Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35951
Docket No. CL-36151
02-3-00-3-338

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-12616) that:

(a) Carrier acted in an arbitrary and capricious manner when it unjustly assessed discipline of 10 days suspension to be served on Clerk L. Langley on June 3, 1999.

(b) Claimant Langley's record be cleared of charges brought against him on March 17, 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.

This is a companion case to that decided in Third Division Award 35929, which was adopted on January 22, 2002, and all of the reasoning therein is applicable hereto. In this instant claim, the Organization argued through testimony at the May 18, 1999 Hearing that the absenteeism for the period of July 1 through December 31, 1998 was covered under the Family Medical Leave Act. The Carrier acknowledges that the FMLA is applicable to the determination of excused or unexcused absences. As we noted in our prior denial Award, the Carrier adjusted discipline after consideration of FMLA applicability.

In this case the Carrier asserts that the FMLA is not applicable to these dates. The Assistant Manager Human Resources maintains that the 13 dates from July 12 to August 2, 1998 are prior to the applied for benefits officially given by the Carrier on August 4, 1998. The record documents that the Claimant became aware of FMLA benefits on March 31, 1998 at a Carrier meeting and acted thereafter to obtain the proper paperwork from the Department of Labor; the proper information from physicians; and submit the documentation for his request. As stated in the transcript by the Local Chairwoman, the Claimant "should have . . . retroactively been granted these days as considered under FMLA . . . from the date he notified the company that he requested it."

We reviewed the full testimony and record and considered when the Carrier knew of the Claimant's condition. The Board reviewed the Claimant's knowledge of notification and understanding of benefits. Additionally, the Organization argued on the property that FMLA benefits are retroactive from the date of notification. Whether they are, or are not, the notification to the Claimant by letter of April 8, 1998 states that the application for FMLA will be reviewed by the Carrier's Medial Review Officer and the Claimant will be notified "if the leave has been approved." The Assistant Manager Human Resources testified that the Claimant "requested an intermittent leave and worked intermittently prior to the dates in question."

It is important to note that there is dispute in this record over the proper application of FMLA. The Organization argued on the property that it is retroactive from notification and maintained a date of March 31, 1998. The Carrier Officer testified as to the beginning of FMLA leave that: "there's four different ways as outlined in the FMLA in which you can calculate how leave is taken and we use it from a 365 period." She stated:

"... when the proper paperwork is submitted from the individual's doctor and approved by a Medical Review Officer, the date in which that approval takes place, then we work 365 days forward from that date. The date in which the Medical Review Officer approves the leave."

The Board lacks jurisdiction to determine proper application of FMLA or even the criteria of selecting among "the four different ways. . . ." The Organization's assertions that proper application is retroactive comes from the language of Federal Regulations, which states in part that "the entire period of the serious health condition may be counted as FMLA leave" (Code of Federal Regulations, Section 825.208, Paragraph (2)(d) with emphasis added) and discusses retroactive application as argued by the Organization. Clearly, it does not mandate what must be, but what "may be counted."

The Board cannot find sufficient evidence to conclude that the application of FMLA benefits was clearly in error. Nor can we find that the Carrier lacked support for its action under the terms and conditions of the Clerical Absenteeism Policy. In short, the Board is constrained by this record to deny the 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 20th day of February, 2002.