

**Public Law Board No. 5428
Case No. 2
Award No. 2**

Carrier File No. 16S(92-90)
Organization File No. ---

Parties to the Dispute:

Sheet Metal Workers' International Association
and
CSX Transportation Company

Statement of the Claim:

- "1. The Carrier has violated the provisions of the current and controlling agreement, and in particular Rule 26 of said agreement, when on October 16, 1992 they improperly dismissed Sheet Metal Worker Leroy Moore, Jr. following an investigation that was held on October 9, 1992.
2. That accordingly, the Carrier be directed to return Mr. Moore to service with compensation for all time lost, including overtime he may have been deprived of; remove any impairment to his seniority, make him whole for all vacation rights, reimburse Mr. Moore or his dependents for all medical or dental expenses incurred while improperly out of service, pay for Claimant's life insurance; compensate the Claimant for all contractual Holidays, bereavement leave, jury duty and all other applicable contractual benefits he may have been deprived of while being improperly withheld from service."

Opinion of the Board:

Claimant began his service with Carrier as a Sheetmetal Worker on May 17, 1976. The specific location and details of Claimant's initial work assignment, and his job progression thereafter, are not at issue in the instant proceeding; and, therefore, will not be commented upon further in this Award.

According to the record which has been presented herein, on December 16, 1988, Claimant was assessed a ten (10) days deferred ("overhead") suspension for "... excessive absenteeism from assignment in that he was absent, tardy or left (work) early from January 3, 1988 through November 3, 1988." On May 11, 1989, Claimant was assessed a five (5) days actual suspension due to "... excessive absenteeism during period January 17, 1989 through and including April 23, 1989." At that same time, Claimant's previous December 16, 1988 ten (10) days deferred ("overhead") suspension was converted to a ten (10) days actual suspension "... due to less than six (6) months having elapsed since probationary period beginning on 12-16-88."

According to Carrier, on or about May 13, 1992, Claimant's General Foreman counseled him about his (Claimant's) tardiness and absenteeism. It does not appear, however, that any additional discipline was assessed against Claimant at that time.

On Sunday, May 24, 1992, Claimant was assigned as a Sheetmetal Worker/Pipefitter at Carrier's Barr Yard Car Shop Ready Track; and on that day, he was involved in an accident involving a runaway locomotive. The details of that accident and various other related incidents which occurred thereafter have been included in this Board's Award No. 1; and do not need to be reiterated at this point. Suffice it to say, however, that subsequent to said accident, Claimant continued to work, despite experiencing some minor pain; and he did not report that he had been injured in said accident or file an "Employee's Report of Personal Injury or Occupational Illness" form with Carrier until July 15, 1992.

Between Claimant's May 13, 1992 counseling session with his Supervisor and his marking-off sick on July 11, 1992, due to his work related injuries which were allegedly sustained by him in the May 24, 1992 on-the-job

accident, Claimant was docked one and one-half (1½) hours for lateness on May 17, 1992; one-half (½) hour for lateness on May 18, 1992; two (2) hours for lateness on June 6, 1992;¹ one (1) hour for lateness on June 28, 1992; and one-half (½) hour for lateness on July 1, 1992 (Tr. pp. 5-6). Because of his marking-off sick for the period of July 11 through July 28, 1992 (again allegedly due to the May 24, 1992 accident), on July 28, 1992, Carrier sent Claimant a certified letter advising him to appear at a formal investigative hearing on August 11, 1992. Said letter indicated that Claimant was being charged with excessive absenteeism; and said letter further indicated that the specific purpose of the investigation was to:

"... develop the facts and place responsibility, if any, in connection with the following record of your attendance:

January 12, 1992	-	Late 2 hrs.
January 13, 1992	-	Late 30 mins.
January 20, 1992	-	Late 15 mins.
January 22, 1992	-	Late 1 hr.
February 9, 1992	-	Late 1 hr.
February 17, 1992	-	Late 30 min.
March 2, 1992	-	Late 15 min.
March 3, 1992	-	Late 30 min.
March 10, 1992	-	Late 1 hr.
March 18, 1992	-	Late 1 hr.
March 26, 1992	-	Late 1 hr.
March 31, 1992	-	Late 1 hr.
April 15, 1992	-	Late 3 hrs.
April 20, 1992	-	Late 1 hr.
May 17, 1992	-	Late 1 hr. 30 min.
May 18, 1992	-	Late 30 min.
June 28, 1992	-	Late 1 hr.

¹ This particular lateness, for some unexplained reason, was not included in the July 28, 1992 Statement of Charges letter which was ultimately sent to Claimant by Carrier in this matter.

July 1, 1992 - Late 30 min.

Absent Without Permission:

March 1, 1992 - 8 hrs.

Failed to Report:

May 9, 1992

June 6, 1992

Sick No Pay:

March 22, 1992 - 2 hrs.

March 23, 1992 - 1 hr.

April 19, 1992 - 6 hrs.

April 28, 1992 - 1 hr.

May 16, 1992 - 8 hrs.

June 2, 1992 - 4 hrs.

June 13, 1992 - 4 hrs.

July 11, 1992 - 8 hrs.

July 12, 1992 - 8 hrs.

July 13, 1992 - 8 hrs.

July 14, 1992 - 8 hrs.

July 15, 1992 - 8 hrs.

July 18, 1992 - 8 hrs.

July 19, 1992 - 8 hrs.

July 20, 1992 - 8 hrs.

July 21, 1992 - 8 hrs.

July 22, 1992 - 8 hrs.

July 25, 1992 - 8 hrs.

July 26, 1992 - 8 hrs.

July 27, 1992 - 8 hrs.

July 28, 1992 - 8 hrs."

Claimant's investigative hearing was postponed on several occasions at Claimant's/Organization's request; and was rescheduled for September 9, 1992. Said rescheduled hearing was convened; but was postponed at Organization's request on September 9, 1992, due to Claimant's failure to appear. Claimant's investigative hearing was finally held and concluded on

October 9, 1992, with Claimant present and offering testimony. Claimant's hearing in the instant case was conducted on the same day immediately after the conclusion of another hearing concerning Claimant's alleged failure to promptly report his May 24, 1992 on-the-job injury which was the subject matter of this Board's previous Award No. 1.

As a result of Claimant's second investigative hearing which was held on October 9, 1992, in a letter dated October 16, 1992, Claimant was advised by Carrier that he had been found guilty of excessive absenteeism as charged; and that, as a result, he was dismissed from Carrier's service.

Claimant/Organization filed a timely complaint on Claimant's behalf in protest of Carrier's second dismissal of Claimant. Said claim, for reasons which will be discussed more fully hereinafter, was denied by Carrier; and the matter was appealed by Organization throughout all of the remaining steps of the parties' negotiated grievance procedure. Thereafter, the matter was appealed to arbitration by Organization; the undersigned Board was properly constituted and authorized to hear and decide this matter; and pursuant to hearing, the matter is now properly before this Board for resolution.

Organization's basic contention in this dispute is that Claimant was treated in a grossly unfair manner by Carrier. Organization predicates this assertion upon the fact that Carrier dismissed Claimant for excessive absenteeism, subsequent to Carrier's previously also having dismissed Claimant for failing to report his May 24, 1992 on-the-job injury in a timely manner (Public Law Board No. 5428, Award No. 1). According to Organization, such treatment of Claimant by Carrier is "... like hanging a man and then shooting him an hour later just to make sure he is dead."

Organization further objects to the propriety of Carrier's consideration of Claimant's attendance record between January 12, 1992 and his counseling date of May 13, 1992. In this regard, Organization believes that the admission and consideration of such evidence by Carrier was totally improper because the counseling session itself was discipline for the previous cited infractions, and to later resurrect those same charges constitutes double jeopardy; and, more importantly, according to Organization, Claimant's attendance improved dramatically after the May 13, 1992 counseling session, thereby serving as proof that the discipline which was intended by the counseling session had a successful effect upon Claimant. Still yet further regarding this same point, Organization also objects to Carrier's admission into evidence and consideration of Claimant's attendance record between July 11 and 28, 1992, because, according to Organization, Carrier knew full well that Claimant was off work due to his injuries which were sustained by him on May 24, 1992 as a result of the on-the-job accident.

In addition to the foregoing procedural contentions, Organization also argues that Claimant was further treated unfairly by Carrier in this matter because no other employee has ever been cited or disciplined by Carrier for excessive absenteeism who was off work due to a work-related injury. Organization attributes this disparate treatment to the fact that Carrier is attempting to rid itself of an injured employee; and further because Carrier is fearful that Claimant might file a lawsuit against Carrier for the on-the-job injury(ies) which was/were sustained by him as a result of the May 24, 1992 accident which occurred at the Barr Yard Car Shop Ready Track.

As its final significant area of argumentation in this case, Organization contends that Carrier improperly dismissed Claimant for excessive absenteeism because Carrier does not even have a written absenteeism policy

upon which to evaluate/assess the employees' attendance/absenteeism records.

Carrier's initial contention in this dispute is that Claimant was afforded a fair and impartial hearing as is required by Rule 26 of the parties' Schedule Agreement. In particular, Carrier maintains that the Hearing Officer properly admitted into evidence at the investigative hearing, Claimant's past attendance record; and further that Carrier properly considered Claimant's previous disciplinary assessments when determining the appropriate amount of discipline which was to be assessed in the instant case. Moreover, Carrier also maintains that it was proper for Carrier to consider the dates of Claimant's absences related to his personal on-the-job injury when assessing discipline herein.

Carrier next argues that it is well established in the railroad industry that excessive absenteeism, regardless of the reason for said absence(s), is a dischargeable offense.

Carrier's final significant area of argumentation in this case is that the assessment of the penalty of dismissal was clearly justified, given Claimant's demonstrated pattern of numerous tardinesses and absences; and further given Claimant's prior disciplinary assessments for similar actions, and the fact that Claimant has been given "every consideration" by Carrier in this case.

After carefully considering all of the arguments which have been proffered by the parties in support of their respective positions in this controversy, the Board is persuaded that Organization's procedural objections to Carrier's handling of this matter, are without merit. Accordingly, the Board concludes that the Hearing Officer properly entered into evidence at the investigative hearing evidence of Claimant's prior

attendance record; and Carrier later properly considered said evidence when attempting to determine whether excessive absenteeism had, in fact, occurred, and, if so, the appropriate amount of discipline to be assessed. Furthermore, Carrier is also correct in contending that Management may cite an employee for excessive absenteeism, even if that employee is unavailable for work for an otherwise good reason. In this regard, it does not matter whether the employee was on a "frolic" or was "home sick in bed." If that employee is unavailable for work, then s/he may be disciplined, up to and including dismissal, for excessive absenteeism. Arbitral support for the above posited conclusion, both within the railroad industry and in all other types of employment relationships as well, is both extensive and comprehensive; is undoubtedly well known by the parties herein; and, therefore, does not need to be reiterated by this Board at this time.

Still yet further, regarding another of Organization's procedural objections in this matter, a written policy concerning excessive absenteeism by employees is not required of Carrier, since it is well established in the common law of railroad industrial relations that excessive absenteeism is a disciplinary offense. Moreover, Carrier obviously has exercised its managerial authority on numerous previous occasions in similar such situations without any apparent objection from Organization; and this Board cannot see any difference between those previous situations and that which is involved in the instant case.

Despite having made the preceding determinations, and despite the fact that the Board is of the opinion that Carrier has proved that Claimant has committed a de facto violation of Carrier's absenteeism policy, the Board, nonetheless, is also of the opinion that the assessment of the penalty of dismissal in the instant case was itself excessive and, therefore, was

improper. In this regard, it is significant to note that Claimant's prior disciplinary assessments were effectuated more than three (3) years previously, and consisted of only a five (5) days suspension and a ten (10) days suspension; no further discipline was assessed against Claimant by Carrier for excessive absenteeism in the subsequent three (3) years prior to the occurrence of the incident which is the subject matter of the instant proceeding -- except for the verbal counseling which occurred on May 13, 1992; Claimant is a long-term employee with an otherwise relatively good work record; Claimant's attendance does appear to have improved somewhat in recent years over his previous levels; and lastly, Carrier, apparently, has not dismissed any other employee(s) for excessive absenteeism when that/those employee(s) were off work due to a work related injury(ies).

When the above factors are considered, in toto, the Board is persuaded that mitigation of Claimant's dismissal is warranted. Due to the fact that Carrier had twice previously suspended Claimant for excessive absenteeism, however, the Board will direct that Claimant's dismissal in the instant case be modified instead to a sixty (60) days suspension without pay, which is to run from the date of his dismissal, October 16, 1992, until December 16, 1992. Said suspension, furthermore, shall run concurrently with the thirty (30) days suspension without pay which was previously assessed against Claimant by this Board in Case No. 1. Claimant shall be reinstated with back pay commencing from December 16, 1992, until the date that he is reinstated by Carrier as a consequence of this Award. Claimant's seniority and all other applicable contractual rights and benefits shall also be restored to him unimpaired; and Claimant's personnel record shall be amended to reflect this change. Claimant's back pay entitlement in this matter, however,

shall be offset by any outside wages which might have been earned by him during the period of his improper dismissal.

Award:

Claim sustained; and remedy directed in accordance with the preceding findings and conclusions.



John J. Mikrut, Jr.

Chairman and Neutral Member

Dissent attached.



R. S. Bauman

Organization Member



M. K. Carmichael

Carrier Member

Issued in Columbia, Missouri on December 31, 1993.

PUBLIC LAW BOARD NO. 5428
DISSENT OF CARRIER MEMBER TO AWARD NO. 2

The majority erred in its decision to restore the Claimant to service in that Mr. Moore was clearly guilty of continuing a pattern of excessive absenteeism, after being disciplined twice previously for the same type of offense. Under these circumstances, the Claimant's dismissal was fully justified. The Board erred, further, in reducing the penalty to a sixty day suspension. While the Board concurred completely with the Carrier's finding of guilt, it determined that the penalty was too harsh. Numerous awards have held that unless the discipline assessed by a Carrier is arbitrary, capricious or unreasonable, it is not the function of the Board to modify it. Among those awards are the following:

Third Division Award No. 8431 (Daugherty):

" . . . The Board will not presume to substitute its judgment for that of a Carrier and reverse or modify Carrier's disciplinary decision unless the Carrier is shown to have acted in an unreasonable, arbitrary, capricious, or discriminatory manner, amounting to abuse of discretion."

Third Division Award No. 24303 (Silagi):

"The decisions of this Board have consistently held that within the scope of its review, both as to culpability and the amount of discipline, the ruling made on the property will not be disturbed when the charge is supported by substantial evidence and the amount of discipline is not arbitrary or capricious."

In view of the clear finding of guilt, supported by the Board, of the serious charges at issue, the discipline of dismissal was fully justified and should have been upheld.

Respectfully submitted,

M. K. Carmichael

M. K. Carmichael
Carrier Member