

**NATIONAL RAILROAD ADJUSTMENT BOARD  
SECOND DIVISION**

**Award No. 13497**

**Docket No. 13324**

**00-2-98-2-8**

**The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.**

**(Brotherhood Railway Carmen Division  
( Transportation Communications International Union**

**PARTIES TO DISPUTE: (**

**(Springfield Terminal Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the Committee of the Union that:**

- (1) That the Springfield Terminal Railway Company violated the terms of our current agreement, in particular Rule 13 when they arbitrarily assessed Carman Richard A. Dixon with a formal reprimand as a result of an investigation held on February 14, 1997.**
- (2) That, the Carrier failed to hold a timely investigation as provided in Rule 13 of our Agreement.**
- (3) That, accordingly, the Springfield Terminal Railway Company be ordered to remove the formal reprimand from the file and record of Carman Richard A. Dixon.”**

**FINDINGS:**

**The Second 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 the 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.**

**As a result of an investigation held on February 14, 1997, the Claimant was issued a Formal Reprimand for excessive absenteeism for calendar year 1996. The record reflects that he was absent 42 hours from January 1 to December 31, 1996, and had been counseled in January 1996 about his absenteeism rate in 1995 (which was 59 hours).**

**The basis for the Carrier's charge was a comparison of the Claimant's absenteeism with the shop average, which, for calendar year 1996 was calculated at 33 hours. Car Maintenance Manager Berkshire testified that the shop average is calculated on an ongoing monthly basis, and is based upon the absenteeism rate of people working a bid job, not those off ill or injured for an extended period. He noted that there is no written policy on how the shop average is calculated or what is excessive, and testified that the shop average is not posted and varies from month to month. Absences as a result of vacation or personal days are not included in the shop average.**

**The Claimant is a 30 year employee and Local Chairman of Lodge 6923. The record reflects that 24 hours of his 1996 absence were paid as sick leave under Rule 16 of the Agreement, implemented on December 14, 1995, four hours were a result of his consultation prior to, and required attendance at, a formal investigation in July 1996, and the balance related to medical appointments concerning his diabetes condition which was well known to the Carrier. The Claimant produced a medical note for all of his absences, excluding the four hours in July. The Carrier did not dispute the legitimacy of the Claimant's illness or his absences.**

**The Carrier argues that it is entitled to take into account even legitimate absences in proving an excessive absenteeism record, and notes that by agreeing to Rule 16 as a benefit (not an entitlement) it did not give up any right to rely upon paid sick leave absences in considering an employee's absenteeism record. The Carrier notes that the Claimant's absenteeism record was 27% greater than the shop average, which it contends is an acceptable method of measuring absenteeism relying on Public Law Board No. 5805, Award 4 involving the same parties. The Carrier asserts that since the Claimant had been counseled about his absenteeism record in the past, the minor discipline imposed was reasonable.**

**The Organization argues that the Claimant should not be disciplined for exercising a contractual benefit, and alleges that the shop average used here as a**

comparison was an improper method of determining excessive absenteeism, citing on property Second Division Awards 13445, 13446, 13447, 13448. The Organization notes that the Claimant's absenteeism rate improved by 33% between 1995 and 1996 after his counseling.

A careful review of the record reveals that by adopting Rule 16 the parties agreed upon a sick leave scheme to compensate employees a percentage of their regular pay for absence due to a legitimate illness up to a maximum of four days per year (based upon seniority), which employees could "bank" up to a total of 20 days in future calendar years. This newly adopted provision was applicable in calendar year 1996, and the Claimant was entitled to four paid sick days that year. He used three, since he was told he could not use them for routine medical appointments not resulting from illness.

The analysis of the relationship between Rule 16 and the calculation of excessive absenteeism, using an unpublished shop average on this property was dealt with by the Board extensively in Second Division Awards 13445, 13446, 13447 and 13448. In Second Division Award 13445, it was noted:

"Claimant could not have known the shop average at the time he took his contractual sick days. Thus, at the time he exercised a contractual benefit, Claimant had no way of knowing that by doing so he would be jeopardizing his disciplinary record. Carrier argues that the provision for paid sick days did not entitle Claimant to take those days off. We agree but only to a limited extent -- the provision for paid sick days did not entitle Claimant to take the days off at will or on a whim. However, they did entitle him to days off with pay when he was legitimately ill and disabled from working. Carrier does not challenge the legitimacy of Claimant's claims to have been ill on the days in question.

Given the way Carrier's attendance control policy operates, an employee who takes a contractually entitled sick leave day does so completely at his own risk that, at a later date, Carrier will determine that the Claimant's absences exceeded the shop average and will charge the employee with excessive absenteeism. Under these circumstances, we find persuasive those awards which hold that a Carrier may not penalize an employee for exercising a contractual right, and therefore, may not base a charge of excessive absenteeism on properly used contractual sick days. See, e.g.

**SBA No. 1056, Award 10; Special Board of Arbitration (CSX and TCU),  
Case No. 1; SBA No. 958, Award 54; SBA No. 958, Award 55.”**

The Carrier's dissent to the above Awards was based, in large part, upon the fact that the Claimants' absenteeism rate far exceeded the shop average (between 41 and 200%) and that prior counseling had no effect upon them. The instant case does not present such a situation. The Claimant's absenteeism record improved greatly between his counseling in January 1996 and the time of the instant discipline. Further, even including the 24 hours for which he was paid sick leave and the four hours of required attendance at an Investigation, he exceeded the shop average (which did not take into account employees off sick or injured for an undefined "extended" period of time) by 27%. Discounting those hours, the Claimant fell well within the shop average range.

The Board noted in the above-quoted Award, that many of the cases holding that the Carrier is entitled to discipline employees for excessive absenteeism even if the absences were for legitimate reasons, did not present fact situations where the days off were contractually provided sick days or measured an employee's absenteeism against an absolute standard of reasonableness, rather than the type of shop average used by the the Carrier herein. The facts presented in the instant claim cannot be said to prove that the Claimant's 1996 attendance record was excessive when judged against an absolute standard of reasonableness. Under such circumstances, we must find that the Carrier did not sustain its burden of proving the charge for which the Claimant was disciplined, and we will sustain the claim. This conclusion does not mean that the Carrier may not rely upon a properly adopted attendance control policy which includes a comparison based upon an identifiable published shop average and consider total absences (including those for legitimate reasons) in determining excessive absenteeism.

**AWARD**

**Claim sustained.**

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**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 Second Division**

**Dated at Chicago, Illinois, this 17th day of April, 2000.**