

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31342
Docket No. TD-31673
96-3-93-3-667

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

PARTIES TO DISPUTE: (American Train Dispatcher Department/
(Brotherhood of Locomotive Engineers
(
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"This is the appeal of dispatcher A. A. Karsokas of the discipline of 30 days deferred as stated on G-32, dated August 25, 1992.

Mr. Karsokas is not guilty, both procedurally and factually."

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 waived right of appearance at hearing thereon.

The dispute devolves upon the issue as to whether an employee who has been absent, over a period of time which the Carrier considered to be excessive, but some of those absences were due to bona fide illness, may properly be subject to the Carrier's discipline.

The Claimant entered the Carrier's service as a clerk in 1970. In due course he acquired seniority as a train dispatcher.

On July 8, 1992, the Claimant reported off sick. The Carrier thereupon, on July 13, 1992, issues him a notice to attend an Hearing which stated that the Claimant's absence on July 8, 1992, constituted excessive absenteeism in light of the Claimant's previous attendance record. The Hearing Notice sets forth the following record of the Claimant's 1992 absences:

<u>"From</u>	<u>To</u>	<u>Days</u>	<u>Type of Absence</u>
1/2		1.0	sick
1/5	1/6	2.0	sick
1/27		1.0	sick
2/18		1.0	sick
2/25		1.0	sick
2/26	2/27	2.0	sick
3/12		1.0	sick
3/15	3/19	5.0	sick
4/12		1.0	sick
4/13	4/15	3.0	sick
4/22		1.0	sick
5/12		1.0	sick
7/8		1.0	sick"

After several postponements, the Hearing was held on August 17, 1992. On August 25, 1992, the Claimant was informed that he had been found guilty as charged and assessed a 30 day deferred suspension.

The Carrier denied that it committed procedural or substantive errors in assessing the Claimant discipline. The Carrier states that although the Claimant's absences, for medical reasons, considered alone or in tandem with other absences, as in this case, it has to determine whether such an employee, excessively absent, is a liability rather than an asset to it.

The Carrier cited several recent Awards on this property which have held that even genuine illnesses may subject an employee to discipline even up to discharge, if the employee, because of other absences, in addition to absences because of illness, prevents the employee from meeting his work responsibility to the Carrier.

The Carrier states that in addition to the absences cited in July 17, 1992 Notice for Investigation, the Claimant has been disciplined on six prior occasions for failing to protect his assignment. The Claimant had also received three letters of caution, i.e., on March 7, 1977, August 28, 1980 and February 2, 1981, directing his attention to his absenteeism problem. The Carrier asserts the Claimant has disregarded its efforts to remedy the situation or to improve his attendance.

The Carrier stated the Claimant has the duty to pursue his occupation in a diligent manner on behalf of his employer. It adds it has the right to expect availability from the Claimant in this matter. This obligation should not be imposed on other employees.

The Carrier maintains, in light of the claimant's poor record on attendance, past and recent, the sanction is not only commensurate with the present offense, but it is accordingly mild under all the circumstances of the case.

The Carrier denies there is any merit to the procedural objections interposed by the Organization. It noted that the postponement of the Investigation from August 3 to August 17, 1992 allowed the Claimant ample time to collect whatever medical documents he needed.

The Carrier asserted it was not a prejudicial error for the Hearing Officer to ask the Claimant whether the number of days he missed in 1992 was excessive. The Carrier stressed this question went to the heart of the problem.

The Carrier stated that the excessive absenteeism of the Claimant was not mitigated even though he received permission to be off on the days in question. It further states that Witness Timko could not prejudge the Claimant since he did not assess discipline or act as a "judge." It adds the Organization did not make this objection at the Hearing, and it is too late to do so at this juncture.

The Carrier stated it was not an error for Mr. Martinez not to appear at the Investigation to verify the letter he wrote the claimant about his attendance record. There is no dispute that the Carrier was concerned about Claimant's substandard attendance record and the Claimant was well aware of the standards of attendance to which he was expected to comply.

The Carrier stated it was proper to introduce the Claimant's prior disciplinary record to show that the discipline assessed in the instant case was appropriate.

The Carrier stated a review of the entire record reveals that the Claimant received all his contractual rights and in no way denied due process and therefore the Board should deny the claim.

The Organization maintains that the disciplinary proceedings against the Claimant were flawed both procedurally and substantively.

The Organization maintains that the Carrier violated Rule 18, the Discipline Rule, when the Assistant Superintendent denied the Claimant's Representative a postponement of the August 3, 1992, Hearing because the Claimant had a doctor's appointment on the date of the Hearing and also needed time to obtain his medical records. Rule 18 states that a Hearing may be postponed for a valid reason for a reasonable period of time. The Organization stated the Carrier's refusal to grant the postponement was not only a breach of the Claimant's contractual rights but it also showed pre-judgment on the part of the Carrier.

The Organization also maintains that it was a material error for the Carrier not to have produced Supervisor Martinez at the Hearing, despite the Organization's repeated requests that he be produced. Mr. Martinez prepared records and exhibits which were introduced into the record and the Organization insists that it had the right to cross examine and question him on this information that was entered into the record. It was critical that Mr. Martinez be present. It states the Carrier presented one witness, Mr. Timko, who was a third party, to offer information against the Claimant. Mr. Timko testified as to conversations between the Claimant and Mr. Martinez.

The Organization stated the evidence is clear that the Claimant marked off on all the dates with which he was charged without any Carrier Official interposing any objections to the occasions when he marked off sick.

The Organization states the testimony at the Hearing clearly and unequivocally established that the Claimant suffered severe gastrointestinal problems. His doctor's note which is in evidence attested to this malady. The Claimant testified he suffered great pain and discomfort, loss of appetite, and continual vomiting as a result of this condition. It prevented him from performing his duties as a Train Dispatcher. At times, the Claimant stated the pain and the stomach cramps prevented him from even driving to work.

The Organization asserts that the Claimant had a legitimate and valid reason for not covering those assignments he missed because of his illness. Sickness is a legitimate reason for not covering one's assignment and the Carrier's actions were unwarranted in penalizing the Claimant for his illness.

The Organization stressed that "excessive absenteeism" has to be evaluated by the facts of the particular case. The Carrier erred in treating the Claimant under the guidelines of a general policy without giving consideration to his painful gastrointestinal condition. There can be no Rule that determines a certain number of absences constitute "excessive absenteeism." All cases of absenteeism have to be viewed in the context of the particular situation in which they occur.

The Organization asserts the Carrier treated the Claimant in accordance with its Policy, but gave no consideration to the severe situation facing the Claimant. The Carrier ignored the Claimant's condition and used his case to send a message that absenteeism for any reason will be met with harsh consequences.

The Board finds this a troublesome case. It concludes that while the Hearing was not a paragon of perfection, the errors did not constitute such material faults that they require the Board to vacate the discipline. In truth, there are very few contested facts in this case. The nub of the dispute centers upon the emphasis and significance that should be ascribed to the Claimant's absences, not only in 1992 but also over his entire work record.

The Board finds some merit in the Organization's contention that bona fide illness is not a valid basis for assessing discipline for absenteeism. However, it is necessary to guard against too simplistic a reply to this issue. Before determining whether the absences in question are excessive, it is necessary to review the position the involved employee occupies. The Carrier is properly entitled to hold that a dispatcher should be kept to a higher standard than a clerk typist. Obviously, all employees owe a high degree of fidelity to the demands of their positions. Nevertheless, the importance of a Dispatcher to the efficient running of a railroad and his continued absences may properly be viewed in a somewhat more demanding and critical manner than an employee occupying a less responsible position.

The Carrier is also properly entitled to view judiciously the entire attendance record of the affected employee. Even though the absence of the employee may be due to a bona fide illness, beyond the control of a employee, there is philosophical underpinning for the assessment of discipline. The Employee-Employer relationship creates a framework that demands the Employer compensate the employee with a fair rate for a fair day's work and the Employee obligates himself to render a fair day's work for his compensation.

When either one of the parties to this relationship fails to meet his obligations thereunder, the relationship may be considered severed or terminated. This is the rationale that allows an employer to review the totality of the employee's attendance record and take corrective action even if part of the attendance record consists of absences caused by bona fide illnesses. That is not to say the carrier does not have to exercise his review of the employee's attendance record judiciously and compassionately. Before the Carrier can discipline an employee for excess absenteeism when part of the absences were caused by genuine illness, the Carrier must demonstrate it has not acted arbitrarily or precipitously.

In the case at hand, the Board finds that the deferred 30 day suspension is proof that the Carrier has given consideration to all the factors that caused the Claimant to be absent an inordinate amount of time from his important position. Even if the 1992 absences were necessitated by bona fide illness, the Claimant is guilty of fracturing or undermining the Employee-Employer relationship. The Board finds that the Claimant must take some affirmative measures to indicate that he is actively undertaking therapeutic measures to cope with his gastrointestinal problem. The Claimant cannot realistically expect to be absent several days each month and still retain his job. The Carrier is also expected to make its counseling and medical facilities available to assist the Claimant regain his health. The Claimant as a senior employee with 22 years seniority has the right to expect assistance from the Carrier to enable him to be able to render regular service.

In summary, the Board finds no merit to the Organization's procedural objections. It also finds that in light of the Claimant's total record, and in light of the exigencies of the Employer-Employee relationship, the Carrier did not act harshly or arbitrarily in assessing the Claimant a deferred suspension for his 1992 absences when it is juxtaposed against his overall attendance record.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders an award favorable to the Claimant not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th of January 1996.