

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated January 19, 2011, D. A. Smith, Roadmaster II MW Nashville Division, notified R. R. Podany ("the Claimant") to attend a formal Investigation on February 1, 2011, at the Nashville Division headquarters building in Nashville, Tennessee, "to determine the facts and place your responsibility, if any, in connection with information received on January 3, 2011, regarding your continued absence. It is alleged," the letter continued, "that you failed to respond to a Carrier letter dated December 21, 2010 directing you to provide information and/or documentation of your continued absence and have your physician provide an update to your current medical status no later than January 3, 2011." The letter stated that in connection with the foregoing the Claimant was "charged with insubordination, failure to protect your position, marking off under false pretenses, failure to follow instructions, abandonment of your position, and possible violations of, but not limited to: CSXT Operating Rules – General Rule A; General Regulations GR-1 and GR-2." The Claimant, the letter continued, was removed from service pending the outcome of the formal Investigation. The Investigation was subsequently rescheduled to February 22, 2011.

FINDINGS:

Public Law Board No. 7120, 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, R. R. Podany, is a Machine Operator for the Carrier with a service date of July 16, 2007. The charging officer, Damon Smith, has been a roadmaster for eight years and employed by the Carrier for 13. He supervised the Claimant for a few months, he stated, while the Claimant was a Machine Operator on the surfacing team. Mr. Smith related the following history regarding the Claimant's absences that led up to the charge letter in this case.

On February 5, 2010, the Claimant requested and was granted time off to attend to the damage to his house caused by a pipe that burst in an upstairs bathroom. On February 26, 2011, the Claimant made a written request for a leave of absence of up to 30 days because he still had "unfinished conditions at [his] house on the main floor and the upstairs floor due to a plumbing flood . . . which affected about 70% of the living space." On March 31, 2010, the Claimant requested in writing that his leave be continued an additional two to four weeks for "the same situations as before not yet addressed." The request was granted.

On April 12, 2010, the Claimant attempted to return to work but was not permitted to because the length of his absence required that he pass a physical examination before being allowed to return to work. On April 28, 2010, the Carrier's Chief Medical Officer approved the Claimant's return to work with the stipulation that he "must wear corrective lenses while on duty." On May 3, the Claimant contacted the Roadmaster and asked how

to get corrective glasses.

On May 5, 2010, the Claimant orally asked Roadmaster Smith for another 30-day leave of absence. Roadmaster Smith denied the request because he had already granted the Claimant the maximum time he was permitted to as an immediate supervisor. The Claimant was off sick until May 20, 2010, on which date he showed up for work. Roadmaster Smith did not permit him to work because he had been off sick for three weeks and needed another medical release to return to work. Roadmaster Smith gave the Claimant an MD-3 form to be completed by a physician stating that it was okay for him to go back to work.

On June 2, 2011, the Claimant brought Roadmaster Smith a letter dated May 25, 2010, from Roy Asta, MD, Psychiatrist. The letter stated that Dr. Asta had been treating the Claimant for certain described symptoms since November, 2009, and that the Claimant would be off work for an extended period of time.

By letter dated June 4, 2010, Division Engineer J. W. Fortune, Nashville Division, notified the Claimant that Dr. Asta's letter dated May 25, 2010, was forwarded to the Carrier's Medical Department and that the Claimant's employee status had been corrected to indicate that he was off and coded as Sick No Pay (SNP). The Claimant was directed to contact an EAP counselor within five days if he had not already done so and instructed that "you will be required to abide by his recommendations, if any." The letter concluded with the statement, "Should you fail to follow the instructions as indicated herein, you may be subject to disciplinary action as provided for by the provisions of your collectively bargained Agreement."

On November 10, 2010, Kristen Waychoff, RN, Nurse Medical Manager CSX Medical Department, sent an email to Roadmaster Smith and Staff Engineer Buford

Smith which stated, "Mr. Podany is not being cooperative; please handle his continued absence administratively." Roadmaster Smith testified that Ms. Waychoff's communication was in response to management's request for a follow-up on the status of Mr. Podany's medical leave of absence. Ms. Waychoff, Roadmaster Smith stated, replied back that she had gotten no response from Mr. Podany and that he wasn't to be considered off on medical leave any longer.

On December 21, 2010, Staff Engineer Buford Smith wrote a letter to Claimant Podany which stated as follows:

Dear Mr. R R Podany:

Your attendance record indicates that you have been on Medical Leave since March 2010. There have been no updates provided by you or your physician regarding your current Medical Status since that time.

A CSX Medical Questionnaire (Certification of Ongoing Injury or Illness form) is enclosed for your physician to complete and submit to the CSX Medical Department no later than **January 3, 2011**. If your physician specifies that you are not medically qualified to return to service and does not provide an estimated return-to work date, medical updates must be submitted every 45 days thereafter until you are able to return to work.

Documentation must be sent to: [address of CSX Medical Department,
ATTN: K. T. Waychoff]

Your failure to submit this documentation to the Medical Department as directed, and your physician does not specify that you are unable to return to service may subject you to additional handling under the Carrier's Discipline policy (IDPAP).

B.B. Smith
Staff Engineer

On January 5, 2011, management sent an email to Nurse Medical Manager Waychoff inquiring, "Did you receive Mr. Podany's Medical info?" Ms. Waychoff replied the same day that "no updated medical has been received." Thereafter on January 19, 2011, the charge letter in the present proceeding was mailed to Claimant Podany.

Daniel C. Bowen, Clinical Manager for the CSX Employee Assistance Program, testified as follows. Mr. Podany contacted the EAP counselor on June 2, 2011, two days before Division Engineer Fortune's letter dated June 4, 2010. The EAP counselor referred Mr. Podany to a provider for treatment of the problem that Mr. Podany had contacted him about. On June 16, 2010, the EAP counselor left a message for Mr. Podany for an update regarding his treatment. On June 28, 2010, Mr. Podany left a message for the counselor that he had made contact with the provider to whom he had been referred. On June 30, 2010, the EAP counselor left a message for Mr. Podany to continue with the provider and to let the counselor know regarding his status. On July 7, 2010, the provider communicated to the counselor that they had made certain recommendations to Mr. Podany, what the recommendations were, and their evaluation of Mr. Podany.

On August 10, 2010 [Mr. Bowen's testimony continued], the EAP counselor spoke with a staff member of the provider who stated that Mr. Podany had been scheduled to start some services on July 8, 2011, but did not follow through. The staff member also said that Mr. Podany told the provider that he was going to a different provider. Mr. Podany's own provider sent certain documentation to the CSX Medical Department. On September 1, 2010, Ms. Waychoff of the CSX Medical Department returned a call from Mr. Podany and left a message that they had received an MD-3 form from his physician but that he (Mr. Podany) still had to contact the EAP counselor for clearance to return to work.

On September 2, 2010 [Mr. Bowen's testimony proceeded], Mr. Podany called the counselor and left a message for him. The counselor returned the call the next day and left a message for Mr. Podany. On September 7, 2010, the counselor and Mr. Podany had

a telephone conversation. Mr. Bowen described the conversation as follows:

Employee advised where he had gone and who was the original referral that had been made. It was an equivalency to the recommendation and then, you know, [the counselor] reviewed . . . the June 4th letter from Mr. Fortune with the employee and just advised that he needed to get the documentation from the services that he stated he had obtained prior to being able to recommend his return to work, and [the counselor] gave him, all of our staff have these senior fax accounts where you can fax things directly into their email. So he gave Mr. Podany that number . . . (Tr. 34)

Mr. Bowen testified that on September 14, 2010, the counselor received a report from the treating physician. The report was dated September 7, 2010. According to Mr. Bowen, the doctor's report "still did not address the issues for which he [Mr. Podany] had been referred." On September 15, 2010, the EAP counselor called Mr. Podany and said that he had received Dr. Asta's letter but still needed some other information relative to the referral that had been made. On September 10th [sic 20th ?] (Tr. 35), Mr. Podany called the counselor and left a message stating that he would get a letter sent from Dr. Asta and reminding the counselor that Dr. Asta had cleared him to return to work.

Mr. Bowen testified, "On 9/21, 2010 [the counselor] left a message at 1307 hours for Mr. Podany about needing the information as to the services that had been referred to in the past, the specialists, and again left the fax number." Mr. Podany returned the call on September 29, 2010, at 1810 hours and, according to Mr. Bowen, "left a message that Dr. Asta had released him to return to work and wanted [the counselor] to contact Dr. Asta." On September 30, 2010, at 1301 hours the counselor called Mr. Podany and said that he got his message from the night before and asked him to try calling during the day so that they could discuss the situation. On October 7, 2010, at 1609 hours the counselor again called Mr. Podany and left a message asking him to call during the day and said that he would be in the office on Friday October 8, 2010, and would be able to take his call.

“And then,” Mr. Bowen testified, “I don’t believe there was any further contact directly between Mr. Podany and our EAP from that point on.”

Mr. Bowen was asked by the conducting officer to clarify what the problem was between the counselor and Mr. Podany in that the Claimant was saying that his doctor was letting him go back to work and the counselor was requiring something different. Mr. Bowen stated as follows:

Well, without getting into any diagnostic protected HIPPA information, suffice it to say that the issues that Mr. Podany presented to the EAP on June 2nd of 2010, a specific referral was made to address those and the Dr. Asta’s several reports from that date on never addressed, or showed that the program that had been referred to had ever been completed, and the Medical Department would require, given the presenting issues, that documentation be presented, that somebody had successfully addressed that. And to date we have never received anything to that effect from Mr. Podany.

The Claimant, Ryan Podany, testified that in addition to the position of Machine Operator he has also held the positions of track man, foreman, and welder. He passed the book of rules test, he stated. In response to Staff Engineer Smith’s letter of December 21, 2010, Mr. Podany stated, a letter from his doctor was faxed to Ms. Waychoff a couple of days after January 3rd, 2011. With the Christmas and New Year holidays and the doctor’s office being closed several days, it was a couple of days after January 3rd, Mr. Podany testified, before he was able to fax and submit the copies requested of him. “Should have the file, copies on file in the CSX Medical Department now,” Mr. Podany stated.

Asked by the conducting officer if he had documentation that he supplied the information he testified about, Mr. Podany testified, “I don’t have any with me today. If

need be I can get a copy of everything from my doctor, submit it or whatever today, or faxed to whoever immediately.” The conducting officer replied to the Claimant, “This hearing is your opportunity to present evidence on your behalf, so you would be required to have that documentation with you if you want to present it in this hearing.” In response Mr. Podany stated, “Well it’s information that the CSX Medical Department has and if they didn’t submit that back to you or Mr. Smith, Roadmaster, I mean.”

The Claimant explained that when you call to see the doctor you can’t demand to be seen the same or the next day and that he got the first available appointment which was January 6th or 7th. The Claimant reiterated that the CSX Medical Department received a report from his doctor. Asked by the conducting officer if he made an attempt to contact anybody from CSX when he saw that he couldn’t meet the January 3rd date, the Claimant stated that he left a voice mail with Ms. Waychoff on January 3rd but never heard anything back from her department. He had no record that he left a voice mail, he testified.

The conducting officer asked Mr. Podany if he ever completed his treatment plan agreed to with his counselor. He replied that he did not recall having a treatment plan. He contacted the EAP counseor, he testified, on his own and discussed certain things which concerned him (Mr. Podany). The counselor “agreed with them and that was that,” Mr. Podany stated. He did not receive anything in writing from the Counselor, Mr. Podany testified. According to Mr. Podany, the EAP counselor did not make any recommendations to him. Rather, Mr. Podany testified, he (Mr. Podany) made certain suggestions, and the counselor agreed with them. The conducting officer asked Mr. Podany, “Regardless of whose suggestions they were, did you and [the counselor] agree upon a treatment plan?” Mr. Podany answered, “. . . I looked into what I thought was I was interested in for the best for me and my family, and I did so because I sought that.”

The conducting officer responded, “Again, the question is, did you abide by the agreement that you made with [the counselor]?” Mr. Podany answered, “And I told [the counselor] . . . I had done what I set out to do and so yes.”

Regarding the allegations in the charge letter pertaining to his absence from work, failure to protect his position, and abandonment of his position, Claimant Podany testified, that he had permission to take off work, that he was granted leaves of absence, and that he never received a letter from CSX stating that he had to return to work or forfeit his seniority. He denied that he willfully neglected his duties or that he was disloyal, dishonest, or insubordinate. He stated that he did not violate any of the rules listed in the charge letter.

Mr. Podany testified that the CSX people, including the EAP counselor, had every telephone and fax number to contact his (Mr. Podany’s) physician. The counselor, Mr. Podany asserted, could have called him [the Claimant’s physician] and requested anything he wanted. “The fact that he didn’t get everything he wanted from them was out of my hands,” Mr. Podany testified, “but I gave him the tools to do that . . .” (Tr. 54). Mr. Podany repeated, “My office visit was after January 3rd, but when it was completed I stayed in the office and I faxed it down there to the Medical Department in the physician’s office.” (Tr. 54).

The conducting officer recalled Mr. Bowen and asked him, “Mr. Bowen, on the record between Mr. Podany and [the EAP counselor], was there anything in writing given to Mr. Podany that told him what he was supposed to do as far [as] the treatment and all?” Mr. Bowen answered, “[The counselor] did not send him a letter with the specifics of, they discussed it several times.”

In a closing statement in his own behalf, the Claimant stated as follows: “[I]t’s

been an overwhelming year, appointments, doctors, the home thing in the beginning. Again for the record though I with, with my position at CSX in limbo or in jeopardy that I expressed that I really desire to keep my job, and anything from, you know, this point on, to do that, to let that be known that I'll do what I have to do to express that to keep my job here at CSX. Nothing was willingly, willfully, I didn't neglect anything willingly, but I do appreciate my job at CSX and desire to keep that."

Following the close of the hearing, by letter dated March 11, 2011, Division Engineer Fortune notified the Claimant of the Carrier's determination that there was sufficient evidence presented to substantiate the charges against him. The letter stated that the discipline to be assessed was dismissal. The reasons given by the Division Engineer for his decision were as follows:

Based on evidence and testimony from the witnesses during the course of this hearing, . . . sufficient proof exists to demonstrate that you failed to provide necessary documentation to justify your continued absence from service, and that you consistently failed to follow the instructions issued by EAP. Consequently it is clear that through a review of all the material associated with this case that you have effectively failed to follow instructions, marked off under false pretense and essentially abandoned your position. Based on these facts, because charges were proven by a substantial measure, it is my decision that the discipline to be assessed is your immediate dismissal in all capacities from CSX Transportation.

The Board finds serious shortcomings in this case on the part of both the Claimant and the Carrier. Where the Carrier fell short in this Board's opinion was in the failure of its EAP representative to communicate directly with the Claimant's physician, Dr. Asta, and inform him what more was needed in terms of medical documentation. It is clear from Mr. Bowen's testimony that as of September 1, 2010, the Claimant had informed the Carrier's Medical Department that he had been cleared by Dr. Asta to return to work. (Tr. 34). On September 7, 2010, the Carrier's EAP counselor informed the Claimant that he needed documentation from the Claimant's physician that the Claimant had received

certain services. The Claimant, according to Mr. Bowen's testimony, provided medical documentation from his physician, Dr. Asta, on September 14, 2010. (Tr. 34).

On September 15, 2010, the EAP counselor informed the Claimant that he received Dr. Asta's letter but needed still more information from the doctor. On September 20, 2010, the Claimant stated that he would get a letter sent from Dr. Asta, but on September 29, 2010, after the counselor had left another message detailing various items that were needed, the Claimant called the EAP counselor back and left a message requesting the EAP counselor to contact Dr. Asta directly. It is not disputed in the record that the Claimant had provided the EAP counselor with both the telephone number and the fax number of Dr. Asta.

In the Board's opinion, under the circumstances the Claimant's request of the EAP counselor was eminently reasonable. Within a week of the EAP counselor's September 7 request for medical documentation, the Claimant had provided the documentation to the counselor on September 14, 2010. The counselor was not satisfied with the documentation but wanted various other items of information (Tr. 35, lines 7-10). It was a reasonable request by the Claimant under these circumstances that the counselor communicate directly with Dr. Asta and tell him what more he wanted. Certainly the EAP counselor was in a better position than a layman such as the Claimant to describe to the doctor what additional medical information he needed. The counselor had not even provided a written statement of what he wanted to the Claimant.

No explanation whatsoever was offered at the hearing or told to the Claimant why the EAP counselor could not communicate directly with the physician for the additional information. In this connection it is to be noted that, according to Mr. Bowen's testimony, the very same EAP counselor on August 10, 2010, had communicated directly

with the first provider that the Claimant had seen during his medical leave of absence (Tr. 34). Moreover prior to his August 10th conversation with the provider, the EAP counselor had made a couple of unsuccessful attempts at communication with the provider, succeeding finally to make contact on August 10. It therefore cannot be claimed that it is against company policy for an EAP counselor to initiate a communication with a provider. In the Board's opinion the counselor should have acceded to the Claimant's request to communicate directly with the Claimant's physician to explain exactly what he wanted where the Claimant had previously complied with the counselor's request to provide medical documentation but the counselor found the submitted information deficient.

The Claimant, however, was seriously at fault in this case. The fact that the EAP counselor did not act on the Claimant's request to contact Dr. Asta for the additional information needed did not excuse the Claimant's failure to do anything to advance his returning to work. Ultimately it is the employee's responsibility to protect his job and do whatever is necessary to fulfill his employer's reasonable requirements for returning from a leave of absence. The Claimant did not respond to the EPA counselor's calls to him of September 30, and October 7, 2010. Thereafter he made no effort to communicate with anyone from the Carrier for the remainder of October and all of November and December, 2010.

Mr. Podany claims to have responded to Staff Engineer Smith's letter to him of December 21, 2010, but to have been late in doing so because of the intervening holidays when his doctor's office was closed. This Board is very doubtful that the Claimant even visited Dr. Asta on January 6 or 7, as he testified. Why did he not know the date of the visit, whether it was January 6 or 7? And where is the documentation? The charge letter

made clear to the Claimant that his failure to respond to the Carrier's letter of December 21, 2010, directing him to provide a medical update of his condition would be an issue at his hearing, and yet he brought no documentation of an alleged visit to the doctor in response to the letter.

Nevertheless because the Carrier was also at fault in this case, as described above, the Board will not uphold the penalty of dismissal. Had the EAP counselor communicated directly with the Claimant's physician to explain to him exactly what more information the counselor needed, it is reasonably possible that the information would have been provided and the Claimant been permitted to return to work sometime in October. The December-January events would then never have taken place. For that reason the Board will not enforce the discipline of dismissal in this case. However, no back pay will be awarded.

The appropriate disposition of the Claimant's situation is as follows. The Carrier shall promptly furnish in writing to the Claimant a statement of exactly what information it requires from the Claimant's physician. The Carrier shall provide the Claimant with the name and fax number or email address of the person who is to receive the information from the Claimant. From the time of receipt of the written statement from the Carrier, the Claimant shall have two weeks to obtain the information from his physician and fax or email it to the person named by the Carrier to receive the information. If the Claimant encounters any delay in obtaining the requested information, he shall immediately notify the person designated to receive the information of the reason for the delay. A new due date shall then be set for the receipt of the information. Failure of the Claimant to act in good faith to obtain the requested information shall be ground for immediate dismissal of the Claimant. As provided in Staff Engineer Smith's letter to

medical updates must be submitted every 45 days thereafter until [the Claimant is] able to return to work.” In the latter event, the Claimant’s situation shall be handled by the Carrier in accordance with its usual way of dealing with employees who are off work for a medical leave of absence.

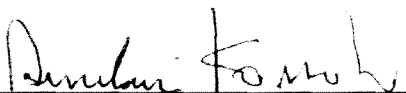
This Board strongly recommends that the Organization work closely with the Claimant to see to it that he obtains and provides the Carrier the requested information.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the date the signed Award is transmitted to the parties.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
June 13, 2011