

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28216
Docket No. TD-27822
89-3-87-3-387

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

PARTIES TO DISPUTE: (American Train Dispatchers Association
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"CLAIM #1 - J. E. Arneth - System Docket CR-335

Appeal of J. E. Arneth re 5 days suspension, deferred as per Rule 18 Section 2(b)(1). Carrier file System Docket CR-335

CLAIM #2 - M. J. Bednar - System Docket CR-336

Appeal of M. J. Bednar re 5 days suspension, deferred as per Rule 18 Section 2(b)(1). Carrier file System Docket CR-336

CLAIM #3 - R. C. Castaldo - System Docket CR-337

Appeal of R. C. Castaldo re 5 days suspension, deferred as per Rule 18 Section 2(b)(1). Carrier file System Docket CR-337

CLAIM #4 - T. J. Didyoung - System Docket CR-338

Appeal of T. J. Didyoung re 5 days suspension, deferred as per Rule 18 Section 2(b)(1). Carrier file System Docket CR-338."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On various dates in April, 1986, each of these Claimants called in and marked off from work due to illness. Each sick pay Claim was paid by

Carrier and the bona fide of these Claims are not contested by Carrier. However, Claimants each were charged with failure to report for duty on the days they marked off sick in April, 1986, and also notified "in light of your prior attendance record this constitutes excessive absenteeism." Prior to the issuance of these disciplinary notices each Claimant had been interviewed by Supervisor Kaufman and informed that his attendance was not satisfactory, whatever the reasons might be.

Following a Hearing into the alleged excessive absenteeism and failure to report for duty each Claimant was assessed a five-day suspension without pay, which was deferred. The Organization filed timely and proper appeals of these disciplinary actions and the Claims are now properly before the Board for determination.

The Organization appeals on behalf of Claimants on grounds that they were not at fault for being ill and Carrier abuses its managerial discretion when it disciplines employees for being legitimately sick and collecting sick leave benefits. Carrier counters with several arbitration decisions which hold generally that excessive absenteeism, even for legitimate reasons, need not be tolerated indefinitely by an employer.

Carrier relies especially upon two 1983 Cases involving the same Parties and issues in which the Board upheld disciplinary action against train dispatchers who were "excessively absent" due to illness, but reduced the penalty from five days deferred suspension to a letter of warning. See Third Division Awards 24540 and 24541. We have reviewed these Awards and find them so internally inconsistent that they are of little value in the present case. At the outset in those decisions the majority held that Carrier's right to discipline employees for excessive absenteeism was preconditioned upon a fair and thoughtful determination as to what reasonably constitutes "excessive" absenteeism. After holding that Carrier failed to meet that "precondition", however, for some reason the majority abandoned its central premise and issued a split decision reducing the discipline to a letter of warning. It is easy to understand why both Parties filed Dissents to portions of these Awards.

We concur that a precondition of employer implementation of discipline for "excessive" absenteeism is a fair and thoughtful determination as to what really constitutes "excessive" absenteeism and communication of that information to employees. By necessary implication, therefore, disciplinary action for "excessive" absenteeism without such a determination and communication is unreasonable on its face and must be set aside, not just split down the middle. Further, even if this precondition is met by the employer, the fundamental premise for progressive discipline in such cases is that an employee has it within his control to modify or improve his attendance and can be prodded into doing so by the negative inducement of disciplinary action. It necessarily follows that application of disciplinary action against a chronically and legitimately sick employee is unreasonable. In cases where

the employer has clearly proven that an employee is unable, despite his best intentions and efforts, to appear regularly and promptly for work, the Employer may be justified ultimately in severing the employment relationship. When there is reasonable doubt whether a case is appropriate for disciplinary action, in the absence of any contractual limitation the employer is well within its right to counsel and warn employees and/ or require a medical verification of claimed illness. These and other fundamental principles were discussed in a similar case decided by PLB 2263 in Award No. 37, as follows:

"...care must be taken to distinguish between culpable excessive absenteeism for no good reason, which is 'subject to discipline' and 'no fault' excessive absenteeism over which an employee has no control. In the latter situation, the approach properly utilized by personnel managers and the principle upon which the better-reasoned arbitration decisions turn is a balancing of interests analysis.

Fundamental to the employment relationship is the payment of a fair day's pay in return for a fair day's work. Implicit in this arrangement is the understanding that an employee must be reasonably prompt and regular in his/her attendance at work. Repeated failure to report for assigned duties undermines efficiency, unfairly increases the burden on fellow employees and improperly increases operating costs. If such excessive absenteeism is caused by intentional or negligent dereliction or by abuse of sick leave by an employee, management may use reasonable progressive discipline to modify the misbehavior, following which dismissal might be warranted. If the excessive absenteeism is neither intentional nor negligent in its origin, but rather beyond the employee's control as in chronic illness, then discipline is not the answer.

Absent contract language to the contrary, in our society the employer is not obligated to carry forever on the payroll an individual who is incapable of providing reasonably prompt and regular attendance at work in return for wages and benefits. We cannot compel Carrier to subsidize year after year the excessive absenteeism of a chronically ill employee who has demonstrated beyond doubt his inability to be a regular full-time employee...."

Application of the foregoing principles to the present facts leads us to sustain these Claims and reverse the disciplinary action. Even if Carrier had properly developed and communicated to Claimants a reasonable standard of "excessive" absence, there is no proof on this record that Claimants abused

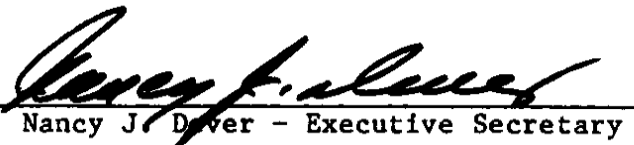
sick leave or were otherwise culpable for those absences on the "triggering" dates in April, 1986. For Claimants Didyoung (stress due to wife's heart attack) and Castaldo (recovery from spleen surgery) there is not even a suggestion of chronic uncontrollable absenteeism. For Claimants Bednar (hypertension and sciatica) and Arneth (diabetes) the evidence of uncontrollable chronicity is not conclusive. Given the state of this record, neither disciplinary action nor "no fault" severance is justifiable at this time. Claimants would be well advised, however, to heed carefully the warnings issued previously by Carrier and reinforced in this decision that "excessive" absenteeism whether for legitimate reason or otherwise need not be tolerated indefinitely by an employer.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 4th day of December 1989.