Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13614
Docket No. 13512
01-2-99-2-117

The Second Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Brotherhood 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 violated the terms of our current agreement, in particular Rule 13.1 when they arbitrarily assessed Wilfred L. Bennett with a formal reprimand as a result as a result (sic) of an investigation held on December 9, 1998.

2. That accordingly, the Springfield Terminal Railway Company be ordered to remove the discipline from the file and record of Carman Wilfred L. Bennett, including all correspondence relative to this investigation."

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.

The Claimant holds a regularly assigned bid position at the Carrier's Waterville Shop in Waterville, Maine. On November 20, 1998, the Carrier notified the Claimant to attend an Investigation on the charge that he had been excessively absent during the period January 1, 1998 through October 31, 1998. The Hearing took place on December 9, 1998. The Claimant was subsequently notified that he had been found guilty as charged and was issued a formal reprimand.

The Carrier argues that the record fully supports the imposition of discipline. It points to the evidence at Hearing which established that the Claimant's record of absenteeism was 84% higher than the shop average during the first ten months in 1998. Compared to the shop average of 33 and one quarter hours of lost work time, the Claimant missed 61 hours. The Carrier contends that such a record is clearly excessive. It submits that it is entitled to take into account even legitimate absences and contractually authorized sick days in calculating an employee's absenteeism rate. Moreover, the Carrier argues, the record shows that the Claimant had previously been given opportunities to correct his excessive absenteeism. When he did not do so, the Carrier maintains that it was fully justified in issuing a reprimand.

The Organization defends this claim on various grounds but there is one point that determines the outcome here. In the Organization's view, the Claimant's contractually paid sick days should not have been included or counted in computing his absenteeism rate. We agree.

Under Rule 16, negotiated and agreed upon by the parties, employees are provided compensation for absence due to legitimate illness up to a maximum of four days per year, based on seniority. By including contractually authorized sick days in its absenteeism rate, the Carrier's utilization of the "shop average" collides with Rule 16. Where the Agreement and the Carrier's attendance policy address the topic of sick days in different ways, one must yield to the other. Since the policy is inconsistent with the Agreement, the Board must enforce the Agreement.

The Carrier's position does not directly address this inconsistency. Instead, it relies on a number of earlier cases which cite the general principle that absenteeism, whether legitimate or not, can become excessive. If an employee cannot comply with management's legitimate expectations regarding attendance, then discipline is fully warranted, it argues. That principle is based on the notion that an employee may develop an absenteeism history that effectively renders him unable to provide full-time

employment. When that occurs, and all leave time and authorized absences have been exhausted, separation from employment is recognized and upheld not as a punitive action but because he simply cannot come to work on a regular basis, no matter what the reason.

We have no quarrel with that general proposition, as far as it goes. However, the argument raised by the Organization brings into sharper focus what may be considered in determining excessive absenteeism and the relationship between an attendance policy and an agreed upon scheme for sick leave compensation. Just as employees are not penalized under the "shop average" for taking contractually provided vacation days, they should similarly not be disciplined for exercising their contractual sick leave benefit. In both instances' work is not being performed by the employee. In neither instance should an employee be disciplined for exercising a contractual right. Recent Awards of this Board have sustained claims originating on this property where employees have been disciplined under the Carrier's "shop average" absenteeism policy which included contractual sick days. The thinking of the Board on this point is perhaps best summarized in Second Division Award 13445, where it is stated:

> ". . . . 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 doing so 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.
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> Given the way the 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. . ."

Accord, Second Division Awards 13497, 13502.

Concluding as we do that the foregoing Awards are persuasive, we have no alternative but to find that the Carrier has failed to meet its burden of proving the charges against the Claimant. The record as presented does not permit us to parse through and determine whether the Claimant's absenteeism would still be considered excessive if the shop average omitted consideration of contractual sick days. Accordingly, we have no alternative but to sustain the claim.

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 4th day of June, 2001.

Carrier Members' Dissent
to Awards 13614, 13615 (Dockets 13512, 13513)
Referee Kenis

Claimants Bennet and Delano had absenteeism rates 84 and 31% respectively, above and over the average at the Waterville shop between January and October 1998. Such excessive absenteeism is not disputed. Claimants were absent on dates that their services were needed at the shop. Unlike vacation, which is planned in advance, these absences were not. In the case of Mr. Bennett he had used FMLA before without causing a problem and could have continued to do so without running afoul of the absenteeism policy. It was acknowledged on the property that there were ways and means available to him to avoid having his absences counted against him but he failed to avail himself of that action. Each individual was issued a formal reprimand for his absenteeism.

The Majority states, "By including contractually authorized sick days in its absenteeism rate, the Carrier's utilization of the 'shop average' collides with Rule 16," and cites Second Division Award 13445 that such is improper. In our Dissent to that decision we noted that:

> "...this benefit did not change the basis on which it (the Carrier) had historically considered absenteeism....You are still absent and work is not being performed."

The difficulty with these decisions is the apparent presumption that it is OK to just absent yourself when your services are expected. And it is also OK when there are other means available but it is too much trouble to follow the rules.

We Dissent.

P V Varga
Paul V. Varga

Martin Fingerhut
Martin W. Fingerhut

Michael C. Lesnik
Michael C. Lesnik