

PUBLIC LAW BOARD NO. 6890

AWARD NO. 5
CASE NO. 14
CSXT FILE: 110468
UTU FILE: 2006161-1011-Y

PARTIES
TO
DISPUTE

CSXT TRANSPORTATION, INC.
(Former Seaboard Coastline Railroad Company)
and
UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM

Claim of J. A. Woods (574080) for clear record, pay for all time lost and reinstatement of benefits pursuant to the Schedule Agreement in connection with investigation held June 28, 2006. CSXT File No. 110468. 5 days actual suspension plus 2 overhead for a total of 7 days actual suspension.

FINDINGS AND OPINION

The Board after hearing upon the whole record and all the evidence, finds that the parties herein are the Carrier and Employee, respectively, within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted under Public Law 89-456 and has jurisdiction over the parties and dispute involved herein; and that the parties were given due notice of the hearing thereon.

During the period spanning May 15, 2006 through June 11, 2006, the Claimant, a trainman, marked off sick on Friday, May 26, Saturday, May 27, Friday, June 9, and Saturday, June 10, 2006. Consequently, on June 22, 2006, the Claimant was directed by the Carrier to attend an investigation regarding his alleged failure to meet the minimum availability requirements for the period of May 15, 2006 through June 11, 2006, in violation of the special instructions contained in System Notice 102.¹ The investigative hearing was conducted on June 28, 2006, after which the Carrier, on the basis of the evidence it credited, determined that the Claimant violated the Simplified Employee Availability Standards Policy (hereinafter the "Availability Standards Policy"). He was assessed a five-day actual suspension which activated a two-day overhead (i.e., deferred) suspension for a previous incident occurring in February, 2006, resulting in an actual suspension of seven days.

The Organization, on behalf of the Claimant, appealed the Carrier's disciplinary action on procedural and substantive grounds. After the parties exhausted the contractual appeal process without resolution, the dispute over the Claimant's seven-day suspension was placed before this Board for a final determination.

Here, the Board has thoroughly reviewed the record in this case and finds that significant procedural issues have been raised by the Organization which must be dealt with before the substantive merits of the dispute are considered. Turning to the threshold procedural issue, the Organization maintains that the Claimant was not timely notified of the charge against him in accordance with Article 2, Section 1(A) of

¹ System Notice 102 is the Carrier's "Simplified Employee Availability Standards Policy" which addresses weekend layoff and absenteeism. This Policy was promulgated on September 30, 2005, with an effective date of October 3, 2005.

the Schedule Agreement.² Specifically, the Organization points up that the Claimant's notice of investigation was dated June 22, 2006, which exceeded the prescribed ten-day limit. From the Organization's perspective, the Carrier was procedurally time-barred from pursuing any charge against the Claimant relative to his alleged failure to comply with the Availability Standards Policy; i.e., the measurement period for his alleged absenteeism ended on June 11, 2006, which should have resulted in an investigation notice no later than June 21, 2006. In response, the Carrier submits that the Crew Availability Specialist (i.e., the Carrier officer designated to handle attendance-monitoring issues) ordinarily receives an absenteeism report on Monday of each week. However, the Carrier avers the absenteeism report relevant to the Claimant's attendance history that should have been received by the Crew Availability Specialist on June 12, 2006, was not obtained by her until June 18, 2006 because of an internal technological malfunction. Taking into account the reason for the lateness of this report, the Carrier argues that the Claimant, nevertheless, received a timely notice of investigation when the Carrier first had constructive knowledge on June 18, 2006 of his alleged failure to meet the minimum availability requirements.

With respect to this procedural issue, it cannot be gainsaid that the Carrier is required to comply with the time limitation under Article 2, Section 1(A) when notifying an employee of alleged wrongdoing within ten days of the occurrence. Generally, excuses for lack of compliance will not provide a valid cause for extending contractually prescribed time limits. To same effect, see Public Law Board No. 5714, Award No. 16 (Harris, 1995); and Public Law Board No. 5916, Award No. 13 (Peterson, 1999). Without diminishing this axiomatic principle, the Board here finds justification, albeit on a non-precedential basis, for the Carrier's belated notice of investigation in light of a technological malfunction, presumably attributed to an internal computer glitch in generating the absenteeism/availability report for the measurement period ending June 11, 2006. As noted, the Carrier acted within the timeframe of ten days once it became aware of a problem concerning the Claimant's putative absenteeism during the measurement period in question. Accordingly, Article 2, Section 1(A) was not breached by the Carrier in this instance. Yet to avoid a contrary ruling in future similar situation, it behooves the Carrier to promptly inform the Organization when an absenteeism report germane to the Availability Standards Policy is delayed as a result of a computer malfunction.

The other procedural complaint raised by the Organization concerns the Claimant's right to confront and interrogate witnesses as provided for in Article 2, Section 1(A). Specifically, the contention underlying this complaint is that the Claimant was denied a fair and impartial hearing because his fundamental right of due process was compromised when, over the Organization's objection, the Carrier declined to summon a material witness (viz., the Crew Availability Specialist) to testify in person rather than by telephone. Continuing in this vein, the Organization cites Public Law Board No. 4975, Award No. 17 (Harris, 1992), which found the Carrier's failure to have a witness present at the hearing to explain essential facts in the case deprives the charged employee of the right to see the witness during cross-examination; and that such a denial constitutes a deprivation of due process safeguards which are memorialized in the controlling labor agreement. Conversely, the Carrier asserts that the parties' Agreement contains no provision prohibiting telephonic testimony. In this regard, the Carrier also relies on arbitral authority, to wit, Public Law Board No. 6213, Award No. 19 (Lynch, 2000), which did not find the physical absence of a material witness and the use of the telephone to question and cross-examine

² The time limits under Section 1(A) of Article 2 specifies a period of ten days from the date of the incident within which the Carrier will notify the accused employee of the occurrence, or within ten days after the occurrence becomes known to the Carrier, for purposes of scheduling an investigation relative thereto.

that witness to be a fatal procedural due process flaw. There, the Board opined that such telephonic testimony is permissible if clear and precise and that the accused employee is given every opportunity to develop all the information to which the witness is privy. Besides, it appears from the Board's observation that such telephonic testimony is justifiable where the absent witness' supervisor testifies at the hearing and is able to answer all questions relative to the matter at issue. Judging by the ruling of Public Law Board No. 6213, telephonic testimony under these circumstances does not adversely affect the accused employee's right to a fair and impartial hearing.

This Board is cognizant of the conflicting arbitral authority on the use of telephonic testimony in the course of a carrier-initiated investigation. Understandably, testimony provided by telephone may occur when the witness' testimony is corroborative in nature or can be corroborated by an attending witness, or where the witness cannot be compelled to testify in person because he/she is not an employee under the carrier's control, or is simply unavailable to be physically present due to the nature of the witness' job or profession (e.g., a physician). Arguably, traveling a distance to the place of inquiry may be another factor as well which prevents the witness from attending an investigation. In any event, before a decision is made to use telephonic testimony, the carrier, which is in control of the investigative process and responsible for safeguarding the charged employee's due process rights, should consult with the charged employee's representative in order to reach a consensus or understanding on their relying upon this alternative method of obtaining direct evidence.

Although the Organization here objected to the Carrier's unilateral decision to have the Crew Availability Specialist testify by telephone, there was no subsequent attempt by the Carrier to reach an understanding with the Claimant's representative concerning the method by which this witness' testimony would be given. After a studied examination of the case record, it is readily discernible that the Crew Availability Specialist's presence at the investigative hearing was necessary because her testimony on the essential facts underlying the accusation against the Claimant required that she testify in person. This witness was not an uninterested bystander summoned to merely verify records admitted in evidence concerning the Claimant's attendance and/or availability for service. Instead, this witness was expected to and did provide direct evidence relating to her attendance monitoring actions which formed the basis for charging the Claimant for allegedly violating the Carrier's minimum availability requirements. It appears that the Crew Availability Specialist was the Carrier's chief witness whose opinions dealt with the Claimant's absences due to illness in correlation with the minimum availability requirements under the Availability Standards Policy. Since she was not physically present at the hearing and could not be confronted by the Claimant, nor interrogated in person by his representative during cross-examination, the Board is impelled to find that the Carrier compromised this crucial aspect of the investigative process. As a consequence thereof, the Claimant was deprived of his right to a fair and impartial hearing which provides a sufficient basis for vacating the Carrier's disciplinary action.

In the Board's judgment, the foregoing procedural ruling is in harmony with Public Law Board No. 4975, Award No. 17, *supra*, regarding the protections afforded an employee who is accused of violating a rule or policy imposed by a carrier. There, the Board iterated that "[t]hese protections include the right to due process in the investigative hearing and specifically give the accused the right to interrogate witnesses. Such interrogation includes the right to cross-examination as part of the adversarial system of obtaining the facts in any particular situation. *** Were this not the case, a carrier would never have to call any witnesses to be present at the hearing but could rely completely on telephone conference calls or other method of obtaining statements. Clearly, this has never been the practice in the railroad industry. Without a strong showing of necessity on the part of the carrier or the agreement of the claimant, all

essential testimony must be in the presence of the accused.” (Id. at 4-5) For the reasons stated, this arbitral authority is controlling in the disposition of the Organization’s procedural due process complaint concerning the Carrier’s use of telephonic testimony at the Claimant’s investigation.

Generally, when a dispute is decided on procedural grounds, as here, there is no need to address the substantive merits. Yet there are certain exceptions to this arbitral standard. Notwithstanding the procedural ruling reached in this instance, the substantive matter at issue deserves to be scrutinized in light of the alleged offense and the resultant discipline assessed the Claimant.

As previously noted, the matter at issue arose within the availability measurement period of May 15, 2006 through June 11, 2006, during which the Claimant was unavailable for service on four occasions because of sickness. The record shows that the Claimant was absent from work on May 26 and May 27, and as a result of a toothache, marked off before the completion of his assignment which began on June 8, 2006.³ He was treated for this toothache on June 9 when he had three teeth extracted to relieve his discomfort. As a result of this dental treatment, the Claimant was given a prescription for Vicodin, which is a narcotic. He marked off sick on June 9 and 10 because he was prohibited by the Carrier’s own rules to perform service while taking medication of this kind. The Claimant returned to service on June 11, 2006. Nearly two weeks later, as recounted herein, he was directed to attend an investigation on the allegation that he failed to meet the minimum availability requirements for the specified measurement period in question. This charge was predicated upon the Carrier’s Availability Standards Policy, which in pertinent part states:

ITEM 4. MINIMUM AVAILABILITY

* * * *

EMPLOYEES WITH AN ATTENDANCE HANDLING IN THE PAST 6 MONTHS

* * * *

EMPLOYEES ON ASSIGNMENTS WITH TWO OR MORE REST DAYS WHO FAIL TO WORK OR TO BE AVAILABLE FOR WORK A MINIMUM OF 19 STARTS IN A 4 WEEKS PERIOD OR FAIL TO WORK OR BE AVAILABLE TO WORK A MINIMUM OF 10 WEEKEND STARTS (F-SU) DURING THIS PERIOD WILL BE SUBJECT TO REVIEW.

NOTE - AVAILABLE TIME INCLUDES ALL COMPENSATED TIME OFF (VACATION, PERSONAL LEAVE DAYS, ETC.). A WEEKEND REST DAY (F-SU) = A DAY OF WEEKEND AVAILABILITY.

In justifying its position that the Claimant violated the Availability Standards Policy for the availability measurement period of May 15, 2006 through June 11, 2006, the Carrier maintains that his absences during this period provide no merited defense to this violation. Continuing in this vein, the Carrier avers

³ The Claimant’s tour of duty began on the evening of June 8, continuing into June 9. He worked until 3:15 a.m. on the morning of June 9 when he felt ill from an apparent toothache and informed the yardmaster who told him to mark off sick, which he did. Later in the morning of June 9, the Claimant sought dental treatment.

that even if the Claimant had worked or was given credit for the two days he missed for dental appointments, he still violated the Availability Standards Policy because he would not have been available for the required minimum of nineteen days of work. It appears from the Carrier's calculation the Claimant only worked or was available for service for sixteen starts. According to the Carrier, even excused absences such as those caused by illness or injury can be considered when evaluating an employee's record of excessive absenteeism under this Policy. Thus, the Carrier posits that it has every right to expect employees to be available for service and where there are excessive or repeated absences, including absences for illness, it has the right to impose discipline. From the Carrier's perspective, the Claimant's seven-day suspension was warranted.

Arguing to the contrary, the Organization submits that the record reveals that the Claimant worked sixteen days during the applicable availability measurement period; that he was available eight days, which reflects the assigned off days for his assignment, and was absent four days due to illness. The Organization asserts that the Claimant met the applicable criteria specified in the Carrier's Availability Standards Policy, since he was available and/or worked twenty-four days – which would equal twenty-four starts during the availability measurement period under review. It is clear to the Organization that the Claimant complied with the minimum availability requirements for the measurement period in question.

With respect to absences resulting from dental treatment (e.g., teeth extractions), the Organization refers to the August 31, 1973 letter of understanding between the Carrier and the respective General Chairmen covering employees who mark off sick. (Employee's Exhibit D) The Organization contends that the Carrier, in light of this letter of understanding, agreed that employees could be off sick subject to review. Such review would only occur when the Carrier perceived that employees were marking off sick when they were not sick, which would amount to an absence without permission. It is the Organization's position that the August 31, 1973 letter of understanding constitutes an established working condition that can only be charged in accordance with the Railway Labor Act, as amended. Moreover, the Organization holds to the view that the Claimant had a contractual right to mark off sick subject to Article 5, Section 1(F) of the Schedule Agreement.

For the foregoing reasons, the Organization opines that the Claimant did not violate the Carrier's Availability Standards Policy and was wrongfully suspended for seven days. Accordingly, the Organization urges the Board to vacate the Carrier's disciplinary action and pay the Claimant for time lost.

The Board has carefully studied the substantive matter at issue in context with the parties' respective arguments and the express language in the Availability Standards Policy requiring the minimum number of starts an employee must work or be available for work over a four week period. As recounted herein, the Carrier asserted that during the measurement period in question, the Claimant failed to work a minimum of nineteen starts or was available to work a minimum of ten weekend starts. The Organization, arguing conversely, maintained that the Claimant worked or was available for twenty-four days or service during the May 15 through June 11, 2006 measurement period. The determination here rests not only on an interpretive application of the controlling provisions of the Availability Standards Policy, but also on whether the Carrier satisfied its burden in proving the Claimant's alleged failure to comply with the minimum availability requirements set forth in this Policy.

Judging by the express language in the Availability Standards Policy, the terms "to work" or "be available for work" must be read conjunctively in calculating the employee's availability to perform service during the prescribed measurement period. Even taking into account the Claimant's absences due to illness during the measurement period in question, the Organization's calculation regarding the number of days he worked or was available for work appears to be a more reliable figure and consistent with this Board's interpretive application of the terms of the Availability Standards Policy than the Carrier's calculation. Simply put, the Carrier did not meet the requisite burden of proof to support the charge that the Claimant had violated the Policy's availability standards because he worked, or was available for work, less than the required minimum of standards as alleged during the measurement period in question. This inherent fault in the Carrier's position can be found in its treatment of absences due to illness when ascertaining availability of the employee, like the Claimant, to work the minimum number of starts, or be available to perform service, within the given measurement period. From the Carrier's perspective, the Claimant's absences adversely affected his ability to work as well as his availability for work under the Availability Standards Policy which, in effect, triggered disciplinary action. This so-called rationale raises the collateral issue of whether the Carrier's unilaterally implemented Policy can override the commitment to which the parties here previously acquiesced and memorialized in the August 31, 1973 letter of understanding covering absences when employees justifiably mark off sick. In significant part, that letter of understanding (which management initiated) states that the Carrier "does not expect, nor does it want its employees to work when they are actually sick, even when there is a shortage of men; however, the use of sickness under false pretenses is recognized as being absent without permission and may be [dealt] with accordingly."⁴ (Employee's Exhibit I)

Yet the Carrier's incongruous administration of the Availability Standards Policy, as evidenced by the instant case, curtailed the Claimant's right to mark off sick in accordance with the August 31, 1973 letter of understanding and the applicable provisions of the Schedule Agreement. The curtailment of this right prompted the Carrier to ignore a legitimate illness as a factor mitigating any lack of preclusion on the Claimant's part to satisfy the minimum availability requirements under the Policy. Consequently, the Carrier's misapplication of the Availability Standards Policy in this instance resulted in the imposition of discipline which contravened the Claimant's right to mark off sick without adverse ramifications.

Although the Board empathizes with the Carrier's attempt to administer the Availability Standards Policy as a deterrent toward minimizing if not eliminating excessive, unjustified employee absenteeism, the Carrier cannot arbitrarily penalize an employee, like the Claimant here, where legitimate absences due to illness preclude the employee from possibly satisfying the Policy's minimum availability requirements.⁵ In sum, the Carrier erred when it improperly subsumed the right to mark off for illness within the ambit of excessive absenteeism as a means of determining employee compliance with the Availability Standards Policy. To remedy the type of situation dealt with in this case, it is incumbent upon the Carrier to

⁴ The letter of understanding further states that "[i]n instances where an employee lays off account [of] sickness a disproportionate amount of time, it may be necessary to require him to submit to a physical examination to determine his fitness to continue service." (*Id.*) This arrangement is consistent with Article 5, Section 1(f) of the Schedule Agreement.

⁵ The Board does not countenance employee conduct involving absences under false pretenses; e.g., marking off sick when not ill. Such conduct improperly interferes with the Carrier's right to efficiently maintain its operations. Under these circumstances, it is entirely appropriate for the Carrier to implement the process established by Article 5, Section 1(f) of the Schedule Agreement concomitantly with the investigative and disciplinary processes.

harmonize policy criteria with contractual rights on the issue of absenteeism vis-à-vis the employee's obligation to perform service and/or be available for service. Otherwise the same dispute will resurface.

Given the reasons stated herein, the Claimant's disciplinary suspension will be vacated on the merits and expunged from his personal employment record, entitling him to lost pay for the period he was in a suspended status, viz., seven days.

AWARD

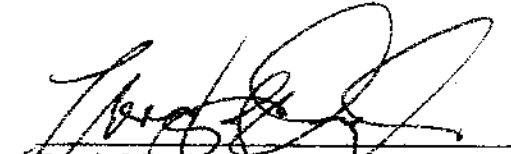
Claim sustained.

ORDER

The Carrier shall comply with this Award within thirty (30) days from the date hereof.



Charles P. Fischbach
Chairman and Neutral Member



Francis J. Doyle, Carrier Member

Dated at Chicago, Illinois,
this 28th day of February, 2007

Dissent Attached



Roy G. Boling, Employee Member

CONCURRENCE ATTACHED

**CARRIER'S DISSENT
TO
AWARD NO. 5
PUBLIC LAW BOARD NO. 6890**

The instant award is palpably erroneous, counters mainstream rationale and provides no precedential value for the following reasons.

The Neutral Member declared the case procedurally defective because the Carrier allowed telephonic testimony from a chief witness. The Neutral Member states in this Award that before a Carrier uses telephonic testimony it "*should consult with the charged employee's representative in order to reach a consensus or understanding on their relying upon this alternative method of obtaining direct evidence.*" Yet, in Award No. 1 of this very same Board the Neutral Member stated, "*...the Board does not consider the telephonic testimony in this instance a deprivation of a fair and impartial hearing. Although the Carrier's Manager, Taxi Services, testified by telephone, he was still subject to direct and cross-examination as were the other witnesses who attended the hearing.*" The same Neutral Member in this Award justified his decision on the grounds the Crew Availability Specialist was the Carrier's "*chief witness*" and therefore should have been in attendance at the hearing so the Organization could have "*direct and cross-examination*" of her testimony. However, the Terminal Superintendent appeared as the chief witness at the hearing and testified to all of the issues in this case. The Crew Availability Specialist only appeared to present statistics related to the Claimant's attendance.

Moreover, the Carrier in its submission cited numerous Awards, both on and off property, supporting the premise that telephonic testimony does not deny the Claimant or his representative their "due process". See PLB No. 6213, Award No. 19 (Lynch); NRAB, First Division Award No. 24522 (LaRocco); PLB No. 6916, Award No. 5 (Ross); the Neutral Member's PLB No. 6890, Award No. 1 mentioned above, as well as many, many more so numerous that listing all of them would demonstrate that this decision is but a single row boat drifting in a lonely sea.

In addition, there is nothing in the Schedule Agreement with the UTU in this case that comes near the Neutral Member's declaration of a requirement to *consult* with the Organization or the "*reach a consensus*" prior to utilizing telephonic testimony. The Neutral Member, in effect, has written and enforced a provision not included in the Schedule Agreement, obviously exceeding the Board's authority.

This Neutral Member also stated, "*Generally, when a dispute is decided on procedural grounds, as here, there is no need to address the substantive merits*". However, he does so because of alleged "*certain exceptions to this arbitral standard*", yet he fails to state them. There are no exceptions and the arbitral standard was ignored.

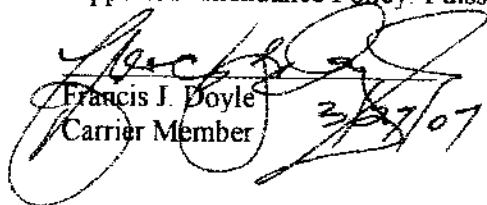
A Carrier's ability to manage its workforce through policies controlling attendance has mainstream support from the astute college of arbitrators. In Award No. 8 of Public Law Board No. 6879 (Ross) (UTU/SCL v CSXT), for example, the Neutral Member observed:

Numerous tribunals in this industry and on this Carrier's property have held that the Carrier has a right to expect employees to comply with its rules and policies that require satisfactory attendance and to impose corrective and progressive discipline when poor attendance patterns emerge, even when such patterns are due to illness or injury, we emphasize.

Also, in Award No. 36 of Public Law Board No. 6610 (Goldstein) (BLET/SCL v CSXT) stated:

Numerous Board decisions have unequivocally held that, in this industry, as in virtually every other, the Carriers have an inherent right to expect satisfactory employee attendance and may undertake disciplinary action when patterns of poor attendance emerge and documentation is lacking. Here, the Carrier reasonably examined a relevant time frame and proved, after complying with employee due process requirements, that an unacceptable pattern of marking off existed. Indeed, the investigation transcript contains detailed testimony and documentation regarding each mark-off in question. As an appellate body, and with respect to this case in particular, the Board will not substitute its judgment regarding acceptable attendance patterns for that of the Carrier unless it has been established by the Organization that the Carrier's method or approach was unreasonable, biased, or otherwise unfair to the Employee. Numerous Boards and other tribunals have held that the Carrier maintains an inherent right to manage its workforce based on service delivery requirements. Here, the Board finds that the Carrier's determination that the Claimant was excessively absent was well founded and that the Carrier's decision to discipline the Claimant was reasonable and justifiable.

Suffice it to say, the Carrier declares the Award issued by the Board to be palpably erroneous and of no precedential value. The Referee's interpretations re-wrote the existing collective bargaining agreement and ignored the Carrier's legitimate and widely supported Attendance Policy. I dissent.


Francis J. Boyle
Carrier Member
3/27/07

Public Law Board No. 6890

Award No. 5, Case No. 14

Organization's Concurring Opinion

In rendering this decision, the Honorable Neutral joined with several reputable Neutrals in professing the rights of a charged employee to confront witnesses which provide testimony that ultimately determine the charged employee's future employment in the rail industry. In the instant case, the decision references a decision by the Honorable Neutral Robert O. Harris in an on-property decision, which in itself clearly defines Carrier's responsibility to provide a witness whose testimony provides "*essential facts underlying the accusation against Claimant*" and determines that it would be "*required that she testify in person*". This very important issue has also been previously addressed by other Honorable Neutrals; David Twomey and Don B. Hays (unreferenced in the decision), which each have cast the same light on Carrier's responsibility to provide witnesses for face-to-face interrogation/cross-examination¹, yet Carrier has carelessly dismissed the established precedent of these decision, and continually failed in many cases to provide pertinent witnesses to ensure a fair and impartial hearing for the charged employee.

This decision also provides clear insight into Carrier's misplaced application of their Availability Standards Policy, especially when that policy conflicts with a documented clear and present working condition, agreed to by both the Organization and Carrier representatives, and is declared in writing by a Carrier officer. This decision clearly explains that Carrier, in its efforts to promote a flawed "policy" and discipline Claimant for his alleged attendance failures, they have failed to consider the working condition established by the letter August 13, 1973 and

¹ The disputed witness in the instant case was located in the same city and less than two (2) miles from the location of the investigation.

its application, whereby, this decision sustains the fact that this established working condition would supersede Carrier's application of the so-called "Policy".

This decision clearly establishes a precedent regarding the application of polices unilaterally implemented by Carrier, especially when those policies conflict with applicable agreements and established working conditions. This decision places Carrier on notice to clear up the inequities in their attendance polices, when contrary to the applicable Agreement provisions and/or established working condition, this to eliminate future disputes similar to the instant case referenced in this decision. This decision has further emphasizes the above referenced established precedent on this property and places Carrier on notice that, those polices must not be in conflict with provisions of both Agreements and/or established working conditions that are in place. As stated in this decision, "*... it is incumbent upon the Carrier to harmonize policy criteria with contractual rights on issues of absenteeism vis-à-vis the employee's obligation to perform service and/or be available for service.*"


This decision clearly defines the handling of an employee who is ill and unable to report for service, that employee's absence must be considered, unless it can be proven the claim to illness to be false, excluded from the standards established within the policy, and the absence due to illness must be further considered as "**excused**" under the provisions of the August 13, 1973 signed by Carrier officers.

The parties to this dispute commissioned the Board, by Agreement, to review the record presented to it and make that record the basis for the decision rendered. In the instant case, the Organization prepared an in depth appeal on behalf of the Claimant during the on-property handling, and Carrier failed to refute any of the facts established by the on-property record or the referenced precedent included in that appeal and presented by the Organization. Carrier's

dissent asserts the decision to have overstepped the jurisdiction of the Board, but in actuality, this decision clearly fulfills the jurisdiction assigned to it by the parties, in as much as the decision considers only the record provided and **bases its decision only upon the record presented to it by the parties**. Carrier's belated criticism of this decision is an effort to re-argue the case before the future reviewers of this decision via the dissent and is clearly a defensive action representing their failures to proactively rebut the position of the Organization² during the on-property handling of the appeal, thus allowing the contents of the on-property appeal of the Organization to remain uncontested before the Board.

For the above reasons, the Organization concurs with the decision and looks forward to Carrier's application of the precedent established by this decision.

Respectfully submitted,


Roy G. Boling
Employee Member

3/30/07

² The Board was not provided all of the arguments and listed decisions included in Carrier's dissent, therefore the Board did not have the opportunity to review those arguments prior to rendering its decision. thus they were not a part of the record for review by the Board.