Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13690
Docket No. 13540
02-2-00-2-16

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. The Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13, when they arbitrarily assessed the record of Paul R. Camire with a five (5) working day suspension as a result of an investigation held on May 11, 1999.

2. That, accordingly, the Springfield Terminal Railway Company be ordered to compensate Carman Paul R. Camire in the amount of eight (8) hours pay for each workday he was withheld from service commencing June 14, 1999 through and including June 18, 1999. Also, any reference to this discipline should be removed from his personal record and file."

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.

After Investigation, the Claimant received a five working day suspension by letter dated June 4, 1999 for excessive absenteeism "highlighted by the 86.83 hours missed from May 1, 1998 through April 16, 1999."

The record shows that the Claimant marked off on June 1, 1998 (8 hours); August 10, 1998 (1 hour); September 9, 1998 (20 minutes); October 5, 1998 (8 hours); October 26, 1998 (1.5 hours); November 18, 1998 (5 hours and 45 minutes); December 7, 1998 (6 hours and 15 minutes); January 11, 1999 (8 hours); January 12, 1999 (8 hours); February 22, 1999 (8 hours); April 12, 1999 (8 hours); April 13, 1999 (8 hours); April 15, 1999 (8 hours) and April 16, 1999 (8 hours) - computed by the Carrier to be 86.83 hours.

The parties' focus on the "shop average" - here, calculated as 43.11 missed hours per employee - thereby placing the Claimant at an absence rate of twice as much as the other employees. That focus really misses the point in this case. There are problems blindly using a shop average to determine whether an employee is excessively absent. How is the Claimant to know when he takes off that at some point in the future the absence history of other employees will show that his absence pattern is greater than the shop average? What if the other employees show an average of one day's absence for the year and the Claimant takes off a mere two days for that year? Should the Claimant be disciplined for excessive absenteeism because his absence rate was double the shop average? Obviously not. See e.g., Second Division Awards 13502, 13020 between the parties (rejecting reliance upon the shop average). But compare, Public Law Board 6073, Award 3 between the parties (approving reasonable use of a shop average). On the other hand, what if all of the employees had absence problems and the shop average was 800 missed hours per year and the Claimant only had 750 missed hours? Could not the Carrier also discipline the Claimant for excessive absenteeism? Obviously it could. Therefore, the concept of "shop average" does not really help in deciding these cases.

These must be case-by-case calls using the well established standard in discipline cases that the burden is on the Carrier to demonstrate substantial evidence to support its conclusion that the Claimant engaged in misconduct and to further show that the amount of discipline was not arbitrary.

In this case, substantial evidence supports the Carrier's conclusion that, for the period in question, the Claimant's absence record demonstrated excessive absenteeism. First, the Claimant missed a total of 86.83 hours during the one year period - i.e., over two weeks of missed time (on the basis of a 40 hour week). Second, the Claimant's absences were numerous - the absences occurred on 14 separate days. Third, the Claimant's absences were reoccurring and scattered throughout nine separate months during the period in dispute (June, August, September, October, November, December, January, February and April). That is enough for the Carrier to meet its substantial evidence burden for us to conclude that the Carrier has shown that the Claimant's history of absences was excessive.

Nor do we find the imposition of a five day suspension to be arbitrary. The record shows that the Claimant had been previously warned about his absenteeism, and no improvement was made. A five day suspension falls therefore within the realm of reasonable discipline for the demonstrated misconduct.

The Organization's arguments do not change the result. First, the Organization attacks the Carrier's use of the shop average. We have not considered the shop average in deciding this particular case. Second, the Organization asserts that the Carrier improperly used Family Medical Leave Act absences to discipline the Claimant. The record does not support that assertion. From the record, it appears that the Claimant was excused from overtime for FMLA reasons to take care of his wife. The absences in dispute were not from overtime for the Claimant to take care of his wife. Third, the Organization argues that the Claimant could never be disciplined for using a negotiated benefit - here, sick days. Sick days are not scheduled vacation or personal leave days, but are days to be used for unanticipated (and thus unexcused) sickness. The Agreement while permitting compensation for a certain number of sick days per year (here, under Rule 16.1, four days for the Claimant based upon his years of service with the ability to bank an additional 20 days per Rule 16.2) does not prohibit the Carrier from disciplining employees who are excessive in their use of sick days (here, over eight) where those sick days are used in a random and sporadic pattern with a large number of separate instances. Again, these are case-by-case calls. Finally, we find no procedural errors which could justify overturning the discipline in this case.

On the basis of the above, the claim will be denied.

## 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 24th day of April, 2002.