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The Organization argues that the discipline cannot be sustained, since Appellant's absences on October 10, 15, and 16, 1999, cannot be considered unsatisfactory attendance, either viewed alone, or in connection with his prior attendance record. According to the Organization, Appellant's absences on these dates were never questioned by the Carrier as being invalid and thus it must be concluded that the Carrier accepted the fact that Appellant was legitimately sick on the dates in question. Thus, the Organization asserts that Appellant did no more than exercise his contractual right to utilize sick days and cannot be subjected to discipline therefor.

The Organization maintains that, in a Memorandum of Understanding for the period January 1, 1995 through December 31, 1998, in Article VI, thereof, the Parties reached agreement regarding "approved leave status." The Organization argues that "the Carrier's position is illogical because the Carrier claims that an 'approved sick day' can be used to determine unsatisfactory attendance." In the Organization's estimation, the Carrier's position conflicts with the Parties' Agreement that designates "the term 'sick' as an 'approved leave status.'" The language of Article VI, the Organization observes, also contains language that "employees shall be able to utilize any and all sick days in their bank." The Organization further observes that there is no language in the Parties' Agreement "that provides that any condition can be present which could prevent the employee from utilizing his sick day for legitimate reasons."

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The Organization argues that arbitral precedent supports its position. The Carrier, according to the Organization, "has unilaterally implemented a no fault system to assign disciplinary jeopardy for the use of contractually mandated sick days." According to the Organization, the Carrier seeks to acquire restrictions on sick leave that it could not accomplish through collective bargaining.

Further, the Organization states that Appellant can also not be considered to have unsatisfactory attendance for being late on October 2, and 12, 1999, in light of his prior attendance record. The Organization maintains that Appellant's prior attendance record cannot be considered relevant to an assessment of whether or not he engaged in unsatisfactory attendance. Article VI of the Memorandum of Understanding for the period January 1, 1992 through December 31, 1994, the Organization notes, states that "if an employee maintains an unblemished record from the date of G-32 (Notice of Discipline) for a one (1) year period (including warnings), then the Reprimand will be removed from his/her record." This language also states, the Organization notes, that "[i]f an employee is assessed discipline of sixty (60) days or less and maintains an unblemished record from the date of G-32 (Notice of Discipline) for a two (2) year period (including warnings), then the discipline will be removed from his/her record." According to the Organization, "it would be inequitable for the Board to reconsider a period of absenteeism, with the respect to the expungement rule, [for] which the Appellant may

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have already served discipline." The Organization observes that its members are also contractually entitled to bereavement leave and personal leave, and that it would clearly be wrong for the Carrier to consider a bereavement absence or the exercise of personal leave as amounting to unsatisfactory attendance. The Organization opines that "the same principle which applies to bereavement and personal days applies to sick days; that is, sick days are a contractual benefit which the employee may use when he is absent from work due to legitimate illness."

According to the Carrier, the record clearly establishes that Appellant was either late or absent for the days set forth in the charge. The Organization maintains that these absences and incidents of lateness, seen in view of "the Appellant's attendance record for the years 1996, 1997, 1998, and 1999 ... establish the Appellant's history of unacceptable attendance." Thus, the Carrier observes that, in 1996, Appellant was absent 11 times (exclusive of a 3 ½ week period of illness) with four late starts; in 1997, he was absent 14 times with three late starts; in 1998 he was absent 12 times with 12 late starts; and, in 1999, prior to the date set forth in the charge, he was absent seven times with 12 late starts.

The Carrier asserts that it matters not that Appellant submitted a doctor's note that excused his absences from work from October 14, though October 16, 1999, because such excuse "does not justify his overall record of unacceptable attendance and tardiness." The Carrier observes that the note does not justify Appellant's absence on October 10, or his late

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starts on October 2 and 12, 1999. The Carrier maintains that its position is supported by arbitral precedent. Finally, the Carrier claims that the discipline assessed is warranted in view of the burden unsatisfactory attendance places on the Carrier and the fact that Appellant was warned for unacceptable attendance and also received a three day record suspension on July 10, 1998, for unsatisfactory attendance.

OPINION OF THE BOARD

An employer has the right to expect regular and prompt attendance from an employee. Unsatisfactory attendance in terms of absences, incidents of tardiness, or a combination of the two, has always constituted just or sufficient cause to support the imposition of discipline by an employer. Needless to say, these abstract principles can be shaped with more precision by parties to a collective bargaining agreement in the form of contractual understandings. Moreover, arbitrators have long recognized the ability of an employer, absent contractual restrictions to the contrary, to promulgate attendance/discipline policies. In the absence of contractual understandings regarding time and attendance standards, or in the absence of an articulated policy by an employer, arbitrators have applied the "rule of reason" in determining whether in a given situation an employer has cause to impose discipline on an employee for

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unsatisfactory attendance.

The great weight of arbitral authority is also to the effect that a distinction exists between an employer's right to impose discipline for unsatisfactory attendance and an employee's contractual right to sick leave. Arbitrators have ruled in any number of different employment settings that an employer can take into account, absent a contractual understanding to the contrary, an employee's exercise of a contractual right to sick leave when considering the question of whether the employee has, overall, engaged in a pattern of unsatisfactory attendance. (See Elkouri & Elkouri, *How Arbitration Works*, [5th Ed. 1997], 796, "The right to terminate employees for excessive absences, even when they are due to illness, is generally recognized by arbitrators.") As noted above, the ability of an employer to discipline an employee for unsatisfactory attendance must be viewed through the prism of any contractual understandings, that exist, the articulated attendance policy of the employer (which can be subject to challenge on the ground of unreasonableness), and "the rule of reason" if no contractual understandings or attendance policy is in place.

Turning to the Parties' Controlling Agreement, this Board does not find that any understanding is in place between the Parties regarding unsatisfactory attendance. While the Organization has pointed to the Parties' current Agreement regarding "approved sick leave," this Agreement address only the contractual right of an employee to be paid while on "approved sick

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leave" and does not address at all the Carrier's right to impose discipline for unsatisfactory attendance. It is not illogical, as the Organization contends, for the Carrier to impose discipline on an employee for unsatisfactory attendance, even if the absences involved were part of an employee's "approved sick leave" if the overall attendance record of the employee, reasonably understood, supports the Carrier's conclusion that the employee has in fact engaged in unsatisfactory attendance. The Board notes that the arbitration Award relied on by the Organization (in RE: St. Joseph Mercy Hospital and American Federation of State, County and the Municipal Employees [87 LA 529]) dealt with a no fault attendance policy, which distinguishes that case from the instant case, since the Carrier is not acting pursuant to any no fault attendance policy. Rather, the Carrier, when lodging a charge of unsatisfactory attendance, is claiming the employee is at fault because of an overall unsatisfactory attendance record. To the extent that the rationale employed by the arbitrator in the award cited by the Organization can be viewed as being in conflict with the Board's analysis herein, the Board respectfully declines to follow the arbitrator's rationale as being against the weight of arbitral authority.

In analyzing the Parties' positions in this proceeding, the Board is aware of the Organization's argument regarding bereavement leave and personal leave. However, it occurs to the Board that, to the extent the Carrier would ever seek to rely upon an employee's exercise of bereavement leave or personal leave within the contractual parameters as part of a pattern of

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unsatisfactory attendance, the Carrier would be acting unreasonably. Thus, the Board views the question before it as being whether the Carrier's conclusion that Appellant's attendance record was unsatisfactory was a conclusion supported by reason. In answering this question, the Board does not feel constrained by the Organization's argument regarding the contractual expungement rule. The Carrier, in setting forth its case against the Appellant, has taken into account Appellant's past attendance record for the years 1996 through the dates in question, but has relied on actual absences and dates of lateness and not the issuance of any reprimand or suspension. The Carrier's reliance on Appellant's past disciplinary record has been related only to the question of penalty and not of guilt.

Viewing Appellant's attendance record, including the absences and periods of lateness set forth in the instant charge, the Board finds that the Carrier has sustained its burden of proof of showing unsatisfactory attendance. That is to say, the Board concludes that the Carrier has shown that it was reasonable for it to consider Appellant's attendance record to reflect a pattern of unsatisfactory attendance. The fact that Appellant was disciplined in 1998, for unsatisfactory attendance, supports, in the Board's estimation, the penalty imposed herein.

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AWARD

The claim is rejected.

DATED: 5/18/2001



THOMAS N. RINALDO, ESQ., NEUTRAL MEMBER



ARTHUR J. DAVIDSON, LABOR MEMBER



ANDREW J. PAUL, CARRIER MEMBER