AWARD NO. 6
CASE NO. 8

PUBLIC LAW BOARD NO. 4732

PARTIES TO DISPUTE ) INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 19

) NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

STATEMENT OF CLAIM:

"In order to make the Claimant [Machinist R. Richter] whole for all time lost between December 29, 1987 and October 11, 1988, must the Corporation compensate the Claimant for all days lost or should such compensation be adjusted accordingly on the basis of the Claimant's absentee record?"

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The question at issue arises from action which the the Carrier had taken in application of Rule 28(b) of the Agreement. This rule provides that employees who absent themselves from work for five days without having notified the company shall be considered as having resigned from the service. In keeping with what it had believed at the time to be the Claimant's failure to be in compliance with the notification provisions of such rule, the Carrier terminated the Claimant from service on November 6, 1987. Thereafter, upon protest of such action, the Carrier rescinded such termination, and restored the Claimant to service effective October 11, 1988. Evidentiary documentation had meantime showed that the Claimant was certified by his personal physician as able to resume regular work effective December 29, 1987. The dispute here at issue thus concerns what compensation the Claimant is entitled to for the period December 29, 1987 to October 11, 1988.

The Carrier says that compensation for time lost should be based on what it terms, the Claimant's "absenteeism rate of fifty percent" during the 10-month period immediately prior to his termination from service, less any outside compensation earned by the Claimant during the period in question.

The Organization maintains that the Claimant should be made whole for all time lost. It says there is no agreement, precedent, or any other support to justify mitigating the claim for time lost.

In the opinion of the Board, even though the Carrier admittedly

violated the above referenced rule, we believe that the claim for compensation should be limited to the net wage loss sustained by the Claimant. We do not believe that the Claimant should be entitled to a windfall because of the wrongful actions of the Carrier.

There is no question that if one was to limit consideration to that period of time immediately prior to the Claimant being terminated from service on November 6, 1987 that it could be held that he had, as asserted by the Carrier, "amassed an absenteeism rate of approximately 50%." He had been off duty account an alleged injury or problem with his back, beginning on September 19, 1987, and then an injury to his ankle on or about October 26, 1987, and, as indicated above, he was not thereafter certified by his own personal physician as being able to resume regular work until December 29, 1987, or well beyond the November 6, 1987 date he was wrongfully terminated from service. The Claimant had also been withheld from service account imposition of a 30-day disciplinary suspension during the month of August 1987 in waiver of a hearing into charges of excessive absenteeism. Therefore, it is apparent that if one was to take into consideration only that period of time immediately prior to the Claimant's termination from service on November 6, 1987 that he, as the Carrier would offer, had been away from work for a rather significant amount of time.

However, when one reviews the Claimant's past work record to the limited extent as submitted by the Carrier with its submission, or, specifically, back to January 1987, it is evident that the Claimant had a variable past attendance record. For example, he was absent about 35% of the time from January 1, 1987 to August 1, 1987, or the date of imposition of the above mentioned 30-day disciplinary penalty. Further, the record shows a 28% rate of absenteeism during the first six months of 1987, with but two or three days of absences in some months. Accordingly, we believe that the Carrier is obliged to take a more protracted look at the Claimant's past work record to determine a rate of absenteeism.

In this latter regard, the Board is of the opinion that it would be inappropriate to include as a part of the Claimant's record that period of time during which the Claimant was absent account those alleged injuries which had essentially led to the dispute here at issue. We also believe consideration of the past record should exclude the 30-day period of time that the Claimant was withheld from service in the administration of discipline as well as the period of time directly related to that charge of record which had led to the assessment of such discipline. We say the latter because it would seem to the Board that the Claimant had been penalized for such days of absence by a subsequent loss of pay during his 30-day suspension from service.

Under the circumstances, the Board will hold that the window of review of the Claimant's past work record be that two-year period

which preceded the first date of charges of excessive absenteeism involved with the administration of discipline imposed on August 1, 1987. The ratio or percentage of the Claimant's absences to scheduled work days during this two-year period will be applied against the number of scheduled work days for which the Claimant would have stood for work during the period December 29, 1987 to October 11, 1988 so as to compensate the Claimant for time lost in resolution of the instant dispute.

AWARD:

Claim disposed of as set forth in the above Findings.

Robert E. Peterson, Chairman
and Neutral Member

L. C. Hrlczak
Carrier Member

D. R. Caruso
Organization Member

Philadelphia, PA
December 15, 1989