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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36753
Docket No. CL-36645
03-3-01-3-253**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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-12734)
that:**

- (a) The Carrier violated the rules of the parties' Agreement made effective December 1, 1949 and subsequent amendments and agreements thereto, particularly Rule 36, 46 and 48, among other applicable rules and agreements when it unjustly dismissed employee Larry Langley from active service because of absenteeism due to personal sickness, regardless that each such absence was verified by his physician and the Carrier physician.**
- (b) Claimant's record be cleared of the charges brought against him on March 3, 2000.**
- (c) Claimant be restored to service with seniority and all other rights unimpaired and he be compensated for wage loss sustained in accordance with the provisions of Rule 36(h)."**

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 General Billing Clerk working at the Carrier's Blue Island, Illinois, facility. He has 23 years of service. There is no dispute that he has a number of medical problems including severe migraines, sleep apnea and TMJ, and that, under his accepted medical certification, was qualified to receive 60 days of intermittent FMLA leave between December 11, 1998 and December 11, 1999.

By letter dated March 3, 2000, the Claimant was advised to attend an Investigation concerning his excessive absenteeism under the Carrier's Clerical Employees Absenteeism Procedural Statement, a policy unilaterally instituted by the Carrier in August 1997. Such absenteeism policy includes the conduct of a statistical review of employees every six months, with employees falling within the top five percent being considered excessively absent. Under such review, absences counted against an employee do not include those attributable to a contractual bump, approved medical leave of 30 days or more, or leave covered by the FMLA, but may include those resulting from illness which has been properly documented. The policy provides for a progressive disciplinary approach based upon statistical reviews conducted in successive six-month periods over the course of five years. A violation of the policy in the first period results in a counseling session, the second period results in a reprimand, the third period results in discipline up to a 30 day suspension, and the fourth period results in dismissal. Employees are entitled to a formal Investigation under this policy at all times after they have received a counseling session.

The Claimant's formal Investigation occurred on April 5, 2000. At the Hearing, the Carrier's Assistant Manager of Human Resources responsible for administering the absentee policy, testified that a statistical review was conducted for all Clerks during the July 1, 1999 through December 31, 1999 period. Of the 96

Clerks which were part of the analysis, Conley testified that the Claimant was on the top of the list, having the most number of absences. The analysis indicates the Claimant with 28 absences, but Conley clarified that, for purposes of absences under the policy, only 18 were countable. She explained that the Claimant had 19 days of permissible leave during this period, including the balance of FMLA leave and paid sick days under the contract, and that he used them all as well as an additional 18 days. The record reveals that five percent of the 96 Clerks would be 4.8 employees, and that the Claimant had the most absences, with the next most absences being 11, 9, 8, and seven employees with seven absences each. Conley confirmed that in administering this policy, she does not look to the reason for the absence, except to see if it meets one of the exclusions.

During the Investigation, the Claimant testified that one of the dates he was cited for was taken in conjunction with his attendance the following day at another disciplinary Investigation. He stated that much of his absence is attributable to the fact that his doctor has placed him on Vicatin, a pain medication which his doctor feels he is able to work under, but the Carrier's medical officer has refused to permit him to come to work while so medicated for safety reasons. The Claimant notes that he had no problem with attendance during his tenure prior to his serious accident in 1995, leading to his medical condition, and that the Carrier is aware of this background. The Claimant testified that he has complied with the requirement to bring in documentation concerning his absences.

As a result of the Investigation, the Carrier found the Claimant in violation of its attendance policy and, relying upon his prior discipline which included counseling, a written reprimand, and a 10-day suspension, dismissed him by letter dated April 24, 2000. The Organization appealed this decision on May 7, 2000, a conference was held, and the Carrier denied the appeal on July 14, 2000. The matter was appealed on September 1, 2000, and ultimately denied on October 31, 2000.

The Carrier argues that there was substantial evidence produced at the Hearing Investigation to prove the charges against the Claimant as there is no doubt that he falls within the top five percent of the statistical review for this time period, that he was absent on the dates charged, and that he had knowledge of the terms of the policy and its consequences. The Carrier contends that the Board has

consistently upheld its right to expect regular attendance, citing Special Board of Adjustment No. 988, Award 200; Public Law Board No. 5379, Awards 13, 43; Second Division Awards 7348, 9480. It asserts that its attendance policy has been upheld both in prior cases involving the Claimant, see Third Division Awards 35929 and 35951, and others, see Third Division Awards 36544, 36380 and 36379. The Carrier also asserts that any claim that the discipline was not issued in a timely fashion is new argument posited for the first time by the Organization to the Board, and cannot be considered.

The Organization contends that the Board should not reach the merits of the case, as the Carrier did not adhere to the Rule 36(h), requiring it to bring discipline within 30 days. It notes that the period encompassed by the absence analysis is July 1 - December 31, 1999 and the review was admittedly conducted in January 2000, yet the Investigation notice did not issue until March 3, 2000. With respect to the merits, the Organization asserts that the Carrier included nine FMLA days in the statistical analysis, and based its conclusion on the Claimant's having 28 days of absence, which was admittedly in error. The Organization also takes issue with the validity of the policy to which it has never been a party, arguing that it is inherently unfair, and confusing enough even to the Carrier who was found not to have administered it in accordance with its terms, citing Third Division Award 36379. The Organization argues that the Carrier's doctor's refusal to permit the Claimant to work, despite his doctor's release, reveals that the Carrier is the cause of any "excessive absence" of the Claimant. It requests that the discipline be overturned.

Initially the Board notes that the Article 36(h) timeliness argument made by the Organization in its Submission before the Board was not raised on the property or during the Investigation, and is a new argument which, under established Board precedent, cannot be considered at this appellate stage. Upon a careful review of the record and precedent cited by the parties the Board concludes that the Carrier has established substantial evidence in the record to support both the charge of excessive absenteeism against the Claimant, as well as the penalty imposed.

First, the Carrier has a right to expect regular attendance from its employees, may establish reasonable Rules with reference to attendance, and may enforce these Rules through the imposition of progressive discipline even though the chronic absenteeism may be based upon legitimate reasons and be supported by

documentation. See, e.g. Special Board of Adjustment No. 988, Awards 198 and 200; Public Law Board No. 3625, Award 97; Public Law Board No. 1790, Award 117.

Second, the Carrier's absenteeism policy itself has been upheld in prior Board Awards, see Third Division Awards 36544; 36380; 36379; 35929; 35951; although its improper enforcement has been overturned, Third Division Award 36379. In fact, Third Division Awards 36544, 36380 and 36379 all deal with the exact same statistical review of 96 employees conducted for the period July 1 - December 31, 1999 in issue herein, and uphold the discipline for those employees found to be within the top five percent - numbers two and four on the list. Third Division Awards 36544 and 36380. In this case, the Claimant leads the list, with seven more absences than the next closest employee whose discipline was found to be substantiated. A review of these Awards reveals consideration of the fact that the reasons for the absence, and documentation submitted to justify them, do not change the Carrier's ability to count them as unexcused absences under its policy. The record does not support the Claimant's contention that the cause of each of his absences cited was the Carrier's refusal to release him to work, or that any such refusal based upon safety considerations would be arbitrary. There is no showing that the 18 absences relied upon by the Carrier fell into any of the exceptions under the policy.

Finally, the record supports the conclusion that the Carrier's enforcement of the policy with respect to the level of discipline administered to the Claimant was consistent with the terms of the policy and the Claimant's prior record. The Claimant was counseled on March 31, 1998, received a reprimand after Investigation on January 22, 1999 which was upheld by the Board in Third Division Award 35929, and received a 10-day suspension on June 3, 1999, also upheld in Third Division Award 35951. Thus, we find substantial evidence in the record to support the Carrier's conclusion that the Claimant's absenteeism was excessive and that dismissal was warranted.

AWARD

Claim denied.

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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 October 2003.