

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13502

Docket No. 13336

00-2-98-2-22

The Second Division consisted of the regular members and in addition Referee Margo R. Newman 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 Company violated the terms of our current agreement, in particular Rule 13 when they arbitrarily assessed Carman Paul R. Camire with a formal reprimand as a result of an investigation held on March 26, 1997.**
- (2) That, accordingly, the Springfield Terminal Railway Company be ordered to remove the reprimand from the file of Carman Paul R. Camire. Furthermore, to compensate him for any lost wages as a result of this hearing as provided by our agreement.”**

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.

As a result of an Investigation held on March 26, 1997, the Claimant was issued a Formal Reprimand for excessive absenteeism highlighted by 59.25 hours missed from January 1, 1996 through October 31, 1996. The basis for the Carrier's charge was a comparison of the Claimant's absenteeism with the shop average of the ten employees at Lowell, Massachusetts, which, for the comparable period of time was calculated at 28.83 hours. Absences as a result of vacation or personal days are not included in the shop average.

Car Maintenance Manager Olson testified that he spoke to the Claimant on two prior occasions about his absenteeism, once in December, 1994 and once in December, 1995, and that he issued the Claimant a formal letter of caution on February 28, 1996. Olson stated that in deciding when to issue hearing notices, he uses as a baseline the shop average, which includes 9 Carmen and one clerical employee, as well as when he feels a hearing is necessitated. He noted that due to the small work force, absence affects employee workload.

The Claimant disputed Olson's assertion that shop employees' know that paid sick leave days are counted toward lost time. The record reflects that 40 hours of his charged absences were paid as sick leave under Rule 16 of the Agreement, implemented on December 14, 1995. The Claimant testified that he has personal problems that he has no control over, which accounts for his absences, and that he was made aware of the Employee Assistance Program. The Carrier did not dispute the legitimacy of the Claimant's absences.

The Carrier argues that it is entitled to take into account even legitimate absences in proving an excessive absenteeism record, and notes that by agreeing to Rule 16 as a benefit (not an entitlement) it did not give up any right to rely upon paid sick leave absences in considering an employee's absenteeism record. The Carrier notes that the Claimant's absenteeism record was more than twice that of the shop average, which it contends is an acceptable method of measuring absenteeism, relying on Public Law Board No. 5805, Award 4. The Carrier asserts that since the Claimant had been counseled about his absenteeism record in the past, the minor discipline imposed was reasonable.

The Organization argues that the Claimant should not be disciplined for exercising a contractual benefit, and alleges that the shop average used here as a comparison was an improper method of determining excessive absenteeism, citing on

property Second Division Awards 13445, 13446, 13447, 13448. The Organization notes that the Claimant's absenteeism rate was only 2.7% of his scheduled work days or only 1% if his sick leave was deleted from consideration, which it contends is not excessive.

A careful review of the record reveals that by adopting Rule 16 the parties agreed upon a sick leave scheme to compensate employees a percentage of their regular pay for absence due to a legitimate illness up to a maximum of four days per year (based upon seniority), which employees could "bank" up to a total of 20 days in future calendar years. This is not the first dispute of this kind on the property. An analysis of the relationship between Rule 16 and the calculation of excessive absenteeism, using an unpublished shop average on this property was dealt with by the Board extensively in Second Division Awards 13445, 13446, 13447 and 13448. In Second Division Award 13445, it was noted:

"..... 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.

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 No. 1056, Award No. 10; Special Board of Arbitration (CSX and TCU), Case No. 1; SBA No. 958, Award No. 54; SBA No. 958, Award No. 55."

The Board noted in the above-quoted award, that many of the cases holding that the Carrier is entitled to discipline employees for excessive absenteeism even if the absences were for legitimate reasons, did not present fact situations where the days off were contractually provided sick days or measured an employee's absenteeism against an absolute standard of reasonableness, rather than the type of shop average used by the Carrier herein. Even considering the Carrier's dissent to these awards, we are of the opinion that the Board's rationale is equally applicable herein, and requires a sustaining award. See Second Division Award 13497.

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 April, 2000.