individual circumstances in administering its attendance control program. Support for that is found in the reply of Mr. Berkshire to the question, "How do you determine what's excessive?"

"Each individual is looked at as a group for the shop average and then on an individual basis. If an individual is sick for one week straight and comes in with a doctor's note, that is looked at in [sic] a one instance item. If the employee was sick for 10 days throughout the whole year and every day was a Friday, or every day was a Monday, or every day was a Wednesday, or if there was a pattern, even if there wasn't a pattern, just that the gentleman missed time every month, he would be addressed more than the person that just spiked. A spiked person would be looked at if this all happened within one time frame because of this reason. The person that missed it over an expanded period of time would be addressed more than the person that just had a spike."

Against that background, the Board examines the Claimant's defense. It must first reject - as have numerous prior Boards - the Organization's assertion that the

² Carrier Rule GR-N provides in part: "Employees must report for duty at the prescribed place and time . . . Employees must not absent themselves from duty . . ."

Carrier should not be allowed to count legitimate or compensated absences in determining excessive absences. Nor does jurisdiction lie in this forum of its ADA arguments. Nevertheless, for the reasons stated below, we find that the Carrier has failed to show that Claimant Dixon was excessively absent, and so conclude that its decision to suspend him for five days was not justified.

If, as the Organization invites the Board to find, the real evil at play here were the Carrier's "hard line of Shop Average," the blandishments to give full weight to those arguments might be strong. As Berkshire's testimony indicates, however, it is not entirely clear that the Carrier rigidly subscribed to such a test in determining excessive absenteeism. Whether it did or did not, it is clear that in this instance it did not apply such a guideline in a uniform or consistent manner. Some employees have exceeded the shop average but not been cautioned or disciplined. The Organization's proof establishes that Carman Smith missed 88 hours in the same time frame as the Claimant, double the Shop Average, without being disciplined or even receiving a cautionary memo. Carman Dostie received notices in April 1996 and January 1997. In May 1997, he received a notice citing him for use of 48.5 hours through the first four months of 1997 against a Shop Average of 14 hours for unsatisfactory attendance. But he was never disciplined. If "Shop Average" was the Rule, its application as to Claimant Dixon was incongruous and arbitrary.

Having concluded that the Carrier has plainly not applied a strict Average Shop Rule with uniformity, we next look at whether it took into consideration individual or mitigating circumstances in the Claimant's case, as Berkshire's testimony indicates it normally does. The Organization argues that the Claimant was a satisfactory employee in 1997 until a single illness spiked his missed time. The Board agrees. The record is devoid of evidence demonstrating that the fact of a one-time spike was ever considered. The Claimant provided the Carrier with notes from his physician to both confirm and explain his illness - acute respiratory illness coupled with diabetes - and to keep it updated on his health status. If, as Mr. Berkshire indicated, a one-time spike is viewed as one incident and relatively less serious than the same missed time spread out over time, the record shows no evidence that a one-time spike was ever considered or that policy ever applied to the Claimant.

Any absence works a hardship on the Carrier, and frequently on co-workers, and the Carrier's Rule GR-N memorializes that principle. But whether the Carrier chose to adopt a rigid or a more flexible policy to further its legitimate interests here, it has

an obligation to enforce its Rule in a generally consistent manner. The Organization here has established that the Claimant was treated differently than his co-workers under circumstances that are facially indistinct from his own. The Carrier's failure to plausibly explain the basis for the significant variations, in our judgment, translates to arbitrary action.

For the reasons stated above, the claim must be sustained.

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 17th day of January, 2001.