

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD No. 7163**

Brotherhood of Maintenance of Way)		
Employees Division, IBT Rail Conference)		
)		
vs.)	Case No.	121
)	Award No.	121
)		
CSX Transportation, Inc.)		

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's dismissal of Claimant C. Brown for failure to protect his assignment in connection with his alleged failure to report to work on August 6, 2011 through August 10, 2011 and for allegedly having a pattern of absences for the work weeks of July 23, 2011 and July 30, 2011 was entirely improper, arbitrary and unwarranted (System File D40411111/2011-112088).
2. As a consequence of the Carrier's violation described in Part 1 above, Claimant C. Brown shall be exonerated of the charges, reinstated to service with all seniority and rights unimpaired, have the discipline stricken from his record and he shall be paid the difference between the amount he should have earned had he not been improperly dismissed and the amount he earned or received during his improper dismissal period."

[Organization Submission at 1]

Findings:

Public Law Board No. 7163, upon the whole record and all the evidence, finds that (1) the parties to this dispute are Carrier and Employee within the meaning of the Railway Labor Act as amended, (2) the Board has jurisdiction over this dispute, and (3) the parties to the dispute were accorded due notice of the hearing and participated in this proceeding.

This claim was timely presented by the Organization and responded to by the Carrier during on-property processing including conference. Having addressed this claim in the customary and usual manner, the record established by the parties is now before the Board for adjudication.

Claimant has six (6) years of service in various job classifications. In 2011 he was a Trackman on a two-man team with his Foreman that was stationed in Riverdale, Illinois.

As of July 23, 2011 Claimant had consumed all leave available to him under the Family and Medical Leave Act (FMLA) while caring for his wife. Claimant informed supervisory officers that he would have continuing absences from work and he would notify them when they occurred. Although Claimant asserted a continuing need to be absent from work the Carrier informed him that he was required to work his assignment but he would not be required to work overtime.

During the week of July 23 through July 30, 2011, the Carrier denied Claimant's request for one (1) day of leave and Claimant was absent the other four (4) workdays that week. A supervisor advised Claimant that the act of calling the Foreman or Roadmaster to inform them he would be absent did not mean that his absence was approved.

For August 6 through August 10, 2011, Claimant was absent for the entire five (5) day workweek. Claimant notes that the Roadmaster replied "okay" or "whatever" when Claimant informed him that he would not be at work and that constituted permission to be absent.

On August 15, 2011 the Carrier charged Claimant with failure to report for work for the week of August 6 through August 10, 2011 and with a "pattern of absences" for the weeks of July 23, 2011 and July 30, 2011 as he was "absent four days each week[.]" These absences are in violation CSXT Operating Rules – General Rule A and General Regulations GR-1 and show Claimant's failure to protect his assignment.

General Rule A states that employees "must know and obey rules...that relate to their duties" and seek clarification from a supervising officer "when in doubt as to the meaning or instruction of any rule" and General Regulations GR-1 stipulates that an employee "must report for duty at the designated time and place" and "must not [be] absent...from duties" without supervisory permission.

The Carrier states that Claimant was absent from work for a total of nine (9) workdays; this is not contested by the Organization. Notwithstanding Claimant's informing officials he would continue to be absent from work, the Carrier clearly communicated to Claimant prior to July 23, 2011 that he was to work his assignment.

This was reinforced to Claimant when he was absent 4 days during the week of July 23, 2011 and a supervisor advised him that he could not continue his absents and contacting the Roadmaster to inform him that he [Claimant] would not be at work was not, in and of itself, permission to be absent. Thereafter Claimant was absent without permission for 5 workdays (August 6 – 10, 2011).

The 9 absents without permission between July 23 and August 10, 2011, is substantial evidence that the Carrier met its burden of proof showing Claimant breached GR-1.

For this breach of GR-1, the Carrier dismissed the Claimant. A penalty imposed on an employee for an offense is assessed for its reasonable proportionality. In this regard, the primary purpose of discipline imposed with a penalty is to cure and correct the offense rather than being punitive and severe. A penalty increases in proportion to the offense committed. Some offenses are sufficiently serious to justify dismissal as the initial disciplinary response. In that situation, the dismissal is proportional for a "capital" offense that renders the employment relationship untenable. Dismissal is also proportional as the final step under progressive discipline when lesser measures have not corrected the recurring offense. In that context the employee has not corrected his offenses and demonstrates a lack of rehabilitation.

In this case, the Carrier established that Claimant was absent without permission in violation of GR-1; however, the Carrier did not establish this violation as a "capital" offense, or demonstrate that *sufficient* lesser measures were deployed and Claimant failed to respond to those measures with corrective action. Under these circumstances, the penalty of dismissal is not proportional to the circumstances of this case, or the Claimant's prior disciplinary history.

As a result, the dismissal will be reduced to a lengthy suspension, and the Claimant shall be reinstated; however, backpay will not be awarded in this case.

Award:

Claim denied on the offense but the penalty is modified and the remedy is granted in accordance with the findings.



Patrick J. Halter
Neutral Member
PLB No. 7163 Case No. 121



Carrier Member
Robert A. Paszta



Organization Member
Peter E. Kennedy

Dated this 24 day of July, 2012