Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36379
Docket No. CL-36621
03-3-01-3-182

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

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-12721) that:

1. The Carrier violated the rules of the parties' Agreement made effective December 1, 1949 and subsequent amendments thereto, particularly Rule 36 among other applicable rules, when on Wednesday, April 5, 2000, it held an investigation, and as result thereof imposed an arbitrary and unwarranted disciplinary action by assessing employee Donald Hampton a decision of reprimand to be noted on his employment record.

2. The Carrier shall be required to expunge from employee Hampton's employment record all notations placed thereon resulting from the April 5, 2000 investigation, and be required to rescind all action taken resulting from the discipline meted out by notice of discipline dated April 25, 2000.

3. The Carrier further violated Rule 36 of the Agreement when the Comptroller denied the District Chairman the contractual right to an appeal hearing.

4. This dispute has been presented and progressed in accordance with the provision of Rule 13 of the Agreement and should be sustained."

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 Claimant is a clerical employee who has been employed by the Carrier since October 1994. He received a reprimand on April 25, 2000 for violation of the Carrier's absenteeism policy.

According to the Carrier's Clerical Employees Absenteeism Procedural Statement, effective August 1, 1997 and modified March 1, 1999, "those clerks whose absenteeism rate places them in the upper five percentile (5%) outside the normal distribution curve will be considered to have excessive absenteeism. Those Clerks will receive a letter to attend an informal informational counseling session. Each subsequent six-month period will be reviewed for absenteeism for a five-year period. Excessive absenteeism, as defined . . . above, that occurs in subsequent six month time periods within this five-year period will be handled in a progressively severe manner as outlined below." The policy was distributed to all employees covered by it.

Pursuant to this policy, the Claimant was counseled about his attendance on March 31, 1998. Thereafter, the Claimant was absent on seven specific dates in the six-month period from July 1 to December 31, 1999.

On January 27, 2000, the Claimant was notified to report "for an investigation/hearing to develop the facts and determine your responsibility, if any, in connection with your alleged violation of the Indiana Harbor Belt Railroad Clerical Absenteeism Procedural Statement."

Following an Investigation held on April 5, 2000, the Claimant was found guilty and was issued a reprimand.

The Organization appealed the decision by letter dated May 7, 2000. The appeal was denied by J. E. DeWitt, Comptroller, and the Organization appealed the decision on September 1, 2000. That appeal was denied by the Manager of Labor Relations on October 23, 2000.

The Organization argues that the policy is incomprehensibly complex and that it was not properly enforced in this instance, in that 11 employees were found to be in the top five percent when in fact five percent is only 4.8 employees. Thus employees in the top 11percent of the clerical unit (11 out of 96) were found to have been excessively absent, when the policy calls for only the top five percent to be so classified. Further the Organization notes that the Claimant's absences were legitimate sick days, for which he was paid, and so should not have been the subject of discipline.

The Carrier argues that it properly found that the Claimant was excessively absent. The policy has been in effect for a number of years and makes clear to employees that they are expected to be regular in attendance. The Claimant had been previously counseled about the need to improve his attendance, yet continued to be excessively absent.

In a statistical analysis of the attendance records of all clerical employees for the period July 1 - December 31, 1999, it was determined that because there were 96 employees during this period, five percent was 4.8 employees. Due to rounding, the number was rounded up and it was determined that five percent of the total population of clerical employees covered by the absenteeism policy during that six-month period was five. It was discovered that the employee who had missed the most days during that period had missed 33 days. The next most frequently absent employee had missed 11 days, the next nine and the next eight. Thus at least those four employees were considered to have been excessively absent, as they were in the top five percent.

There were seven employees with seven days of absence during the period, the next category down, including the Claimant. All seven were found by the Carrier to have been excessively absent, thus bringing the number to 11 total.

We find that the claim should be sustained. While we recognize that even a legitimate absence, for which an employee is paid, can be the basis for a determination

of excessive absenteeism, in this case the Absenteeism Policy was not properly enforced. It is a well-established principle that an ambiguity in a regulation or a policy is to be resolved against the interest of the drafter of the document. Following the statistical review, 11 percent of the unit was deemed excessively absent during the last half of 1999. Such a finding is contrary to the terms of the policy that only those in the top five percent should be so classified. According to the Carrier's reasoning, if every other employee in the unit had had seven days of absence, they would all have been considered excessively absent, even though such a conclusion would result in the entire unit being so classified. Given the circumstances, where 4.8 employees constituted five percent and five percent could not be classified as excessively absent without the resulting overinclusion, the Carrier should have confined its determination to the four most absent employees, because the policy does not explicitly contemplate a contrary result.

The discipline was improperly assessed. Having so found, we do not need to address the Organization's claim that an Appeal Hearing was improperly denied.

The Agreement was violated.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 18th day of February 2003.