

SPECIAL BOARD OF ADJUSTMENT NO. 1056

NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK)

and

TRANSPORTATION COMMUNICATIONS
INTERNATIONAL UNION

Claim of Robert Lugo
(Suspension, Five Days
Deferred, Attendance,
Rule O)
ATK Docket TCU-D-3353
TCU File No. 393-CO-042-S
Case No. 10

OPINION AND AWARD OF THE BOARD

STATEMENT OF THE CLAIM: "1. Carrier acted in an arbitrary, capricious and unjust manner and in violation of Rule No. 24 of the Agreement, when by notice of March 6, 1990, it assessed as discipline five working days' suspension held in abeyance against Reservation Sales Agent, Mr. Robert Lugo.

2. Carrier shall, if Claimant is ever required to serve the suspension, reinstate him to service with seniority rights unimpaired and to compensate him an amount equal to what he could have earned, including but not limited to daily wages, overtime and holiday pay, had discipline not been assessed.

3. Carrier shall now expunge the charges and discipline from Claimant's record."

FINDINGS OF THE BOARD: The Board, upon the whole record and all the evidence, finds that the parties herein are, respectively, Carrier and Organization, and Claimant an Employee, within the meaning of the Railway Labor Act, as amended ("RLA"); that the Board is duly constituted and has jurisdiction over the parties, claim, and subject matter herein; and that the parties were given due notice of the hearing, which was held on December 10, 1991 in Washington, D.C. The Board makes the following additional findings:

Claimant is employed as a Reservation Sales Agent. He has approximately 12 years of service.

Claimant was absent from work on three occasions within a 90 day period. On November 22, 1989, he left work early, for which he received no pay. On December 24, 1989, he was absent and received eight hours of sick pay. Claimant claimed illness for the day and so notified the Carrier at the time he was absent. That absence was Claimant's tenth sick day of the calendar, the maximum number of sick days which he accrued under Art. 19 of the Agreement, based on his seniority. On December 26, 1989, Grievant was also absent, and also called to notify the Carrier that he was sick. That absence was his eleventh day of sick leave for the year; and he

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received no pay for the day. As a result of Claimant's absences on December 24th and 26th, he lost eight hours of pay for December 25th. Claimant was neither asked for, nor did he provide, any medical documentation for his absences.

Claimant's absences on December 24th and 26th produced an absenteeism rate of 22 percent for the 10 day period surrounding the latter two absences. The high percentage flagged a review of Claimant's attendance over a longer period of time. His longer-term absence, as calculated by the Employer, was 15% for the 90 day period from October 21, 1989 through January 18, 1990.

The Carrier calculated Claimant's absentee percentage, based on the number of days he was scheduled to work and the number of days which he was off voluntarily, which the Carrier defines to include absences due to illness, even if the absences are covered by contractual sick days.

The relatively low number of Claimant's absences produced such a high absentee percentage because, during which time he was scheduled to work 56 days, 37 of which he traded away in accordance with the procedures in effect between the parties, leaving only 19 days actually scheduled for work during the period.

As a result of Claimant's absences, the Carrier charged him with violation of its Rule O, which provides, in part, that "[e]mployees must report for duty at the designated time and place . . . Employees may not be absent from their assigned duty . . . without the permission of their supervisor", and with violation of a unilaterally-promulgated absenteeism policy applicable to RSAs, which provides, in part:

"It is the standard of the Reservation Sales Office for each [RSA] to be absent no more than 5% of their scheduled work time."

Section 5 of the Carrier's unilaterally-promulgated Leave Policy provides, in part:

"B.

* * *

2. Voluntary absences are defined as those absences when:

* * *

b) An employee reports unavailable for duty due to illness not covered under a medical leave of absence.

* * *

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3. An employees who has a voluntary absence may be considered in violation of Rule 'O'.

* * * "

An investigatory hearing was convened in the matter, as a result of which the Carrier found him to have violated the provisions cited; and it imposed the discipline which is at issue.

The Carrier's attendance policy has been the result of the work of a task force which researched attendance for similar occupations to find a "reasonable standard". The 5% figure was selected on that basis; and it has been disseminated to employees. The percentage is not derived from actual Carrier absenteeism, which averaged 6% in 1989.

Under the Carrier's policy, there is no fixed percentage of absenteeism which automatically triggers discipline; each case is looked at on its own merits. The procedure utilized during the time period including this case was that the employees with absenteeism of 9% or higher were screened for review and their attendance checked for a 60 or 90 day period to determine if the absenteeism is excessive. The 5% standard appears to be more of a guideline, with individual circumstances (e.g., a single major illness) reviewed in determining whether to take action.

The use of sick leave as absences in calculating absenteeism percentages which trigger discipline percentages has been placed in effect, notwithstanding the provisions of Art. 19 of the Agreement, which provides for the allowance to employees of sick leave on the basis of a formula which appears to provide each employee with Claimant's seniority ten days of such leave per year.

The Carrier's witnesses testified that there is no fixed number or percentage of absences which will trigger discipline; they indicated that each case is reviewed on its own facts.

Claimant had previously been counselled for attendance; that is sufficient to establish that he was aware of the requirements. He had been disciplined three times for absenteeism: a three working day suspension in October of 1987 and a suspension of ten days deferred later that month. 31, 1989, and a reprimand in October of 1989.

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The Carrier's rules require documentation of sick leave on request; insofar as the record indicates, no such request was made and the discipline is not predicated on Claimant's failure to provide such documentation. Sick leave is intended to excuse employees from working while medically unable to do so; and an employee's use of such leave for other than the intended purpose may subject him to discipline. However, Claimant is not charged with misuse of sick leave; and, although the pattern of his absence on the days prior to and after Christmas are suspicious, they are not the basis for the charges against him.

POSITIONS OF THE PARTIES: The Carrier argued before the Board that the record establishes that Claimant was absent on the days charged and that his absences the days before and after the Christmas holiday shows a pattern of abuse. It asserts that his absences represent an absenteeism rate of 22% over a 30 day period, and 15% over a 90 day period, placing him in violation of the Carrier's attendance policies. It points to Claimant's prior discipline for his absenteeism as establishing a pattern of poor attendance, to which progressive discipline was applied, as well as to establish that Claimant was well aware of the attendance policies and the disciplinary consequences of failures to meet the requirements.

The Carrier argued that its charge against Claimant is timely, since the absenteeism took place over a period of time and the charge is against a pattern of conduct. The Carrier asserted that the fact that absences are excusable does not preclude discipline, based thereon, in light of the employee's obligation to report for work. It asserted that the determination of the appropriate policy can properly be made on a department-by-department basis.

The Carrier urged, therefore, that the claim be denied..

The Organization argued before the Board that the evidence is that Claimant's absences were the result of sickness and that he so advised his supervisors and was allowed to leave. It points out that there is no evidence of malingering. The Organization asserts, therefore, that Claimant was disciplined for use of leave to which he was contractually entitled.

The Organization argued that the Carrier's policy on absenteeism, making absences resulting from illness violations of Rule O, is contrary to Art. 19 of the Agreement, which specifically provides for sick leave. It urged that the Carrier cannot properly discipline an employee for exercising a contractual right. It asserted that the Carrier is, in any event, obligated to bargain with the Organization before imposing such a policy.

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The Organization also argued that Claimant has been unfairly singled out because he exercised his rights under the Trade Days Agreement between the parties, since an employee who did not exercise those rights and was absent with equal frequency as Claimant would not have been in violation of the Carrier's attendance policy.

The Organization urged, therefore, that the claim be sustained.

DISCUSSION AND ANALYSIS: This Board has previously held that it is basic to an employee's obligation to the employer that he report for work when assigned and that an employee's failure to meet that obligation over a period of time entitles the employer to impose progressive discipline.

That obligation must, of course, be balanced against the reality that employees are human and that human beings become unable to work from time to time because they are sick or injured. The Parties to this case have recognized that balance by providing in the Agreement for leave resulting from sickness. They have set both the amount of such leave and the procedures for its proper utilization. See Art. 19 of the Agreement.

The imposition of an attendance control policy which is based on attendance without regard to fault represents a material change in the terms and conditions of covered employees. That is particularly so where the policy makes exercise of a contractually-recognized entitlement to be grounds for discipline under some, employer-determined circumstances. Such programs, and, in particular, the interrelationship of such programs with existing, negotiated contract terms, are appropriately addressed and resolved through the bargaining process and not through the grievance/arbitration procedure. At least prior award between the Parties has so held. See Award No. 78 of PLA No. 2296. It is to the bargaining forum that the parties are most appropriately directed to develop an attendance control program which balances attendance obligations and contractually-authorized sick leave.

Having concluded that the status of the Carrier's policy is most appropriately resolved through bargaining and having recognized precedent on the property for such a resolution, it must, nevertheless, be recognized that the dividing line between major and minor disputes under the RLA has been redrawn by the Courts to make disputes where the policy at issue is "arguably justified" by the terms of the applicable agreement or by the past practice between the parties to be minor disputes. See Consolidated Rail Corporation v. Railway Labor Executives'

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Association, 491 U.S. 299 (1989) ("CONRAIL") at p. 307. The Court in that case held the burden to establish exclusive arbitral jurisdiction to be light. Id. The Courts' tests for what constitutes a minor dispute are binding on this Board.

In light of the lack of explicit contractual language insulating the taking of sick leave from discipline, and the long-standing managerial policy and practice of controlling attendance, the Board is not persuaded that the Carrier's position is frivolous or insubstantial; and, under the low standard advanced by the Court in CONRAIL, supra, it concludes that this Board is a permissible forum for resolution of the dispute. The analysis which follows assumes confirmation that the dispute is "minor", instead of "major", within the meaning of the RLA.

The Board turns now to an argument-by-argument analysis to determine the validity of the Employer's program and its application to Claimant.

A. The Carrier's Failure to Count Days Traded Away as Work Opportunities Does Not Discriminate Improperly Against Claimant.

Of the Organization's argument that counting only the days Claimant worked, and not those which he traded away, for purposes of determining Claimant's attendance constituted discrimination for use of a contractual benefit, the Board is not persuaded. The Carrier's method of counting work opportunities does not change an employee's attendance obligations: the percentage figures to trigger review and to constitute consideration for discipline remain the same for those employees who trade days as those who do not.

When Claimant properly utilizes the Trade Days Agreement and obtains a substitute to work his scheduled shift, he is relieved of responsibility to work that shift; and the employee who has traded to work the shift becomes responsible. Claimant cannot have it both ways, so as to obtain credit for the work opportunity without retaining responsibility for the it. If claimant's liberal use of the Trade Days Agreement lowers the number of absences required to trigger employer standards and increases the percentage impact of any single absence, the impact results from choices made by the employee, who must accept the consequences of those choices.

The Board concludes that the Carrier may properly confine calculation of an employee's work opportunities to those he chooses to work, himself, and not those opportunities traded away.

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- B. The Carrier's Policy Does Not Utilize a Flat Percentage to Determine Discipline; and It Is Not Defective on that Basis.**

Of the Organization's challenge to the Employer's use of a flat percentage absenteeism rate, the Board is also unpersuaded. Prior boards have rejected use of a rigid percentage or occurrence formula to trigger discipline. See Award No. 21 to FLB No. 4267 (Sharp, Chair) at p. 4. However, the record is clear that the policy applied by the Carrier in this case does not utilize a flat percentage to determine discipline. Instead, the Carrier uses the absentee percentages as a screen to bring employees to its attention for its review, with determination whether the employee's absences are excessive made on a case-by-case basis. Thus, while challenge to the reasonableness of the Carrier's determination in a particular case still lies, the Carrier's then-present policy is not subject to attack on the grounds on which a sustaining award was rendered in Award No. 21 of FLB No. 4267.

- C. The Carrier's Policy of Progressively Disciplining Employees for Excessive Absence is Limited to Absences without Acceptable Reason.**

The Board recognizes that there are limits to how far an employer is obligated to go in continuing the employment of an employee who is simply unable, even when due to legitimate injury or illness, to fill the position for which the employee was hired. An employer may be justified in terminating an employee who is unable reliably to perform his job over an extended period of time, without regard to the employee's "fault". However, as Public Law Board No. 4267 held in its Award No. 21, such a determination is non-disciplinary in nature and progressive discipline plays no role. See also the discussion in the following section whether absences covered by contractual leave can be used to establish an employee's unreliability.

In the instant case, by contrast, the Carrier has utilized progressive discipline, a response clearly intended to correct chronic absence without acceptable reason. It is against the standard whether Claimant's absences were without acceptable reason that the validity of the Carrier's action against Claimant must be judged.

- D. Claimant's First Two Absences Are Not Shown to Be Without Acceptable Reason.**

The first two absences for which Claimant was disciplined (November 22nd and December 24th) were allowed and compensated as

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sick leave under Article 19 of the Agreement. While the Carrier alluded to Claimant's failure to submit medical documentation for his absence, the Agreement places the burden to request such documentation on the Carrier. See Art. 19, Sec. __, Para. __. Insofar as the record indicates, the Carrier made no such requests. Similarly, the implication of the Carrier's statements with respect to the timing and circumstances of Claimant's absences is that he was not sick. If so, he would not properly take sick leave, which exists for and is limited to the purpose indicated. However, improper use of sick leave must be charged and proven in order to support discipline; and suspicion and innuendo are not a substitute for such proof.

The Carrier argues, in addition, that Claimant's absences on December 24th and 26th constitute a "pattern of abuse". The Board is not persuaded. Two absences are not sufficient to establish a pattern.

E. The Carrier May Not Count Contractual Sick Leave as Absence Without Acceptable Reason in the Absence of Proof of Improper Use of the Leave.

As indicated, the Board recognizes the necessity to balance the right of the Carrier to reliable employees and to control absenteeism, on the one hand, with the right of employees to reasonable amounts of leave to accommodate legitimate illnesses. The parties have, through their negotiations, established a level of paid absences to which ill employees are entitled. For Claimant and other employees with his length of service, the negotiated paid sick leave is 10 days per year. The Board is persuaded that employees are entitled to take such leave to cover legitimate illnesses, without incurring disciplinary consequences or to be deemed "unreliable". To hold otherwise would be to penalize employees for taking a bargained-for benefit. The Board is not persuaded, in the absence of clear indication to the contrary, that the Parties so intended.

That is not to say that employees are allowed to take sick leave for purposes other than illness or injury or that they can claim entitlement to the leave without complying with the negotiated procedures. However, there is no proof, in the instant case, that Claimant did not meet the contractual tests; and the charge against him is not based on non-compliance with Art. 19.

This case may be distinguished from Award No. 30 of SBA No. 1024 (Harkless, Chair), in which termination of an employee absent due to sickness was upheld, based on absences which included failure to call in. The employee was absent seven times in a 30 day

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period. Whether the remaining days were covered by Art. 19 sick leave is not a part of the record.

The Board concludes, therefore, that the Carrier was not entitled, for purposes of its absentee control program, to count as absences Claimant's proper use of contractual sick leave.

F. Grievant's Third Absence During the 90 Day Review Period is Not Sufficient to Establish Excessive Absenteeism.

Claimant's third, and last, absence during the period, on December 26th, was also claimed by him to be the result of illness. He did give the Carrier notice and was not counted as AWOL. Again, there is no proof that Claimant was not ill or that he failed to comply with the requirements of Art. 19. However, that day did constitute his eleventh sick day of the year, one in excess of his contractual entitlement for the year; and it was not covered by any accrued leave. The day was counted as unpaid leave.

It is the case between the parties that discipline based on absences in excess of the negotiated leave has been upheld between the parties. See Case No. 269 of SBA No. 973. The Board is persuaded that such a rule is not unreasonable. However, in Claimant's case, only one day within the 90 day period reviewed by the Carrier was in excess of that negotiated limit. Claimant's single day of countable absence is neither sufficient to support discipline for excessive absenteeism without good reason nor to terminate Claimant on the basis of unreliability.

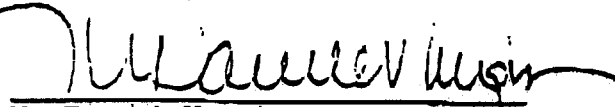
The Board concludes that Claimant's record of one absence in excess of his contractual sick leave and two absences covered by that sick leave within a 90 day period cannot be held to constitute unsatisfactory attendance, even where Claimant's number of work opportunities was reduced by his use of trade days.

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AWARD: The claim is sustained. The penalty of a suspension of five days, deferred, shall be rescinded. Claimant's record shall be expunged of record of the discipline and he shall be made whole for any wages and benefits lost as a result of the discipline.

ORDER: The Carrier shall make the Award effective within thirty days from the date hereof.

April 29, 1992



M. David Vaughn
Neutral Chair

Valorie J. Giulian 8/13/92 Dismissing
Ms. Valorie J. Giulian
Carrier Member

Joel M. Parker
Mr. Joel M. Parker
Organization Member

attached
cp. 2/12/92

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