

## **SPECIAL BOARD OF ADJUSTMENT No. 1089**

### **PARTIES TO DISPUTE:**

Brotherhood of Railroad Signalmen

and

Port Authority Trans - Hudson Corporation

### **Statement of Claim:**

- (1). The Port Authority Trans - Hudson Corporation violated the express provisions of the collective bargaining agreement when absence frequencies associated with Injury-on-Duty (IOD) were combined with non IOD absence frequencies (sick, personal no pay, absent without leave, and no report) for purposes of progressive discipline.
- (2). PATH violated the collective bargaining agreement when it redefined excessive absence to include six (or more) cumulative non IOD days (regardless of number of frequencies) and when it initiated the progressive disciplinary process for such absences.
- (3). PATH violated the collective bargaining agreement when it required employees who were in receipt of warning letters due to an unsatisfactory absence record for frequencies or days to report to the Port Authority Office of Medical Services on the first day of their next frequency.

### **FINDINGS:**

On November 26, 1996, the Carrier issued General Notice No. 96 - 231, PATH ABSENCE PROGRAM, a modification of its absence policy.

The Carrier stated in General Notice 96 - 231, that its action was in response to an increase in absenteeism that had brought about higher costs and a greater burden on employees who report to work on a regular basis.

The the Organization argued that the changes specified in General Notice 96 -231, violated the Agreement. The Organization notified the Carrier it intended to carry out a job action since the revisions represented a major change in the Agreement and was in violation of the Railway Labor Act. The Carrier was granted a temporary injunction and a court hearing was subsequently held to determine if the restraining order should be continued. The court, without passing on the merits of the dispute, determined that the Notice was not a major change as defined under the Act. The parties then proceeded to create a Special Board of Adjustment to resolve the dispute.

## CLAIM 1.

Three changes were instituted under General Notice 96 - 231. Under Paragraph 1, absences associated with Injury-on-Duty (IOD) were, for purposes of progressive discipline, combined with non IOD absences. The Board concurs with the Organization's argument that Article IX, Section A., 6., of the Agreement, prohibits treatment of IOD absences for progressive discipline purposes in the same manner as non IOD absences. Pursuant to the Agreement, "a sickness shall not count as a frequency if an employee is injured on the job and then released by PATH by reason of such injury."

It was undisputed that the relevant contractual clause had been in the Agreement for many years. Ernest Munday, General Chairman of Local 60, testified at the court hearing held on February 27, 1997 that he was personally aware that Article IX, Section A., 6., was in the 1975 Agreement. In fact, the clause was first negotiated in 1962, through a quid pro quo, that gave the Carrier the right to use non-bargaining unit workers for tasks performed by BRS members. The Organization agreed to give up the scope clause and the loss in job security for improvements in sickness and accident benefits. Thus, the applicable clause had been in existence for more than thirty years, at the time General Notice 96-231 had been issued.

The Carrier's argument that supplementary sickness and accident benefits were distinct and separate from disciplinary action is not supported by the language of the Agreement. If the parties had agreed that the two were not related they could have stipulated the distinction within the contract. In fact, the Agreement (Article XV) stipulates that while Trainees can be dismissed for attendance if absent for six or more frequencies in any twelve month period, absences for "military leave, absences caused by on-the-job injuries....." are not included as a frequency. One would assume that Trainees would not be given greater job security than regular employees.

## CLAIM 2.

Under Paragraph 2, the Carrier notified bargaining unit members that progressive discipline action for excessive absence had been redefined to include six (or more) cumulative, non IOD days. Prior to November 26, 1996, an employee had not been subject to progressive discipline on the basis of the number of sick days used in each occurrence.

With the issuance of General Notice 96-231, the Carrier initiated a progressive discipline policy based on cumulative absences rather than the number of frequencies.

The Board believes that the changes made by the Carrier constitute a material change in a past practice that prevailed before November 26, 1996. As a result of the revised policy, progressive discipline will be initiated after six cumulative days absence, although the Carrier stated discretion would continue to be used in evaluating the appropriateness of disciplinary action.

As a consequence of General Notice No. 96-231, Paragraph 2, management has greater latitude in the imposition of disciplinary action. The revised policy, without input from the BRS, redefined the circumstances under which progressive discipline would be administered.

The Board does not dispute the Carrier's right to initiate progressive discipline action against an employee if sick leave benefits are misused. Neither party argued that sick leave could be used indiscriminately. However, the Agreement (Article X, DISCIPLINE - HEARINGS) specifies that an employee "shall not be disciplined without a fair and impartial hearing." The Carrier, under the Agreement, cannot commence progressive disciplinary action with impunity.

As specified in the Agreement, the Carrier is required to hold a fair and impartial hearing charging the employee with abuse of sick leave policy. Based upon the findings of the hearing the Carrier issues or does not issue discipline.

The Carrier has the right to create an absence policy that conforms to the Agreement and impose discipline but, only after a fair and impartial hearing has been conducted. The Organization also has the right to challenge the findings in a claim leading to arbitration.

The policy in effect before General Notice No. 96 - 231 was governed by frequencies of absence within a twelve month period. The revised policy is vague in that it allows the Carrier the right to impose discipline without reference to the reason or circumstances an employee might be absent from work. The revised policy established a mechanical absence management program that circumvents the provisions of the Agreement.

### CLAIM 3:

Under Paragraph 3, of General Notice No. 96-231, PATH established that employees, who have received warning letters due to unsatisfactory absence record for frequencies or days, will be ordered to report to the Port Authority Office of Medical Services (OMS) on the first day of their next sick frequency.

Pursuant to the contract (Article IX, Section 9), a PATH representative cannot act in behalf of the P.A. OMS, after an employee, under the care of his personal physician, has completed a Railroad Retirement card (Orange card). The Carrier contended that prior to completion of the Orange card it had the right to direct an employee to report to the OMS.

The Agreement, Article XIV, Section C, states that "Medical examinations conducted by PATH shall be required of all employees as determined by PATH." An employer has the right to require that an employee undergo a physical examination or report to the company's medical facility. There are instances in which medical examinations are not only justified, but required under federal law. The employer has a responsibility to maintain a safe and drug-free workplace. This sometimes necessitates medical screening and a determination that an employee is fit to perform the job. It is also incontrovertible that the Carrier has a responsibility to prevent abuse of sick leave benefits. However, management's right to require an employee to report to the OMS is not without limits.

If Paragraph 3, is applied literally, sick leave would not have its intended benefit. Under the revised policy, an employee who is legitimately ill could not remain at home. This negates the purpose of sick leave which is to give an employee the opportunity to recuperate and return to work as soon as possible.

According to General Notice 96-231, an employee who has received a warning letter due to unsatisfactory absence is required to report to OMS on the next sick frequency.

Therefore, for some employees under the revised policy, the first day of a sick leave frequency is not really a benefit.

In response to the Organizations concern that physical examinations would be required indiscriminately, the Carrier stated that it did not intend to abuse its power or ignore the principle of just cause. While there is no reason to doubt the good intentions of the current management there is no guarantee that the revised policy would not be abused by future administrators.

It is reasonable to conclude, based upon the above analysis, that the parties did not intend that Article XIV, Section C., give the Carrier the unrestricted right to require an employee to report to the OMS without reason. Under Article IX, Section 9., the parties agreed that after completion of the Railroad Retirement card no representative of PATH was authorized to act on behalf of OMS. The inclusion of Article IX, Section 9, into the Agreement supports the Organization's contention that it has sought to clarify and limit the Carrier's discretionary power in requiring medical examinations.

In effect, while the Carrier has a right to require employees to report to the OMS and undergo physical examinations, it can only do so for valid reasons. Paragraph 3 of General Notice 96-231, is overly broad since it fails to consider each employee's absence frequency on an individual basis. The provisions of the absence management cannot be arbitrary, capricious or unreasonable.

The Carrier had argued that the Organization did not object to previous absence management policies, and as a result, waived its right to challenge the current change. The fact that the Organization has not challenged previous directives does not prevent the BRS from objecting to the provisions of General Notice 96-231 or any future changes.

The Board understands the Carriers concern over abuse of sick leave benefits. The Port Authority Trans-Hudson Corporation has a public responsibility to operate its facilities efficiently and economically. However, any changes in the absence management program must conform to the Agreement.

AWARD:

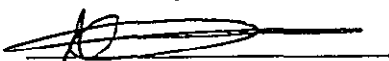
Claim 1. Claim sustained.

Claim 2. Claim sustained.

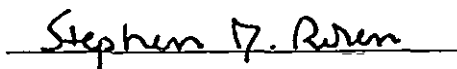
Claim 3. Claim sustained to the extent provided in the Findings.

Adopted at Jersey City, New Jersey. July , 1997.

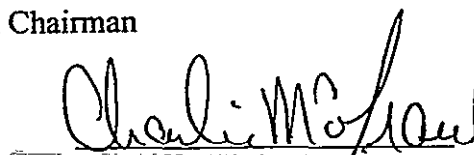
STRONGLY DISSENT



Carrier Member  
Harry Agnostak, Esq.



Stephen J. Rosen, Chairman



Organization Member  
Charlie McGraw