NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29893
Docket No. TD-29183
93-3-90-3-43

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(National Railroad Passenger Corporation
((AMTRAK)

STATEMENT OF CLAIM:

"Appeal of reprimand assessed Train Dispatcher J. F. Akins, 2/17/89 Carrier file NEC-ATDA-SD-118D"

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 employe 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.

The Claimant was issued a reprimand for violating Policies and Procedures No. 2, issued June 13, 1988, which reads:

> "When an employee has been absent from duty on two (2) or more occasions within any thirty (30) calendar day period, the supervisor will review the reasons for the absences with the employee. During such counselling session the employee shall receive a verbal warning concerning absenteeism.
>
> When an employee has been absent from duty on four (4) or more occasions in any six (6) month period, the supervisor will review the reasons for the absences with the employee. During such counselling session, the employee shall receive a verbal warning concerning absenteeism unless such employee has, within

> the preceding six (6) months, already received a verbal warning. In such cases, the employee shall be advised, in writing, to improve his or her attendance and that failure to do so may result in disciplinary action.
>
> If the employee is absent on one (1) other occasion within sixty (60) calendar days following receipt of the letter specified above, formal disciplinary action may be instituted."

The charge read as follows:

> "1. On July 18, 1988 you received a verbal warning from H. J. Walls, Chief Train Dispatcher for your absenteeism on May 19, June 11, 12, 18, 20, 21, 22 July 2 and 22, 1988.
>
> 2. On November 21, 1988 you were advised in writing by H. J. Walls, Chief Train Dispatcher of the seventeen (17) days you were absent between May 19 and October 17, 1988 and that your attendance record must improve.
>
> 3. You were absent from duty on December 18, 1988."

The Investigation was postponed and ultimately opened on January 26, 1989, and concluded on February 9, 1989.

The Organization challenges the reprimand on two grounds: 1) the decision is procedurally defective because Hearing Officer Cavalier, rather than the Superintendent issued the decision in violation of Rule 19(b) of the Agreement and 2) the Carrier has not met its burden of proof in disciplining the Claimant.

Rule 19(b) provides:

> "(b)...A decision will be rendered by the Superintendent within ten (10) days after completion of investigation."

The Carrier explains that the procedure used in determining guilt was explained to the Organization on April 9, 1987, to ensure a more fair and impartial discipline process. The Hearing Officer determines whether sufficient evidence was presented to prove the

charges and if so, discipline is assessed by a department officer. The Carrier also argues that since the Organization took no exception to the procedure when implemented, it cannot now allege it is a defect sufficient to void the proceedings.

The Carrier contends that the decision of the Hearing Officer was simply an objective opinion as to whether the evidence presented was sufficient to establish guilt of the charge. The decision to assess discipline was made by the Superintendent in strict compliance with Rule 19(b).

The Board finds Third Division Award 28319 to be determinative of this issue. That Award involves the same parties and an alleged violation of Rule 19(b). The Board decided that while the Organization's argument had some substance it was no reason to set the matter aside:

> "The Hearing Officer is required to convey to the deciding authority, by one means or other, his views as to the guilt of the party to the charges. Furthermore, in this case, the Organization was put on notice, on April 9, 1987, on the property by letter to the General Chairman, that a modification to the disciplinary hearing procedure had been made. All-in-all, we find no basis on procedural grounds for deciding this matter in favor of the Organization."

We also find that in this case, there is no basis on procedural grounds to set aside the reprimand.

With respect to whether the Carrier has met its burden of proof, the burden of proof is entirely upon the Carrier to prove by substantial and competent evidence of probative value that the employee is guilty of the accusation against him.

The Carrier submits that the evidence clearly established that Claimant was excessively absent as charged. At the time of the July 28 counseling, Claimant had been absent on 19 occasions (32 days) during 1988. As a result of six additional absences (eight days) on November 21, 1988, Claimant received a written warning. The Carrier argues that this is clearly excessive absenteeism.

The Organization contends that the provisions at issue do not require an employee to do anything except present himself for review/warning and counselling sessions, which the Claimant did. The paragraphs specify only that "the employee shall be advised, in writing, to improve his or her attendance and that failure to do so

may result in disciplinary action," and under certain conditions, "formal disciplinary action may be instituted."

The Organization's argument is that the way the policy is worded, it merely provides guidelines for the procedures the Carrier must follow, but does not mandate any particular attendance requirements on the employee. The Organization also argues that the provisions do not specifically state what constitutes excessive absenteeism.

While the policy is in language which describes actions which the Carrier may take in response to certain employee actions, rather than stating what an employee can and cannot do, the Board finds that the policy is clear with respect to the number of absences an employee may be warned and disciplined for. We are also persuaded by the fact that the Claimant testified that he understood the absentee policy and was warned about possible repercussions of future absences.

The Organization argues that the policy fails to differentiate between employees absent due to bona fide illness and employees absent without excuse. We are presented with varying Award opinions regarding excessive absenteeism and how this relates to absence due to legitimate illness.

In Third Division Award 28216 the Board held that implementation of discipline for excessive absenteeism requires fair and thoughtful determination as to what constitutes "excessive" and this information must be communicated to employees. The Board went on to hold that even if this is met, a fundamental premise for discipline is that an employee has it within his control to modify or improve his attendance. The Board also held that application of disciplinary action against a chronically and legitimately sick employee is unreasonable.

In Award 32 of Special Board of Adjustment No. 910, the Board held that provisions for sick leave benefits in an Agreement are not unquestionable authorization for employees to be absent. The Board concluded that the Carrier can take into account absences which occur beyond the scope of the Time Limits Rule of the Agreement. The Board also concluded that the Carrier is not precluded from considering excused and legitimate absences when determining that an employee is guilty of excessive absenteeism.

In Third Division Award 27972, the Board stated:

> "Even assuming that each allegation of Claimant's illness is true, this Board has long held that there may come a time when an

employer need no longer countenance excessive absenteeism on the part of an employee."

Most important, however, is the fact that Policies and Procedures No. 2, at issue in this case, was found to be reasonable and not violative of the Sick Leave Agreement existing between the parties in Public Law Board No. 4616, Award 1.

This Board does not agree with the Carrier that absences occurring prior to the issuance of the Rule can be used in the charge (June 11 and 12, 1988). While, as part of Claimant's attendance record they can be used as evidence of past absences, they cannot be used in the specific charge alleging a violation of Policies and Procedures No. 2. However, even without these absences, there are still enough absences which occurred after the issue date of the policy (June 13, 1988) to constitute a violation of the policy.

As for the question of discipline, a reprimand is not disproportionate given the amount of absences. Moreover, the Claimant was warned twice about his absenteeism and testified that he understood the policy and the repercussions of continued absence.

Accordingly, the claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.

Labor Member's Dissent
Award No. 29893 - Docket TD-29183
Referee Vernon

When this Board is more concerned with policies unilaterally imposed by the Carrier than it is by the collectively bargained agreement, dissent is warranted.

That is precisely what has occurred here. These parties have negotiated sick leave agreements on two separate occasions: first in 1977 and then in 1982. These agreements don't contain provisions for counselling sessions, verbal warnings, medical documentation, nor disciplinary consequences after a certain number of absences. It's the applicable agreement that this Board should have based its opinion on; not the Carrier initiated "Policies and Procedures No. 2."

The question is whether the Carrier sustained its burden of proof is determining the Claimant was guilty of the charged offense. Specifically, that charge involved alleged violation of the Carrier's Policies and Procedures No. 2. Claimant was not charged with excessive absenteeism.

Nonetheless, since the policy was involved in the charge, it was subject to the Board's close scrutiny. Upon examination, the Board held that the Carrier met its burden of proof. In other words, there was sufficient evidence presented to sustain the charge against Claimant. In some manner, according to the opinion, he violated the policy.

It is difficult, for this writer to comprehend exactly how this poorly worded, confusing policy; which required no action on the part of the Claimant other than to attend a counselling session, could be used as a basis for assessing discipline. I'm not alone in my confusion. Shortly after being unilaterally imposed, the policy received some well deserved criticism from U. S. District Judge Stanley Sporkin. The Court held;

> "...This, I must tell you, is one of the worst written things I've even seen. I'll be quite frank with you. This is a terribly written policy....Confusing...And I'll tell you why it is bad, quite frankly. It's bad because you are confusing -- you are mixing two different things. You're mixing an absentee, a person who is absent for matters other than sickness, and I think you've got to have a policy that differentiates between when a person is absent because of an illness and a person who is absent for other purposes."

Even with this evidence before the Board, the majority has held that the Carrier has met its burden of proof. How the Board managed to sorted out what the Court couldn't remains a mystery.

L. A. Parmelee, Labor Member