Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33218
Docket No. TD-33851
99-3-96-3-1080

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

PARTIES TO DISPUTE: (American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
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(Burlington Northern Railroad

STATEMENT OF CLAIM:

"This is to appeal the decision of Mr. D. L. Burns to dismiss dispatcher E. D. Barker for alleged violations of rule 1.13 and rule 1.15 of the General Code of Operating Rules."

This is to request that Mr. E. D. Barker be allowed to return to his assignment without loss of seniority, compensation or benefits."

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 Appellant, at the time a 29 year employee assigned to Carrier's Train Dispatcher's office in Seattle, Washington, was notified by letter dated July 11, 1995 to attend an Investigation on July 14, 1995 relating to his "alleged failure to comply with

the provisions of a waiver dated March 6, 1995 and alleged excessive absenteeism as a Train Dispatcher. . . ." After an initial postponement, the Investigation was held on August 4, 1995. Effective August 11, 1995 the Appellant was dismissed for violation of Rules 1.13 and 1.15 of the General Code of Operating Rules and failure to comply with the waiver cited above.

Rule 1.13 – REPORTING AND COMPLYING WITH INSTRUCTIONS, and Rule 1.15 - DUTY, REPORTING OR ABSENCE, read as follows:

> Rule 1.13
>
> "Employees will report and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when their instructions apply to their duties."
>
> Rule 1.15
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> "Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority."

The Carrier contends that Claimant's absences for 80 workdays between February 1994 and February 1995 - 22 for paid illness and the remainder without pay - were excessive. It maintains the Claimant had been counseled on numerous occasions in an effort to correct this unsatisfactory pattern, including an attempt with his Organization representatives on March 6, 1995 to extend him one last chance to retain his position contingent upon satisfying certain conditions. The relevant provisions of that waiver agreement provide as follows:

> "In connection with this occurrence [notice of investigation set for March 6, 1995 concerning absences without permission since February 9, 1995] I, E. D. Barker, Train Dispatcher, am waiving my right to investigation as provided in the schedule and agree to the following terms and conditions;

* * *

3. I understand and agree, that with the one exception noted above [upon release approved by Dr. Mears to obtain required medical treatment] I must protect my five day assignment with no layoffs except for personal leave day, bona fide sickness, and vacation.

4. I understand that I must, without exception, provide my supervisor with a medical statement from my physician for consideration as a bona fide sickness.

5. I understand that I will be placed in probationary status for twenty-four (24) months, commencing immediately and that my supervisors may review my work record with me every three months during that period.

6. In the event I fail to comply with any of the conditions stated herein, or if my supervisor has any reason to believe my sickness lay-offs are excessive or not bona fide, a formal investigation under the terms of my collective bargaining agreement will be conducted, and I may be subject to discipline, including dismissal.

7. I further waive my right to appeal the discipline and the conditions as set forth in this waiver. . . ."

The Carrier maintains that after executing this waiver, Claimant continued to absent himself from duty an additional 25 workdays during April, May and June 1995, prompting it to issue the July 11, 1995 Notice of Investigation referenced above, followed by Notice of Dismissal on August 11, 1995.

At the onset, the Carrier asserts procedural objections to the Organization's handling of this matter. First, it contends that the claim is fatally defective for vagueness and that it has no way of knowing what occurrence the Organization is complaining about. Upon its examination, the Board finds the claim to be sufficiently clear in context to inform the Carrier of the basis for the claim, and concludes Carrier's objections on that basis are without merit.

Secondly, the Carrier maintains that the Board is barred from considering the claim on its merits by reason of the Organization's failure to appeal its earlier denial to the proper next higher officer within 60 days as required by Article 24 of the Agreement. The record indicates that the claim was timely appealed to the person believed to be the

incumbent of the Superintendent's position, Mr. McKay, based upon McKay's October 16, 1995 letter in which he identified himself as "General Supt. Operations." The Board concludes the Organization's appeal, under the circumstances, comports with the requirements of Article 24.

On the merits, the Carrier argues that there is no way it can fulfill its obligations to operate efficiently without a reliable workforce. In this instance, Claimant's absences were chronic; they caused his employer unnecessary expense; he was not responsive to repeated counseling; and he failed to abide by the terms of the waiver agreement which he signed voluntarily and with a full understanding of its ramifications.

The Organization contends that the Carrier has failed to bear its burden of proof; that Claimant is a single parent, and that he was off both because of personal illness and the poor health of his children; that his absences were in every case authorized; that his dismissal was not preceded by fair warning; that he was on medication on several of the workdays missed; that he complied to the best of his ability with the terms of the March 6 waiver; and that Carrier itself failed to comply with those terms of the waiver indicating that "my supervisors may review my work record with me every three months during that period." [24 month probationary status.]

Each of the Organization's above contentions appears to fall within one of the following three broad categories: 1. Claimant's absences were for legitimate reasons and involved no falsification of sick leave; 2. Claimant was never forewarned that his attendance was problematic for his employer; 3. Carrier's actions violated the March 6, 1995 waiver.[1]

With respect to the first of these contentions, the Board concludes that the argument springs off a wobbly premise. As confirmed by the Awards submitted by both parties in this instance, the fundamental question for this Board is not whether Claimant's absences were for good cause, but whether they were so numerous as to warrant Carrier's determination that they were excessive. The general principle

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[1]A fourth argument suggesting that Carrier violated the provisions of the Family Medical Leave Act, 29 U.S.C.A.§ 2901 et seq., is beyond the jurisdiction of the Board.

adopted by the weight of authority in this and numerous other industries is as expressed in Third Division Award 31342 involving this Organization and this Carrier:

> "The Carrier . . . is also properly entitled to view judiciously the entire attendance record of the affected employee. Even though the absence of the employee may be due to a bona fide illness, beyond the control of an employee, there is philosophical underpinning for the assessment of discipline. The Employee-Employer relationship creates a framework that demands the Employer compensate the employee with a fair rate for a fair day's work and the Employee obligates himself to render a fair day's work for his compensation. When either one of the parties to this relationship fails to meet his obligations thereunder, the relationship may be considered severed or terminated. This the rationale that allows an employer to review the totality of the employee's attendance record and take corrective action even if part of the attendance record consists of absences caused by bona fide illnesses."

That same principle was articulated in another Third Division Award 29011 involving this Organization and another carrier:

> "We conclude that even though the Claimant complied with the procedures for calling in to report his absences, this fact does not negate the Claimant's excessive absenteeism . . . Everyone recognizes there are long term illnesses or disabilities which require lengthy absences. In those circumstances, employees should be given the benefit of the doubt. However, when an employee attends work sporadically based on a myriad of reasons, he diminishes his value as an employee. The employer is justified in removing him from its employment and replacing him with a more productive employee." [2]

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[2] Third Division Award 28216 relied upon by the Organization appears to ladle more goo than useful insight into the mix. There, the Board reviews a number of prior Awards holding that "excessive absenteeism, even for legitimate reasons, need not be tolerated indefinitely by an employer," and finds them "internally inconsistent [and] of little value in the present case." The Board then hands down this tablet: "It necessarily follows that

(continued...)

The Board must also respectfully reject the Organization's vigorous and well-argued second contention - that the Claimant was somehow ambushed by Carrier's decision to dismiss him, or that in failing to document its additional costs incurred for overtime and the like, it has forfeited the right to now assert that argument. The record here clearly establishes that Carrier demonstrated great patience in dealing with Claimant's attendance problems, which, for reasons that were apparently legitimate, were nonetheless severe. There is, indeed, no detailed account of the Claimant's prior counseling here. But there is a record of a March 6, 1995 "last chance" waiver, imbedded in which, at least inferentially, is an admission of Claimant's past attendance problems and recognition of the imminent peril to his job. In effect, the Board concludes that the Organization has effectively waived any challenge to lack of prior counseling or warnings by its participation in a waiver agreement made necessary by a record of acknowledged unsatisfactory attendance. The Board further finds that Carrier's failure to document the costs it incurred as a result of, and the inconvenience occasioned by Claimant's absences is irrelevant in that such proof, although often obtainable, is not a necessary element of this offense.

The Organization's third contention is that the Carrier violated the terms of the March 6, 1995 waiver by failing to review with him his work record every three months during the newly established 24 month probationary period. That contention, however, misreads paragraph 5 of the waiver which permits, but does not require, such a review.

(...continued)
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." It cites as authority for that set of cross-canceling principles Award 37 of Public Law Board No. 2263, which mirrors the confusion in holding as follows: "If the excessive absenteeism is neither intentional nor negligent in its origin, but rather beyond the employe'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 reasonable prompt and regular attendance at work in return for wages and benefits." Award 28216 and Public Law Board No. 2263, Award 37 reflect ambivalence of biblical dimensions, and hardly can be of much use to the parties in managing their affairs.

It also, in our judgment, fails to give adequate account to the Claimant's individual responsibilities in this regard. After expressly discussing with Superintendent Danielson his need to provide the results of a complete physical not later than the middle of March 1995, Claimant did not provide such documentation until June 28, 1995, and then only partially complied, not providing the physician's letter until August 1, 1995.[3] Thus, if there was technical non-compliance with the waiver, it was bi-lateral. Neither failure muscle pasts the principal problem which is the focus of this claim: Appellant was placed on probation, given one last chance to improve his attendance, and failed to do so. The major display of non-compliance, therefore, is Appellant's failure to improve his attendance.

Threaded throughout the Organization's case in this instance is the argument that Claimant was deprived of a fair Investigation. That contention is defeated by the Claimant's own testimony in those proceedings:

> "Q. Mr. Barker, I observed that you were present throughout the investigation. Can you now advise of anything that was not covered?
> A. No.
>
> Q. Is there anything that comes to your mind at this time that might cause you to think that this investigation was not conducted in a fair and impartial manner?
> A. No.
>
> Q. Have you been offered full opportunity to ask questions of all principals and witnesses present at this investigation?
> A. Yes.

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[3] Claimant attempts to hold his physician responsible for this delay. Taking this assertion at face value, it does not relieve Claimant from his responsibility in this connection. See, e.g., Second Division Award 6538 ("Over the years, in all divisions, we have ruled consistently that employee responsibility cannot be avoided by shifting of blame to supervisors or other employees. . . ." Citations omitted.)

Q. Do you have any further questions to ask or any statements that you wish to make?
A. No."

After expressly committing to document all future absences, Appellant had two personal leave days and marked off sick six days in April; in May he marked off nine days sick; and in June he was off eight days on account of illness and two days for personal reasons. Out of the 64 working days for which he was scheduled in this time frame, Appellant worked 27, was off sick 23, and missed 14 days for personal leave and vacation. He provided his employer no medical statement for any days missed in direct violation of paragraph 4 of his March 6, 1995 waiver.

The Board concludes that despite his long service, Appellant has clearly demonstrated that his personal circumstances no longer allow him to provide reliable service to his employer in the demanding position of Train Dispatcher. For the reasons cited above, the Board must deny this claim.

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 21st day of April 1999.

LABOR MEMBER'S DISSENT
TO
AWARD 33218, DOCKET TD-33851
(Referee Conway)

In reaching its decision, the Majority incorrectly characterizes the March 6, 1995 waiver as being "last chance". A close examination of this waiver, which the Majority reproduced beginning on page 2 of its decision, reveals nothing whatsoever that could be construed as "last chance". Since the Majority did not reference any portion of this waiver which justified such a characterization, one can only presume that it is referring to paragraph 6, which said that if the Appellant failed to comply with the conditions, he may be subject to discipline. But that even falls miserably short of being "last chance".

In addressing the Organization's contention "that the Carrier violated the terms of the March 6, 1995 waiver by failing to review with [the Appellant] his work record every three months during the newly established 24 month probationary period", the Majority stated, "That contention, however, misreads paragraph 5 of the waiver which permits, but does not require, such a review". The pertinent part of paragraph 5 reads, "...that my supervisors may review my work record with me every three months..." (underscoring added). It would seem that the word "may" is what the Majority is referring to when it says "permits, but does not require". The same logic would then hold true for paragraph 6, which reads, "...I may be subject to discipline..."(underscoring added), which would not require discipline.

The Majority then makes a quantum leap beyond description when they conclude "that the Organization has effectively waived any challenge to lack of prior counseling or warnings by its participation in a waiver agreement". This conclusion lacks even a wobbly premise to spring off of.

It is very clear that the only rights waived as a result of the March 6, 1995 waiver agreement dealt with the Appellant's "right to investigation" and "right to appeal the discipline and the conditions set forth in this waiver" in the March 6, 1995 incident only. Contrary to what the Majority concludes, nothing further was waived.

The Majority also finds fault with the Appellant's assertion that he was not able to provide the Carrier requested medical documentation from his physician within the time restraints imposed by the Carrier, by writing:

> "Claimant attempts to hold his physician responsible for this delay. Taking this assertion at face value, it does not relieve Claimant from his responsibility in this connection. See, e.g., Second Division Award 6538 ('Over the years, in all divisions, we have ruled consistently that employee responsibility cannot be avoided by shifting of blame to supervisors or other employees...')."

In relying on this principle, the Majority attempts to muscle past the fact that Appellant's physician is neither his supervisor or an employee of the Carrier. To hold the Appellant responsible for the action, or rather inaction, of the physician is unreasonable and defies common sense. Neither the Appellant nor the Carrier could require this non-employee physician to furnish the requested information within the unreasonable time restraints imposed by the Carrier.

Finally, the Majority's characterization of Third Division Award 28216 as "goo" is inappropriate. While it is understandable that the Majority may not wish to consider, or agree with, past Awards of the Board, to characterize another Board decision as "goo" is uncalled for.

I dissent.

Respectfully submitted,

David W. Volz

David W. Volz
Labor Member