

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36544
Docket No. CL-36622
03-3-01-3-226**

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(Indiana Harbor Belt Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood (GL-12730) that:

- (1) The Carrier violated the rules of the parties' Agreement made effective December 1, 1949 and subsequent amendments thereto, particularly Rule 13, 36, 46 and 48, among other applicable rules and agreements, when on April 5, 2000 it conducted an unfair and partial investigation which generated an unjust assessment of a reprimand against employee Jack Fitzer, whose wrongdoing was being absent from work account of personal illness, which illness was supported and documented by his personal physician.
- (2) Claimant's record be cleared of the charges brought against him on February 18, 2000.
- (3) Claimant be compensated for wage loss sustained in accordance with the provisions of Rule 36 (h).”

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 Carrier has promulgated an absenteeism policy to address excessive absenteeism among its clerical employees. Under the policy, a statistical review is conducted every six months. Those employees whose absenteeism rate during that period falls within the top five percent are considered to be excessively absent. Specific guidelines are set forth concerning the administration of progressive discipline. Certain absences are excluded from the analysis, including FMLA leave and medical leave of 30 or more days. Employees must provide adequate documentation for absences due to illness or other matters, but such documentation does not necessarily exclude the absences from consideration when the statistical review is conducted.

In the instant case, the statistical analysis for the period July 1 through December 31, 1999 shows that the Claimant was in the top five percent of the total population of 96 clerical employees for purposes of absenteeism. During this period, the Claimant was absent 11 days. As a result, he was cited for excessive absenteeism, and, following an Investigation held on April 5, 2000, he was issued a reprimand.

The Claimant testified that his absences were due to medical problems for which he provided documentation. In the Organization's view, these bona fide absences should have been excluded from the Carrier's computation and analysis in assessing the Claimant's absenteeism rate, particularly since they may have been covered under the Family Medical and Leave Act (FMLA).

We are not persuaded that the Organization's defense has merit, for several reasons. First, there is a long line of precedent Awards in this industry which have recognized that the Carrier may establish reasonable policies with respect to employee attendance, so long as the policies do not conflict with the provisions of the Agreement. Notwithstanding the Organization's arguments to the contrary, these Awards further hold that chronic absenteeism, regardless of the legitimacy of the reasons for the absences, is a proper basis for discipline. It is generally accepted that the Carrier may enforce, through the imposition of progressive discipline, its expectation and the employee's duty of regular attendance. Special Board of Adjustment No. 988, Awards 198 and 200; Public Law Board No. 5379, Awards 13 and 43; Public Law Board 3625,

Award No. 97, Special Board of Adjustment No. 910, Award 32; Public Law Board No. 1790, Award 117.

Second, the Carrier's Absenteeism Policy has been addressed in prior Awards. In Third Division Award 36379 it was determined that the Carrier had not properly enforced its Absenteeism Policy. In Third Division Award 36380 it was determined that if a single employee was found to be in the top five percent the Carrier may impose discipline under its stated terms and conditions, even when absences are for legitimate reasons, when it has been determined that the overall pattern of absenteeism is excessive.

Third, the Organization failed to affirmatively establish that the Claimant's absences during the time period in question fell within the stated exceptions under the terms of the attendance policy. The Organization had the burden to demonstrate that the Claimant's absence qualified under the FMLA and that the employee complied with the conditions for such leave. It did not do so.

Finally, the Organization raised several new arguments in its Submission before the Board. We are an appellate body, however, and consideration is given only to arguments and evidence which have been exchanged by the parties during the handling of the case on the property.

We have confined our review in this matter accordingly.

That being the case, we find that there is substantial evidence for a finding that the Claimant's absenteeism record was excessive and that discipline was warranted. Given that the Claimant was in the top five percent and had previously been counseled and, consistent with the policy's guidelines, discipline in the form of a reprimand was properly assessed.

AWARD

Claim denied.

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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 8th day of May 2003.