

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39527
Docket No. CL-40181
09-3-NRAB-00003-070493
(07-3-493)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization that:

- 1) Carrier violated the terms of the Agreement between Springfield Terminal Railway and TCU when as a result of a hearing held on May 2, 2006 it arbitrarily and capriciously issued a formal letter of reprimand on June 1, 2006 to Claimant Beth Brow; and**
- 2) The Carrier shall now remove its letter of reprimand from the employment record of Claimant Brow and make her whole for any detrimental results of this action.”**

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.

By notice dated April 21, 2006, the Claimant was directed to attend a formal Investigation on charges that she allegedly had been absent without leave on March 20, 27, 28, 29, 30, 31, and April 3, 2006; the charge relating to March 20 subsequently was withdrawn. After a postponement, the Hearing was conducted on May 4. By letter dated June 1, 2006, the Claimant was notified that as a result of the Hearing, she had been found guilty as charged, and that she was being issued a formal letter of reprimand. The Organization filed a claim on the Claimant's behalf, challenging the Carrier's decision to issue the letter of reprimand to the Claimant.

The Carrier initially contends that at the time of the absences at issue, the Claimant had not provided proper verification that she was entitled to FMLA leave. The Carrier had no documentation to substantiate the Claimant's claim to FMLA leave for the dates in question. The Carrier asserts that although the Claimant may have been certified for FMLA coverage, that coverage did not automatically extend to the particular dates involved in this case.

The Carrier points out that the Claimant had applied for FMLA in the past, the Claimant had provided proper documentation in the past, and the Carrier specifically discussed the FMLA's requirements with the Claimant on two occasions. The Carrier also specifically notified the Claimant, on a number of occasions, of what documentation she needed to submit. The Carrier argues that the record demonstrates that she knew or should have known that she had not complied with the required certification procedures. The Carrier asserts that the Claimant therefore had no authority to absent herself from duty, under the auspices of FMLA-covered days. The Carrier asserts that the Claimant never submitted, within the established 15-day period, the required documentation relating to the dates at issue.

The Carrier insists that, contrary to the Organization's suggestions, the Claimant's old request for FMLA leave did not apply to the dates at issue in this case. The Carrier contends that the Hearing Officer therefore properly refused to allow documents relating to this old request to be entered into the evidentiary record, in that these documents are not relevant to the instant matter. The Carrier argues that it is obvious that the Organization's application of FMLA is incorrect, and the Organization's documents did not support an FMLA-related defense for the Claimant.

The Carrier goes on to point out that the Claimant did not make any good-faith effort to provide the proper documentation. Instead, she engaged the Carrier in a debate over the documentation that was required. The Carrier emphasizes that it was not until after she was charged that she attempted to provide the proper documentation to be certified for FMLA leave for the dates in question.

The Carrier then addresses the Organization's reference at the Hearing to an April 20, 2006 Pediatrics West letter, part of the Organization's effort to defend the Claimant. The Carrier asserts that this letter is dated six days after the 15-day time limit and one day prior to the originally scheduled Hearing. With regard to the Organization's reference to a March 27 note from Pediatrics West, the Carrier never received the document. Moreover, the Claimant was unable to explain when or how she submitted the document to the Carrier, if at all.

As for the Organization's assertion that the charge was not specific and does not quote a Rule, the Carrier contends that the charge is self-explanatory. The Carrier additionally argues that there is no contractual imperative that a charge letter cite a Rule. The Carrier contends that the charge letter contained all of the information required by the Agreement. It further asserts that the charge letter was timely. The Carrier points out that it first learned that the Claimant had been absent without leave on April 18, 2006, once the Claimant had failed to provide the required FMLA documentation within the established 15-day period. The Carrier notes that prior to April 18 the Claimant had been marked off until further notice under the auspices of the FMLA, but the Claimant then failed to substantiate that she had been afforded FMLA coverage for the dates in question.

The Carrier emphasizes that as of April 18 it had the right to initiate the instant charge, and it satisfied the contractual time limits by originally scheduling the Hearing to take place on April 27, 2006. The Carrier points out that the Hearing was postponed at the request of the Claimant's chosen representative, and then it was rescheduled by mutual consent.

The Carrier insists that there is no evidence that the Claimant was denied a fair and impartial Hearing. As for the statement of the Claimant's representative that the Hearing was not fair or impartial because it was a company Hearing, the Carrier asserts that such administrative Hearings are the usual and regularly accepted practice within the industry.

The Carrier then disputes the Organization's objections to the use of a Co-Hearing Officer. The Carrier contends that this is well-known and common practice on the property. The Carrier argues that because this was the District Chairman's first Hearing on this property, he may have been unfamiliar with the Carrier's practice. The Carrier contends that the Co-Hearing Officer primarily operates the tape machine and assists the Hearing Officer with questions and exhibits. In some situations, the Co-Hearing Officer is merely training, learning how to conduct hearings. The Carrier further points out that at this Hearing, the Claimant was accompanied by two Organization representatives. The Carrier contends that under the circumstances, the Organization cannot establish that any harm was caused to the Claimant by the use of a Co-Hearing Officer.

The Carrier additionally asserts that there is no foundation for the Organization's complaint about the Charging Officer's testimony. The Carrier insists that this is a non-issue that does not provide any justifiable basis for sustaining the instant claim. Similarly, the reference to "Mr. Silk" clearly was a typographical error, and the reference should have been to the Co-Hearing Officer.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the charge in this matter was not nearly precise enough to sufficiently apprise the Claimant of the occurrence to be investigated. The Organization further asserts that although the Claimant was charged with being absent without leave, she actually had been absent with notice in that she had marked off to her immediate supervisor.

The Organization argues that the Claimant's alleged failure to provide the recertification within a prescribed time frame does not constitute being absent without leave. The Organization points out, in addition, that failing to provide requested documents within a prescribed time frame does not violate any Behavioral Rule. The Organization maintains that when an employee marks off absent, but then fails to submit required FMLA documentation relating to that absence, the matter simply is treated as normal time off work instead of as FMLA leave.

The Organization emphasizes that in order to allege a violation of the Behavioral Rules, the Carrier had to take several twisted steps. The Organization

asserts that the Carrier's reasoning breaks down under even a cursory examination. The Organization emphasizes that the Claimant's immediate supervisor knew that the Claimant's very young daughter had a serious health condition, and that it was dangerous when she had a fever. The Claimant's supervisor also knew that the Claimant had to remain at her daughter's side when she had a fever. The Organization points out that even if the Claimant's supervisor was disposed to such callous behavior as refusing to let the Claimant mark off in such a situation, the Carrier's Legal Department would have had his hide if he had refused to allow the Claimant to mark off. The Organization insists that Claimant's supervisor certainly would have refused to allow her to mark off if she had offered some frivolous reasons, but there are certain situations in which a supervisor simply cannot refuse to accept a mark off, including a child with a life-threatening medical condition.

The Organization then argues that if the Carrier actually was concerned about the Claimant's absence in general – if it had not set out on a pre-determined course to find the Claimant guilty of something, anything – then the Carrier gladly would have let the Claimant advance her vacation. The Organization points out that the Carrier's own policy requires this. Instead, the Carrier misinterpreted federal regulations and drummed up charges. The Organization points out that this case was one of three cases and Hearings against the Claimant in a short period of time. The Organization maintains that the Carrier clearly set out at the beginning to charge the Claimant with innocuous Rule violations, with the intent of assessing more discipline as it proceeded. The Organization contends that the reason is obvious – the testimony of the Claimant's supervisor is rife with bitterness over the Claimant's use of FMLA leave. The Carrier was out to get the Claimant.

The Organization goes on to emphasize that the Claimant timely responded to the Carrier's initial request for recertification, doing so within three days. The Organization emphasizes that the regulation is silent about the time frame for providing additional documentation, which the Carrier requested because it wanted proof that the Claimant was not lying. The Claimant provided the additional information within 20 days, and the Organization asserts that this was reasonable under the circumstances. Moreover, contrary to the Carrier's allegation that the Claimant did not provide the proper documentation until after she was charged, the Organization insists that the documentation was provided on April 20. The Carrier then quickly prepared the Hearing notice the next day; the notice is dated April 21, 2006. The Organization additionally points out that the Carrier erroneously states

that the Hearing originally was scheduled for April 21; the Organization emphasizes that the Hearing notice was dated April 21, and the Hearing initially was scheduled for April 27.

The Organization argues that the Carrier deeply resented the Claimant's use of FMLA leave to care for her sick child. The Organization asserts that the Claimant is guilty only of having a sick baby.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the procedural arguments raised by the Organization, and finds them to be without merit. We find that the notice given to the Claimant fully advised her as to the charges and met all requirements of the Rule. In addition, the Claimant was guaranteed all of her Agreement due process rights throughout the proceeding.

The Board reviewed the evidence and testimony in this case, and we find that the Carrier failed to meet its burden of proof that the Claimant was guilty of being absent without leave for the period March 20 through April 3, 2006. Therefore, the claim must be sustained.

The record reveals that the Claimant had a very sick daughter and that her absences were covered under FMLA. The record reveals that the Claimant had provided the Carrier with a certification from her doctor, and it covered a one-year period from April 21, 2005, through April 21, 2006. The absences with which the Claimant was charged fall within that period.

The record further reveals that the Carrier requested that the Claimant provide various medical documentation and that she complied with the Carrier's requests.

It is fundamental that the Carrier must meet the burden of proof before it assesses any discipline. In this case, the Carrier failed to meet that burden of proof. Therefore, we find that the Carrier had no legitimate basis to issue a formal letter of reprimand to the Claimant on June 1, 2006.

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 Third Division**

Dated at Chicago, Illinois, this 2nd day of February 2009.