Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35929
Docket No. CL-36152
02-3-00-3-339

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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-12617) that:

(a) Carrier acted in an arbitrary and capricious manner when it unjustly assessed discipline of a reprimand on Clerk L. Langley on January 22, 1999.

(b) Claimant Langley's record be cleared of charges brought against him on July 20, 1999.

(c) If Claimant sustained any loss by reason of the charges brought against him, he be compensated in accordance with the provisions of Rule 36(e)."

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 letter dated July 20, 1998, the Claimant was advised to attend an Investigation concerning alleged violation of the Clerical Absenteeism Policy. Following two postponements, an Investigation was held on January 13, 1999. Subsequently, the Claimant was found guilty and assessed a reprimand for excessive absenteeism for the period of August 1, 1997 through June 30, 1998.

Carrier policy required that those Clerical employees in the top 5% receive a counseling session on absenteeism and, in the subsequent six months if excessive absenteeism continued, it would subject the employee to a formal Investigation. The Claimant was counseled on March 31, 1998. The Carrier argued that during the period of this claim, the Claimant had been absent on 84 days.

The transcript indicates that total days absent for unexcused absence count toward excessive absenteeism. Testimony indicates that the policy refers to unexcused absence not covered under circumstances such as the Family Medical Leave Act. The record indicates that the Claimant had been in a major automobile accident in 1995 resulting in serious injury caused by a drunken driver. The facts of record are that he had been given a Personal Medical Leave due to chronic medical problems.

The facts at bar are clear. There is no dispute in this record that the Claimant's absences are the direct result of the 1995 auto accident. There is no dispute that this condition was known to the Carrier. We reviewed the August 22, 1996 letter on necessary medical forms sent to the Claimant, noting no mention of FMLA. Further, when the Claimant was informed that he had a right to FMLA benefits on March 31, 1998, he subsequently applied on August 4, 1998. The benefits were granted, but as testified by the Assistant Manager of Human Resources, "unfortunately it does not cover the period that is in question for this investigation."

The Organization argues that the Claimant was not notified of the FMLA policy; was covered under the Act; that the Carrier was aware of his condition; and therefore, this action was inappropriate and misapplied. While the FMLA is not within the jurisdiction of the Board and we certainly have no intent to interpret the Act, it certainly is applicable to this case. On more than one occasion the Carrier Officer acknowledged that the absences were due to the automobile accident and further that the Claimant "has the right under the FMLA to get approval for intermittent time during the 365-day period." Although stating that the Claimant's absences were covered, the Assistant

Manager of Human Resources testified that while the Claimant was granted a Family Medical Leave of Absence, "unfortunately it is not for the time period in question."

In the particular facts at bar, the Claimant requested FMLA information on March 31, 1998, which the Carrier testified was applied for on August 4, 1998. Such retroactive application, if appropriate under FMLA regulations to March would cover absences herein under consideration in this instant case of August 1, 1997 through June 30, 1998. Our review shows 42 days absent beginning with August 4 through December 17, 1997 and four days to March 31, 1998 when the request was made. Given all the factual evidence of this record, we are not persuaded that the Carrier's decision to reprimand was in error. The Claimant has certainly been absent sufficiently to uphold the Carrier's action for alleged excessive absenteeism.

The Board carefully reviewed all elements of this instant case. We note, as we have in our previous Awards, that even serious medical problems do not mitigate excessive absenteeism (see Public Law Board No. 5379, Awards 43 and 13). Numerous Awards have stated that employers do not need to maintain in their employ those who cannot meet the responsibilities of their jobs (Special Board of Adjustment Nos. 988, 200, 198; Second Division Awards 9480, 7348) and also, that excessive absenteeism is that which "has reached an intolerable level" (Second Division Award 9480).

Even if retroactive application were proper to the March 31, 1998 date of requested FMLA, the Carrier provided sufficient probative evidence to prove excessive absenteeism in this record. We also note in a study of the Claimant's discipline record, that the Carrier was aware of the application of FMLA days (as indicated in a later entry of October 25, 1999). Accordingly, the discipline in this instance will not be disturbed.

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 22nd day of January, 2002.