

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13800

Docket No. 13680

04-2-02-2-41

The Second Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Kansas City Southern Railway Company)

STATEMENT OF CLAIM:

- "1. That the Kansas City Southern Railway company erred and violated the Controlling Agreement, particularly, but not limited to, Rules 15 and 29, when Shreveport, Louisiana Electrician C. K. McCormick was unjustly and arbitrarily assessed a five (5) day suspension from the services of the Kansas City Southern Railway Company, beginning December 9, 2001, and ending December 13, 2002, following an investigation held on November 20, 2001.**
- 2. That accordingly, the Kansas City Southern Railway Company make whole Electrician McCormick as follows:**
 - a. Compensate him for all wages lost at the prevailing rate of pay of electricians and all applicable overtime with interest at the judicial rate;**
 - b. Make him whole for any qualifying days towards vacation rights;**
 - c. Make him whole for any loss of health and welfare and insurance benefits;**

- d. Make him whole for any and all other benefits including Railroad Retirement and Unemployment Insurance;
- e. Make him whole for any and all other benefits that he would have earned during the time withheld from, service, and;
- f. Any record of the arbitrary and unjust disciplinary action be expunged from his personal record."

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 was regularly employed as an Electrician by the Carrier at its Shreveport Diesel Shop, Shreveport, Louisiana.

By letter dated October 26, 2001, the Claimant was directed to attend a formal Investigation to determine whether he was excessively absent during the period of January 1, 2001 thru October 18, 2001.

Following a Hearing held on November 20, 2001, the Carrier concluded that the Claimant was guilty of violating Rules 1.6, 1.13 and 1.15. He was assessed a five-day suspension.

The Carrier argues that the Claimant has a poor attendance record, which is not denied. It maintains that the mere act of calling in and notifying management of an absence does not equate to permission to miss work. Furthermore, it contends, chronic absences, for any reason, reach a point where the Carrier has the right to conclude the employee is not suited for railroad work.

It asserts the Claimant was counseled twice concerning his attendance. It submits when his attendance did not improve, he was charged and after an Investigation was assessed a five-day suspension.

It discounts the Organization's assertion that Rule 15 allows an employee to be absent without permission or proper notification. Besides it argues, the Claimant was not unavoidably kept from work and did not notify management promptly of his absence. Furthermore, it points out that the Claimant's absences were over eight times the Shop average. It submits the Organization failed to prevent any evidence to demonstrate the standard used by the Carrier to determine excessive absenteeism was arbitrary, capricious or an abuse of managerial discretion. It rejects any assertion that the Claimant was ignorant of the Rules. It reiterates that he was previously counseled. Regardless, it says, ignorance is not a mitigating factor.

Moreover, the Carrier cites Board Awards that support its contention that notifying the Carrier of an absence does not equate to permission to be absent. It contends that even if an employee's absences are for good reason, if they become too frequent, they are deemed excessive.

The Carrier argues an inherent management right to create a "no fault" absentee policy. They cite Public Law Board Awards which hold that both legitimate and unexcused absences once determined excessive can be the basis of discipline.

Finally, the Carrier dismisses the Organization's contention that there were procedural errors in the Carrier's case.

The Organization claims the Carrier committed a fatal procedural error by not citing specific dates or circumstances which accounted to the Claimant's alleged

excessive absenteeism. Moreover, it contends the Claimant was never absent without authority since he was absent because of sickness or other unavoidable reasons recognized under the FMLA.

Furthermore, the Organization argues the Claimant was denied a fair Investigation when the Carrier denied his request and that of his Representative for pertinent information. It says this as well as the absence of specific charges violated Rule 29 which guarantees a fair and impartial Investigation. It says while the charge letter cited excessive absenteeism, specific Rules were cited at the Hearing. It argues that none of the cited Rules has anything to do with excessive absenteeism.

Therefore, the Organization maintains the Carrier failed to meet its burden of proof. It cites numerous Awards where claims were sustained when the Carrier failed to prove its allegations.

The Board does concur with the Carrier that it has a right to establish a "no fault" absentee policy. As in many companies, it arrived at standards of attendance or absenteeism by computing the average of all employees at the facility. The advantage of this procedure is that it bases its policy on the average attendance of employees who work at the same facility and are subject to the same environment and general working conditions.

It is clear from the record that the Claimant was counseled several times about his absenteeism. From the first time he was counseled until the current disciplinary action, he was made aware of the attendance requirements as well as the position of the Carrier concerning his personal attendance. He was told that he was expected to meet the average attendance of his co-workers. Quite simply, he failed to comply.

It may be true that some of the Claimant's absences were for legitimate reasons. However, it is recognized that even legitimate illnesses can be used to determine excessive absenteeism. Moreover, the Claimant failed to comply with other requirements such as applying for a leave of absence and calling in to the right supervisors.

In addition, the Board believes the Carrier utilized progressive discipline which was appropriate in cases of absenteeism. He was first counseled several times and then assessed a five-day suspension. The discipline assessed was reasonable.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 27th day of April 2004.