Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13653
Docket No. 13532
01-2-00-2-11

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (International Association of Machinists and
(Aerospace Workers
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"That the Union Pacific Railroad Company (hereinafter referred to as the Carrier or Company) violated Rule 32 contained in the Agreement dated June 1, 1960, between the International Association of Machinists and the Missouri Pacific Railroad Company.

That the Carrier violated the Attendance Policy For All North Little Rock, Arkansas Mechanical Department Employees (hereinafter referred to as the attendance policy) when it failed to comply with the conference provisions contained therein.

Accordingly, we request that the Union Pacific Railroad Company be ordered to reinstate the Claimant to service and compensate him for all lost wages and that all reference to this dispute be removed from the Claimant's personal record file.

That the Claimant be given credit for all benefits lost as a result of his unjust dismissal."

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 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.

The Claimant, hired as an Apprentice Machinist on September 6, 1994, resigned on June 30, 1998. The Claimant Chairman thereafter sought reinstatement to service, which was granted by the Carrier under specific conditions. The August 3, 1998 letter granting conditional reinstatement included the following:

> "5. You must avoid any violation of any Company rule for a period of one (1) year. . . .
>
> Failure to comply with these instructions will result in immediate dismissal without an investigation."

On August 4, 1998, the Claimant signed a "Waiver/Agreement Letter," which included the following:

> "I concur with all the conditions listed in [the Carrier's August 3, 1998 letter]. . . .
>
> I further understand that any violation of any Company rule within one (1) year of my return will result in termination.
>
> I understand and agree that any violation of any Company rule will lead to my immediate dismissal without having any investigation."

This Waiver/Agreement Letter was also signed as a "witness" by the Claimant's Union Representative. This signature does not necessarily make the Organization a party to this Agreement. However, it emphatically provided the Organization with knowledge of the letter's contents and, absent any claim to the contrary, an acceptance

of the surrender of the Claimant's right to a disciplinary Investigative Hearing under Rule 32 - at least as to the matters referenced in the Carrier's August 3, 1998 letter.

On July 19, 1999, within one year of the reinstatement, the Claimant received the following notice from the Carrier:

> "You are currently in violation of Union Pacific Rule 1.15 and the North Little Rock Locomotive Department Attendance Policy.
>
> Therefore, in line with the agreement that you signed on August 3, 1998 [August 4 doubtless intended] you are hereby dismissed from the service of the Union Pacific Railroad."

As to UP Rule 1.15, the Carrier's citation of this is in the following internal memorandum from two Chief Mechanical Officers, reading in full as follows:

> "NUMBER: 99-5
> SUBJECT: DUTY - REPORTING OR ABSENCE - 1.15
> EFFECTIVE 05/01/99
> UPRR RULE 1.15 IS MODIFIED AS FOLLOWS:
>
> 'EMPLOYEES MUST REPORT FOR DUTY AT THE DESIGNATED TIME AND PLACE WITH THE NECESSARY EQUIPMENT TO PERFORM THEIR DUTIES. THEY MUST SPEND THEIR TIME ON DUTY WORKING ONLY FOR THE RAILROAD. EMPLOYEES MUST NOT LEAVE THEIR ASSIGNMENT, EXCHANGE DUTIES, OR ALLOW OTHERS TO FILL THEIR ASSIGNMENT WITHOUT PROPER AUTHORITY.
>
> ADD A SENTENCE TO READ:
>
> CONTINUED FAILURE BY EMPLOYEES TO PROTECT THEIR EMPLOYMENT WILL BE SUFFICIENT CAUSE FOR DISMISSAL.'"

The Carrier's response to the claim on behalf of the Claimant was simply to repeat the assertion of violation of Rule 1.15 and the Attendance Policy. The sole

evidence provided was the Claimant's "Absence Information" from January 8, 1999 through July 6, 1999.

Since there was no explication of how this record specifically relates to alleged "rule violation," the Board will not attempt to infer such meaning, except to note that the record apparently shows: absence without authority, January 29, 1999; "absent-sick," February 13, March 4, April 28, May 17, June 2, 3, 19, 30, July 1 and 19, 1999.

As to the Carrier's conformance with the "Progressive Counseling and Disciplinary Procedure" in its own Attendance Policy, the record shows only Notices to the Claimant advising him of being at Steps 1, 2, and 4 based respectively on absences of June 2, 19 and July 9, as well as a Notice of being charged for two "occurrences" for absences on July 2 and 6.

The extraordinary nature of these Notices is that they are all dated July 16, 1999 - three days prior to the dismissal letter, quoted above. In other words, none of these Notices could possibly have been used in "progressive counseling" of the Claimant.

As one of its principal arguments, the Union argues that the Claimant was denied his "contractual right" to a Rule 32 Investigative Hearing. The Board fully dismisses this argument. The terms under which the Carrier permitted the Claimant to return to service, specifically and with notice to the Organization, waived the Rule 32 rights.

This, however, does not mean the Carrier had preserved full discretionary authority over the Claimant's employment status. Four of the Carrier's five conditions were related to drug/alcohol matters; no suggestion of non-compliance on these is indicated. The fifth condition makes "violation of any Company rule" sufficient to dismiss the Claimant from service without a disciplinary Hearing.

The Board finds, nevertheless, that this permits the Organization to challenge the statement of "rule violation," leaving the Carrier with the burden of proof to show it occurred.

The Attendance Policy

Did the Claimant "violate" the Attendance Policy? Except for the first numbered paragraph, the Attendance Policy is a procedure administered by the Carrier when

employees are absent or tardy; it describes the remedial steps and subsequent penalties for absence. It is, however, not a "rule" which must not be violated.

The Policy's first numbered paragraph is closely similar to Rule 1.15 (as it existed prior to May 1, 1999). It does say, "Employees . . . must not absent themselves from duty . . . without proper authority." The Carrier did not indicate that the Claimant's sick days (while possibly considered excessive in another context) were taken "without proper authority." Only one day is shown (apparently) as absence without "proper authority," January 29, 1999. If the Carrier were attempting to base its dismissal action on this, such would be ineffective six months later.

Rule 1.15 (and Its Addition)

Rule 1.15 has a curious twist. Looking at its content prior to the May 1, 1999 addition, it simply cannot be read as any cautionary Rule against excessive absence or unreported absence. Its attention is directed to employee conduct upon reporting for duty and while on duty. The Claimant is not accused of any violation in this regard. The limited meaning of the Rule as previously written is supported by the sentence added on May 1, 1999, which does indeed concern absence, when it states as follows:

> "Continued failure by employees to protect their employment will be sufficient cause for dismissal."

This additional sentence, it must first be noted, did not take effect until nine months after the Claimant signed the Waiver letter and less than three months before the dismissal action. Since the Carrier makes no case for "continued failure . . . to protect," the Board will not attempt to parse its meaning. Further, questions arise: Was the Claimant (or were employees generally) made aware of the May 1, 1999 Rule addition? How does it relate to the penalties, much milder than dismissal, in the Attendance Policy, along with the directed counseling of employees?

The Carrier's Submission refers to the Claimant being absent "eighteen (18) times between January 8, 1999 and July 10, 1999." A review of the absence record appears to show 11 days; if there were more, such was not explained. The Carrier says the Claimant had an "atrocious attendance record." The Board has no reason to find otherwise, but excessive absence was not the stated cause of the Claimant's dismissal. Once again, the reason given was "violation" of the Attendance Policy (which measures

and assesses absences) and Rule 1.15 (which, prior to May 1, 1999 did not concern absence, and after May 1, 1999 provided untested additional language during the remaining two months of the Claimant's employment).

One further aspect requires discussion: The Carrier looks to other on-property Awards to support its dismissal action without any impairment or the use of a Rule 32 Investigation. The cited Awards are different in nature. Public Law Board No. 4746, Award 115 (same parties as here) concerned a waiver of Investigation, acceptance of dismissal as a proper penalty, conditional return to duty, acknowledged failure to meet one of the conditions. The Award found the Carrier "privileged to return [the employee] to the status of a dismissed employee."

Public Law Board No. 5704, Award 4 (UP-UTU) concerned an employee returned to work on a "probationary basis," with the condition, among others, that the employee could be terminated if he becomes "involved in any rule infraction or display[s] any conducted which in the Carrier's opinion would normally warrant permanent dismissal." (Emphasis added)

In contrast to these temporarily suspended dismissals, here the Claimant was directed to conform with drug/alcohol conditions (not at issue here) and avoidance of Rule violation. In its dismissal action, the Carrier cited only Rule 1.15 and the Attendance Policy. As discussed above, the Board finds insufficient the Carrier's assertion that the Claimant specifically violated this Rule or this Policy.

In determining a remedy, however, there is ample reason for caution. After resigning, the Claimant was able to return to service solely because of the good will and voluntary action of the Carrier. When the Claimant did return and, logically, he could have been held to a near-perfect attendance standard as a condition, he instead was more generously permitted to take care of any possible drug/alcohol situation and work within the Rules. In return, he developed a poor attendance pattern.

As a result, support for the Organization's contractual position in this claim should not involve any retroactive benefit for the Claimant. The Award will, therefore, direct that the Claimant be promptly offered reinstatement with seniority unimpaired but without back pay or retroactive benefits; that the first four conditions of the Carrier's August 3, 1998 letter to the Claimant continue to apply, with the cited three-year period to commence upon reinstatement; and that the Claimant be placed initially

on Step 3 of the Attendance Policy. If these conditions are not acceptable to the Organization and the Claimant, then the dismissal action will stand, and the claim will be denied.

AWARD

Claim sustained in accordance with the Findings.

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 11th day of December, 2001.