

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

Roadmaster Tim Magargle, by letter dated February 1, 2008, notified R. C. Leizear to attend a formal Investigation on February 22, 2008, at the Carrier's offices in Tampa, Florida, "to determine the facts and place your responsibility, if any, in connection with your alleged unauthorized days off beginning March 2, 2007 through March 27, 2007 with no sufficient documentation to support these absences; April 11, May 15, June 1, June 4, June 28, June 29, July 26 and August 8, 9 and 22, 2007. Also, it is alleged," the letter continued, "that you had partial days of absentness on October 29, 2007 and January 10, 2008." The letter stated that the Claimant's "pattern of absenteeism was discovered on January 30, 2008 at approximately 10:30 at the SE Delta milepost SX956.5 when welding team 5T62 was absent from the assigned worksite."

"In connection with the above," the letter asserted, "you are charged with failure to protect your assignment, excessive absenteeism, failure to follow instructions and insubordination." The Operating Rules possibly violated by the Claimant's actions, according to the letter, were General Rule L and General Regulations GR-1, GR-2, GR-3, and GR15.

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 has worked for the Carrier seven years, four of them as a Welder. His regular work hours are 7:00 a.m. to 3:30 p.m. Approximately 6:50 a.m. on January 30, 2008, supervisor Bruce Morris lined up the Claimant with his day's assignment. Claimant was to go to the depot in Okeechobee, Florida, wait there for a substitute helper, Ken Massey, and travel together with him to the south end of the Delta at milepost SX956.5 to remove a 10 mph slow order at that location by performing necessary repairs on a severely damaged frog. The Claimant's regular helper, Brett Mosley, had been snowed in at the airport in Chicago in returning to work from vacation.

The distance from Okeechobee to the work location at Delta was approximately 47 miles. The Claimant was expected to arrive at the work site at approximately 8:30 a.m. He did not come there and start welding until after 11:00 a.m. As a result of the Claimant's late arrival and the failure to make the repairs earlier and remove the slow order, Amtrak trains were delayed and the Claimant worked two hours of overtime. The estimated cost to the Carrier for train delays is \$1,000 per minute.

The Claimant's explanation for his late arrival at the Delta worksite was that he was waiting for his substitute helper, Ken Massey, to arrive at the depot. The Claimant testified that the helper arrived "roughly" at 9:30. Eventually, the Claimant stated, when the helper did not show up, he called the helper and asked him what was going on. According to the Claimant the helper said that he was sick and wasn't coming in, but then agreed to come in because of the slow order that had to be repaired.

The Claimant was asked whether he called supervisor Morris to let him know that the helper was late. He stated that he did not because Mr. Morris told him to wait for Mr. Massey and that he figured that Mr. Morris knew that Mr. Massey was going to be late. The Claimant was further asked whether he did not think that it was important for CSX to know that he was not at the job site as they thought he was. He answered, "If I would have known that they were waiting on me for that long a time, yeah I would have talked to them, but I was [of] the understanding that they knew I was at the depot waiting on my helper."

Roadmaster Magargle was off work on vacation on January 30, 2008, and the Engineer in charge assigned Michael Abar, a management trainee, to take over his duties for the day. Mr. Abar attempted to reach the Claimant on January 29, 2008, to inform him about the slow order that had to be repaired the next morning at Delta. Around 5:00 p.m. he called the Claimant on the cell phone number the Claimant has on file with the Carrier to receive calls. When he got no answer he left a message about the slow order at the south end of Delta and that the work would take place the first thing the morning of January 30th. Mr. Abar called again in the evening but got no answer. The Claimant acknowledged at the Investigation that he received the evening call and another one in the morning but testified that he did not answer the calls and deleted them because he did not recognize the out-of-state calling number. He testified that he does not answer strange numbers on his phone.

Mr. Abar testified that he also left a detailed message for the Claimant with the desk clerk at the hotel where the Claimant was staying, but the Claimant denied receiving any message from the clerk. The Claimant indicated that it is not his practice to inquire at the desk if there are any messages for him.

Between 9:00 a.m. and 10:00 a.m. on January 30th Mr. Abar called the Claimant to check the status of the work on the slow order but got no answer. Abar left a message. Not having reached the Claimant, Mr. Abar then drove to the south end of Delta to personally check on the work. When Mr. Abar arrived at the site, he saw that no work was being performed there. He decided to go the Claimant's hotel in Okeechobee to see what he could find. On the way there he saw the Claimant and the helper heading towards the south end of Delta. Mr. Abar turned around, went back to the work site, and asked the Claimant and his helper why they were just now reporting for the assignment. It was then approximately 11:00 a.m. The Claimant said that the helper was sick that day and that that was the reason for their delay in getting to the job site.

Mr. Abar was present that morning at Mr. Morris's end of the telephone conversation between Mr. Morris and the Claimant when the Claimant was given his assignment. There was no mention in the conversation, Abar testified, of helper Massey being sick. The information he was given regarding the assignment to the Claimant from supervisor Morris, Mr. Abar testified, was that helper Mosley's flight was delayed and that helper Massey was available for work because Mr. Hooper, whom Massey normally assisted, was off that day. There was no indication to Mr. Abar, he testified, that work could not take place the first thing in the morning with the Claimant and Mr. Massey.

Mr. Abar testified that had he been notified that Mr. Massey was not available to do the job first thing in the morning it might have been possible to provide someone else from the West Palm Beach office to assist the Claimant to weld on the frog. He acknowledged that he did not try to reach the Claimant by radio.

In addition to the matter of the delay in his arrival at the job site on January 30th, the Claimant was questioned about his absences on the various dates listed in the charge

letter.

By letter dated March 12, 2008, the Carrier notified the Claimant of the disposition of the Investigation on February 22, 2008, as follows:

. . . Testimony brought out in the investigation revealed that you in fact failed to follow General Rule L by not protecting the interest of the company with excessive absenteeism. GR1 was violated by not notifying a supervisor of your absence at the assigned work location. You failed to comply with GR2 and GR3 by willfully neglecting your assignment with a pattern of excessive absenteeism, thereby being insubordinate and careless in protecting your assignment.

Regarding the assessment of discipline, the letter informed the Claimant that he was being assessed a 45-day actual suspension consisting of 30 days for the new violations and 15 days from a prior overhead suspension of that length of time issued to him on April 12, 2007. In addition, the Claimant was instructed to make contact with the EAP regarding his absenteeism problem.

At the outset of the Investigation the Claimant's representative, a Vice Chairman of the Organization, objected to the charge letter on the ground that the days of absence charged "are outside the time limit scope according to the June 1999 Agreement." All but two dates listed in the letter fell between March 2, 2007, and October 29, 2007. The two additional dates mentioned in the letter were a partial day of absence on January 10, 2008, and "January 30, 2008 at approximately 10:30 at the SE Delta milepost SX956.5 when welding team 5T62 was absent from the assigned worksite."

As the record in this case shows, the Claimant was not absent from work on January 30, 2008. He was late in arriving at the site of his job assignment for the day, but he reported for work on time at the depot and worked his regular shift plus two hours'

overtime. Regardless of any discipline that is properly assessable for the Claimant's late report for his assignment at the south end Delta milepost (a matter to be discussed below) on January 30th, the Carrier cannot use January 30th as a day of absence to tack on to other days as a basis for alleging a pattern of absenteeism amounting to excessive absenteeism. The Claimant simply was not absent from work that day.

Rule 25(d) of the Agreement effective June 1, 1999, states:

(d) An employee who is accused of an offense shall be given reasonable prompt advance notice, in writing, of the exact offense of which he is accused with copy to the union representative. The hearing shall be scheduled to begin within twenty (20) days from the date management had knowledge of the employee's involvement. . . .

The charge letter states that the Claimant's alleged "pattern of absenteeism was discovered on January 30, 2008 at approximately 10:30 at the SE Delta milepost SX956.5 when welding team 5T62 was absent from the assigned worksite." As this Board has already observed, the Claimant was not absent from work on January 30th, and the Carrier cannot join prior dates, on which the Claimant was actually absent, to a date when he was not absent in order to find him guilty of excessive absenteeism.

The first date preceding the charge letter of February 1, 2006, that the Claimant was absent was on January 10, 2008, when he left work sick after two hours and was therefore absent a partial day. Even that date, however, was outside the limitations period stated in Rule 25(d) for charging an employee and scheduling a hearing. If the Claimant had, in fact, been absent at least one day within the limitations period of Rule 25(d), the objection based on timeliness made by the Organization at the hearing would have raised the interesting and difficult question of whether it is permissible to find an

employee guilty of excessive absenteeism based on absences outside the limitations period where at least one day of absence occurred within the limitations period. In view of the fact, however, that the Claimant was not absent at all from work within the contractual limitations period for charging an employee with an offense, the Board need not decide that difficult issue in this case.

Based on the foregoing reasoning the Board finds that the Carrier has failed to prove by substantial evidence that the Claimant “in fact failed to follow General Rule L by not protecting the interest of the company with excessive absenteeism.” The Board notes that General Rule L does not even deal with attendance but is concerned with the protection of railroad property. The Carrier’s attempt to use a rule directed at the protection of railroad property from loss, theft, and the like as a basis for finding an attendance infraction is at best questionable. In any event, however, since the Claimant was not absent from work on any day within the limitations period of Rule 25(d) of the Agreement, the Carrier may not, over timely objection made by the Organization, rely on absences that occurred months previously to find the Claimant guilty of excessive absenteeism. The Carrier’s determination in its decision letter of March 12, 2008, that the Claimant violated General Rule L by his excessive absenteeism is not sustained by the Board.

There is, however, ample support in the record for the Carrier’s finding that “GR1 was violated by not notifying a supervisor of [Claimant’s] absence at the assigned work location.” According to the evidence the Claimant waited at Okeechobee depot for helper Massey to arrive for at least two and a half hours without notifying supervisor Bruce Morris or any other supervisor of the delay. He did this despite the fact that he was instructed that morning by supervisor Morris that his first assignment for the day was to

travel to Delta together with the helper and weld a frog at milepost SX956.5 in order to remove a 10 mph slow order at that location.

The Claimant's explanation for not notifying his supervisor that his helper had not arrived does not hold up to scrutiny. He testified that Bruce Morris told him to wait for the helper, so "I figured he [Mr. Morris] already knew he [the helper] was going to be late." The Claimant had previously testified, however, that after a while he called helper Massey, who told him, "I was sick and wasn't coming in. But since it's just a slow order I'll come in." If supervisor Morris had told the Claimant to wait for the helper, then apparently Mr. Morris had no knowledge that the helper was allegedly sick. The conflict between what the helper told the Claimant in their telephone conversation, according to the Claimant's testimony, and what Morris had previously told the Claimant should have raised a red flag to alert the Claimant that Mr. Morris was misinformed about the helper's situation. A reasonable person in the Claimant's position would have immediately called Mr. Morris to ask for guidance.

In addition, even without the conflicting information that the Claimant was allegedly receiving from Mr. Morris and the helper, it was not reasonable for the Claimant to sit in the depot for hours doing nothing when he had been given an assignment of an urgent nature to be done the first thing in the morning. To be told to wait for his helper does not mean to wait hours for him. At some point, long before two and a half hours had passed, a conscientious employee in the Claimant's situation would have called his supervisor to explain the situation and inquire whether he should continue waiting. While the Claimant was sitting in the depot waiting, trains were being delayed and passengers, inconvenienced.

Rule GR-1 states:

GR-1. Employees must report for duty at the designated time and place. Without permission from their immediate supervisor employees must not:

1. Absent themselves from duty, or
2. Arrange for a substitute to perform their duties.

Employees subject to call for duty must be at their usual calling place or furnish information as to where they are located. When they wish to be absent or if they are unable to perform service, employees must notify the proper authority. They must not wait until a call for duty is received to request permission to be marked off.

...

The Claimant's instructions from Mr. Morris on the morning of January 30, 2008, were to go to the Delta milepost and repair a frog in order to remove a 10 mph slow order. When he saw that he was unable to perform the assigned service, Rule GR-1 required him to notify the proper authority. He did not do so and was properly subject to discipline for this serious omission.

The decision letter also expresses the Carrier's finding that the Claimant willfully neglected his assignment and was careless in protecting his assignment in violation of GR-2 and GR-3. The Board believes that the Carrier proved the Claimant's violations of these rules. Rule GR-2 states, in applicable part, "... Employees must not ... 5. Willfully neglect their duty." Rule GR-3, in relevant part, provides, "Employees must: ... 3. Render every assistance in their power in carrying out the rules and special instructions." Sitting in the depot for hours doing nothing when there was urgent work to be performed and failure to report the absence of his helper needed for that assignment constituted willful neglect of duty on the part of the Claimant and an

insufficient effort by him to carry out the special instructions he had received that morning from Mr. Morris regarding the repair of a slow order. The Board finds that the Claimant violated Rules GR-2 and GR-3.

All three rules-violations, the Board finds, were covered in the charge letter by the allegations that the Claimant failed to protect his assignment. In order for the work of welding the frog to remove the 10 mph slow order to be performed in a timely manner, it was necessary for the Claimant to keep his supervisor apprised of any delay that was preventing the prompt performance of the work and to do everything reasonable in his power to arrive at the worksite as soon as possible. Sitting in the depot for hours without doing productive work and failure to notify his supervisor of the absent helper so that a substitute could perhaps be found was the antithesis of what was required of the Claimant in order to protect his assignment and accomplish the required work.

As stated in the decision letter, the Carrier also concluded that the Claimant was insubordinate. The Board does not find substantial evidence in the record of insubordination on the part of the Claimant. Roadmaster Magargle was asked at the Investigation why he charged the Claimant with insubordination. He answered that he had instructed the Claimant in how to mark off if he (the Claimant) ever had to do so, but that on January 28, 2008, the Claimant was absent without following the Roadmaster's instructions. The Organization objected because January 28 was not listed in the charge letter. The hearing officer agreed with the Organization and stated, "Actually, it's not in the charge letter. We're not here to discuss that." The Roadmaster then stated, "Well then there would not be a time." (Tr. 26). The Board understands Roadmaster Magargle's statement as acknowledgment that the Claimant was not insubordinate on any of the dates listed in the charge letter.

There is no evidence in the record of insubordination on the Claimant's part. Negligence or carelessness in carrying out an assignment is not synonymous with insubordination. The Claimant did perform his assignment on January 30th, although belatedly, and did not flout the authority of any superior. There is no substantial evidence of insubordination on the part of the Claimant, and the Board finds that the Carrier has not proved that part of the charge.

In sum, the evidence establishes that the Carrier properly found the Claimant guilty of violating Rule GR-1 by not notifying his supervisor of his absence from his assigned work location and Rules GR-2 and GR-3 by willfully neglecting his assignment and carelessly protecting his assignment. These were serious violations deserving of discipline.

On the other hand the Board has found that the Carrier erred when it found the Claimant guilty of excessive absenteeism in violation of General Rule L and of insubordination. The number of references to excessive absenteeism or absenteeism in the charge and decision letters makes it reasonable to believe that the Carrier did give significant weight to its finding of guilt of excessive absenteeism on the Claimant's part in assessing the degree of discipline in this case. Since that finding was in error it is proper to reduce the level of discipline assessed by the Carrier against the Claimant. The Carrier also found the Claimant guilty of insubordination without substantial evidence to support its finding. Under all of the circumstances and based on the erroneous guilty findings of excessive absenteeism and insubordination, the Board has decided to reduce the discipline of the Claimant from 45 calendar days of actual suspension to 35 calendar days. The Claimant shall be made whole for the difference.

The Board, however, fully endorses the Carrier's order that the Claimant meet with

the Division Engineer on his first day back to work from his suspension. The Claimant's conduct regarding his January 30, 2008, assignment indicates that counseling was in order regarding the proper work ethic needed for his job with the Carrier. It is assumed that the Engineer impressed that fact upon the Claimant. In addition, if the Carrier believes that the Claimant has an absenteeism problem, it is proper to refer him to its EAP program whether or not he has committed a rules violation. Further, the Claimant should be informed that the Board views his actions on January 30, 2008, as a serious conduct violation and that he should not be misled by the reduction in his penalty to believe his conduct on that date is in any way being condoned. A correction in the way the Claimant looks at his job responsibilities is clearly called for.

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 postmark date the Award is transmitted to the parties.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
July 24, 2008