Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32400
Docket No. TD-32792
97-3-96-3-114

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Pursuant to Rule 19(c), this is to appeal the March 24, 1995 decision of Hearing Officer, R. A. Herz and subsequent sustaining of this decision on May 16, 1995 by R. F. Palmer, Director-Labor Relations. Wherein they advised Train Dispatcher C. J. McCaughey that he was assessed the following excessive discipline, a three day deferred suspension and the loss of pay for eight sick days as a result of an investigation held on February 10, 1995."

FINDINGS:

The Third 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 charged with returning from an "alleged illness" and failing "to comply with the memo issued requiring "a 'doctor's note' upon return from illness"

and advising "your Supervisor that you will not provide a note." The facts are not in dispute. The Manager of Operations issued a memo dated August 10, 1994 due to significant problems. That memo stated that:

> "Anyone who marks off sick and is off more than four (4) days must bring in a doctor's note to verify the reason for their absence. Failure to produce a doctor's note could result in loss of pay."

Nor is there any dispute that as the Local Chairman, the Claimant discussed the memo and took no exception to it. The transcript indicates that up until this instant case, the employees had complied with its application.

On January 19, 1995 and for a total of eight consecutive workdays, the record documents the Claimant's absence from work. Upon return, the Claimant did not bring a doctor's note.

The Organization makes four key arguments in the on-property record. First, it maintains that the Carrier prejudged the Claimant guilty in that it called his absence from work an "alleged" illness. The Organization argues that the Claimant was assumed to have made up his illness, while in fact he was ill along with his whole family. Second, the Organization argues that the Carrier failed to prove the charges. Not only has the Carrier failed to prove that the Claimant was not ill, but it charged him with refusing to comply with a Supervisor's instructions. The Carrier's charge was that the Claimant told his Supervisor that "you will not provide a note." The Organization maintains that there is absolutely no proof of this in the record. Third, the Organization argues that the Claimant was not bound by Section II(f) of the August 22, 1992 Sick Leave Agreement and, therefore, was disciplined for an Agreement Rule which does not pertain. Lastly, the Organization also protests the discipline as excessive in that the Carrier withdrew the eight days pay for actual illness, in addition to the assessed three days of deferred suspension.

Carrier's position in this dispute is that it did indeed prove the charges against the Claimant. The Carrier asserts that the Claimant was properly charged and that the record sustains its position. While it asserts that the sick leave benefits of Section II (f) are applicable, it argues that the crux of this dispute has nothing to do with the sick leave provision, but with the failure of the Claimant to abide by his Supervisor's instructions to bring in a doctor's note. The Claimant failed to follow the instructions

and, therefore, was guilty of the charge of failing to comply. The Carrier notes that the testimony demonstrates that the Claimant said he "could not" provide the doctor's note because he did not go to a doctor and not that he "would not," but maintains such is irrelevant. It is not material because the Claimant was only charged with not following instructions and not with insubordination. The Carrier finds its actions, discipline and withdrawal of sick leave benefits appropriate.

The central issue at bar is the memo dated August 10, 1994. The substance of the Organization's position is that the memo lacks Agreement legitimacy. The Organization argues that the Claimant was not bound by Section II(f) of the August 22, 1992 amendments to the Sick Leave Agreement. That amended Agreement pertained to employees regularly assigned on or after said date. Because the Claimant was assigned prior to that date, he was covered under Section I(b) of the August 20, 1982 Sick Leave Agreement which holds that the Claimant is "allowed sickness benefits when absent from work due to a bona fide case of sickness." The Carrier failed to prove that the Claimant was not absent due to a bona fide illness. The use of the memo requiring a doctor's excuse is misplaced as such request did not apply. There is nothing in the negotiated Agreement requiring a doctor's note.

The Board carefully studied all arguments persuasively presented before us. We find no procedural issues of substance. Calling the illness an "alleged illness" is not sufficient to prove irrevocable error. The Investigation was handled appropriately and there is no evidence that the Carrier's actions were violative of the Claimant's Agreement rights. In fact, the Carrier removed as unsupported the charge that the Claimant said he "would not" provide a note. The Board also finds no Sick Leave Provision before us in either the charges or the Carrier's actions. Therefore, we can make no hypothetical conclusions relative to possible application. What we do find is that the Carrier issued a memo requiring that the Claimant bring a doctor's note and that the evidence demonstrates the Claimant failed to do so.

While we are sensitive to the Organization's argument that this is a non-negotiated Carrier policy and not an Agreement, that does not provide a basis for demonstrating its illegitimacy. The Board does not find it to violate an Agreement provision. The testimony on absenteeism due to sickness is that the Carrier was trying to "curtail it" due to the fact that it had "reached a terrible proportion...." The Carrier requested documentation and the Claimant failed to produce it. The Board is constrained to find the Claimant guilty as charged.

As for the discipline, the Claimant was aware that upon his return if he failed to produce a doctor's note it "could result in loss of pay." The Claimant was absent 12 days and returned without complying with instructions. Accordingly, it is not a matter of whether this was a "bona fide" illness, as the Claimant failed to abide by his Supervisor's instructions to bring in the doctor's note. Under these circumstances, the Board cannot find the Carrier's discipline excessive. This claim must 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 Third Division

Dated at Chicago, Illinois, this 30th day of December 1997.