

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 2, (Case No. 2)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70145711)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2011-113657)**

William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Paszta, Carrier Member

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged C. J. Wagner with violation of Operating Rules - General Rule A and General Regulations Rule GR-1 and GR-2 and was substantial evidence adduced at the Investigation on November 21, to prove the charges and was the discipline assessed in the form of permanent dismissal warranted?

FINDINGS:

Public Law Board No. 7529 finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute.

The Board has thoroughly reviewed the record and finds that the Organization made the same procedural arguments set forth in Award No. 1 of this Board and for the same reasons expressed in that decision they are rejected. The Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

On November 10, 2011, Claimant was directed to attend a formal Investigation on November 21, 2011, concerning in pertinent part the following charge:

"...to determine the facts and place your responsibility, if any, in connection with the unauthorized absences from your assigned position as Machine Operator on System Production Team 6XT4 on Sunday, October 23, 2011 and Sunday, October 30, 2011.

In connection with the above, you are charged with failure to properly perform the responsibilities of your position, failure to follow instructions, absenting yourself without proper permission or authority, neglect of duty, absenteeism, and possible

violations of, but not limited to CSXT Operating Rules - General Rule A, General Regulations Rule GR-1 and GR-2."

On December 9, 2011, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On December 22, 2011, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of June 1, 1999 BMW/CSXT Agreement.

This is the second of two dismissal cases involving the same Claimant. The facts and the positions of the parties are essentially the same as presented in Award No. 1 of this Board other than different dates and will not be reiterated. However, there is one distinct difference in this case and the prior dispute, that being the Claimant was also charged with **"...failure to follow instructions, absenting yourself without proper permission or authority..."**.

On page 6 of the transcript the Manager System Production Teams, B. S. Holder, was questioned as follows:

"Caruth: Okay; you also charged him with failure to follow instructions, can you please state specifically how you feel he failed to follow instructions?"

Holder: On October 18th, there was conversation about previous absentees and we had a conversation stating that he could not miss anymore days without proper authorization to be off and the employee did not show up on the 23rd and the 30th." (*Underling Board's emphasis*)

Manager Holder's testimony was not effectively rebutted. The Claimant's argument that he had been granted all Sunday's off as long as he still had vacation time was changed by Manager Holder on October 18, 2011, therefore, the prior personal agreement which was in effect for the time period covered by Award No. 1 does not protect him in this instance. Foreman Martin also confirmed in this case on page 19 of the transcript that Holder still allowed the Claimant to take Sundays off for a vacation with the proviso that he call in advance that he was going to take a day's vacation. The facts also indicate that on October 23 and 30, 2011, the Claimant, the Manager and Foreman all thought he was out of vacation days and the subsequent discovery of the fact that he did have some unused vacation days does not negate the fact that he did not heed instructions that he could not take any additional days off without permission. It is determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had 33 plus years of service with some prior discipline involving failure to protect his assignment. The Board does not excuse the Claimant's behavior as he was culpable

for his action, however, after review of the record the Board has determined that the discipline was excessive. The dismissal is reduced to a lengthy suspension which is both corrective and progressive in nature. Therefore, the Board finds and holds the Claimant is to be reinstated to service on a "**last chance**" basis with seniority intact and all other rights unimpaired with no back-pay. The discipline is reduced and the appeal/claim is partially sustained. The Board also forewarns the Claimant that he needs to protect his assignment and diligently follow all instructions and directives upon reinstatement.

AWARD

Appeal partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective or before 30 days following the date the Award was signed.



William R. Miller, Referee

Dated: May 7, 2012