

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated April 14, 2008, the Roadmaster instructed Andrew H. Furnish (hereinafter "the Claimant") to attend a formal Investigation on April 25, 2008, at the Carrier's Midwest Region Engineering Department conference room in Louisville, Kentucky, the purpose of which was "to determine the facts and place your responsibility, if any, in connection with your failure to report to work on your assigned work days at the assigned on duty time as the Vehicle Operator on gang 5PD1 at Cincinnati, Oh." The letter listed 4/04/08 as a date he was "Absent Without Permission" and 4/07/08, as a date he "Reported Late."

The letter further stated:

In connection with the above, you are charged with excessively reporting to duty late, absenteeism and insubordination in relationship to failing to follow instructions relating to the timeout on March 27, 2008, which are in possible violations of CSX Operating Rules GR-1 and GR-2.

At the Organization's request, the scheduled April 25, 2008, hearing was postponed from April 25, 2008, to May 1, 2008. A second postponement was also granted at the Organization's request from May 1, 2008, to June 3, 2008.

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 did not appear at the hearing that was scheduled for and held on June 3, 2008. After the hearing opened the Organization requested a postponement "based on the fact that Mr. Furnish is not here and clearly Rule 25 outlines that a postponement can be asked for by the Carrier, employee or his representative . . . and we don't know if Mr. Furnish has been notified of the hearing today." The Organization representative added that "Mr. Furnish cannot be provided a fair and impartial hearing with him not being here."

The hearing officer denied the request on the grounds that the Claimant was properly notified of the scheduled hearing, no request for a postponement was made until the day of the hearing shortly before the hearing was scheduled to start, no compelling excuse was offered for the Claimant's absence, and the Carrier's witnesses were present at the hearing and had scheduled their time to be there that day. When the request for a postponement was denied and the hearing officer stated that he would proceed with the hearing, the Organization's representative stated that the Organization was removing itself from the hearing.

Evidence was presented that the original charge letter dated April 14, 2008, was mailed to the Claimant at his residence on that date by certified mail, return receipt requested. The letter was returned to the sender as unclaimed. The first postponement letter dated April 25, 2008, was signed for as received by the Claimant on 4/26/08. The

second postponement letter dated May 29, 2008, was mailed on that date to the Claimant at the same address as the previous two letters. The tracking record for that letter taken from the United States Postal Service website and introduced into evidence at the hearing contains the same certified receipt number as appears on the letter and states that delivery of the item was attempted at 9:33 a.m. on May 30, 2008, and a notice was left.

The hearing officer stated at the hearing that “in light of the attempts to delivering this mail, the hearing office has made the decision to proceed with this hearing as an open chair hearing and we’ll begin by questioning [the Roadmaster].”

The Claimant worked as a Vehicle Operator. Carrier policy required employees who were going to be late for work or absent to call in and notify the Roadmaster of the absence or tardiness. A special telephone line was set aside to receive such calls. The Claimant was informed of this requirement in job briefings and specific conversations with the Roadmaster regarding the call-in requirement.

The Claimant was absent on April 3, 2008, without permission and without calling in. On April 7 or 8, 2008 (conflicting documentation was entered regarding the date), the Claimant left work after five hours, stating that he was unable to continue the rest of the day. In addition to the April instances, from January to early March, 2008, the Claimant was late four times and absent without permission once. On March 6, 2008, the Carrier sent a charge letter to the Claimant instructing him to attend a formal Investigation regarding his attendance. As an alternative to the formal hearing, the letter “offered the option of selecting a Time Out Session with the Division Engineer or his designee.”

The Claimant chose the Time Out session, and it was held on March 27, 2008. The product of the meeting was a one-page document called Individual Development and Personal Accountability Policy Report of “Time Out” Corrective Action. The document

contained the Claimant's name and ID number and listed the dates of absence and lateness. It identified the ROOT CAUSES of the problem as "Getting up at 6:15" and stated the CORRECTIVE ACTION/SOLUTIONS DEVELOPED as "Get up at 6:00 AM. Need call by 0700 if you will be late. Also call if blocked at crossing."

The document listed three ACTION ITEMS assigned to the Claimant: Get up 15 minutes earlier, Call by 0700 if late, and Call if blocked at crossing to yard. The Roadmaster was designated as the person to monitor the Claimant's progress. The Roadmaster testified that on April 3rd and April 7th the Claimant did not follow the action plan provided to him.

The Roadmaster testified that he charged the Claimant with a possible violation of Operating Rule GR-1 because of continued absenteeism and failure to report for work on time. He was charged with a possible violation of Operating Rule GR-2, the Roadmaster stated, for being insubordinate and not complying with the instructions he was given and the action plan that he agreed to. In addition, according to the Roadmaster, the Claimant violated Rule GR-2 by willfully neglecting his duty with respect to attendance and reporting time. The Claimant, the Roadmaster testified, showed a pattern of reporting to duty late and being absent without permission.

Following the hearing, the Division Engineer, by letter dated June 13, 2008, notified the Claimant that substantial evidence established that he failed to report to work on his assigned workdays at his assigned worktime and that he "failed to follow the provisions of the guidelines agreed to between you and your Supervisor during the timeout that was held on March 27, 2008, in violation of CSX Operating Rules GR-1 and GR-2." As a result, the letter stated, the Claimant was being disciplined with a 30-day actual suspension to run from April 10, 2008, through May 9, 2008.

The first issue in the case is whether it was proper for the hearing officer to hold a hearing in the absence of the Claimant and despite the request of the Organization, which represented the Claimant, to postpone the hearing. Rule 25 of the current Agreement is pertinent and provides as follows:

RULE 25 - DISCIPLINE, HEARINGS, AND APPEALS

* * *

(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. A hearing may be postponed for a valid reason for a reasonable period of time at the request of the Company, the employee, or the employee's union representative. . . .

The evidence establishes that the Claimant was given reasonable and prompt advance notice in writing of the exact offenses of which he was accused and that a copy was provided to the Union representative. Notice was sent by certified mail, return receipt requested, and included the date and location of the hearing, and the starting time.

In addition, documentary evidence was presented that the Claimant received and signed for the letter containing the first notice of postponement. He therefore had actual knowledge that charges were pending against him from the Company and that a formal hearing was scheduled to investigate the charges. It was his responsibility to check his mail and appear for any scheduled hearing or, if he had a valid reason why he was unable to appear as scheduled, to request, by himself or through his representative, a postponement. No evidence has been presented of a valid reason for postponement.

The board finds that the hearing officer acted properly when he denied the Organization's last minute request for a postponement made shortly before the hearing was scheduled to begin and after the Carrier and its witnesses had appeared for the

hearing as scheduled. Rule 25(d) states that a hearing may be postponed for a valid reason. A valid reason for the postponement was not provided in this case.

The evidence established that the Claimant was guilty of excessive absenteeism, including failure to report for work as scheduled and reporting late for work. Between January 1 and April 7, 2008, he was absent or late without permission and without calling in to report his absences a total of seven times. The incidents of lateness apparently were the result of oversleeping, and no explanation was offered to excuse the absences and failures to call in. In addition, the last two incidents occurred after a Timeout pursuant to the Individual Development & Personal Accountability Policy ("IDPAP"). According to the evidence, the Claimant failed to take the corrective action prescribed in the Timeout session held only days before his April 3 absence and failure to call in. In the Board's opinion the Carrier was entitled to administer discipline to the Claimant in an effort to correct his continued unsatisfactory attendance and non-adherence to the terms of the Timeout.

The Roadmaster testified that the Timeout held on March 27, 2008, was done pursuant to the IDPAP. Presumably the discipline in this case also was subject to that policy. Under the IDPAP the normal discipline for a "minor offense," as defined in the policy, following a Timeout is "Up to 10 days suspension." See page 6 of the policy. No evidence was presented in this case warranting a departure from the disciplinary progression for "minor offenses" as defined in the policy.

The Carrier apparently bases the 30 day suspension on its determination that the Claimant was insubordinate because he did not comply with the instructions he was given in the Timeout meeting and the action plan he agreed to. The Board does not believe that under the IDPAP a failure to correct one's conduct following a Timeout may be

considered insubordination. The commonly accepted definition of “insubordinate” is “defiant of authority; disobedient to orders: *an insubordinate attitude.*” The New Oxford American Dictionary (2001). There is no evidence that the Claimant disobeyed any order or was defiant of any supervisor or manager. A remedial plan developed in a Timeout session is not, in this Board’s opinion, the equivalent of a direct order that subjects an employee to a charge of insubordination if he fails to fully comply with the plan.

The best proof that failure to comply with an action plan agreed to in a Timeout is not insubordination under the IDPAP is the terms of the IDPAP itself. There are three types of offenses under the IDPAP: Minor Offenses, Serious Offenses, and Major Offenses, the last being the most serious. Examples of Major Offenses listed at page 8 of the policy include violation of “GR-2 & 2A (Dishonesty, Insubordination, Theft, etc.).” The disciplinary Progression provided in the IDPAP for a Major Offense is “Removal from service - Discipline up to dismissal.”

The Progression for Minor Offenses is set forth on page 6 of the IDPAP. After Timeout, the disciplinary steps given are Up to 10 days suspension, Up to 30 days suspension, and Up to dismissal. If failure to comply with the terms of a Timeout were considered to be insubordination, then clearly the next step of the progression after a Timeout would not be “Up to 10 days suspension.” This is so because Insubordination is listed as a Major Offense at page 8 of the IDPAP, subject to “Discipline up to dismissal” for a first offense. Plainly, in the Board’s view, an employee’s failure to live up to the terms of a Timeout is a disciplinable offense, but it is not Insubordination as that term was understood by those who created the Carrier’s IDPAP.

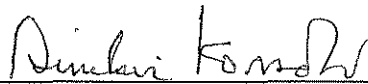
The Board finds that the appropriate discipline in the present case was a 10-day actual suspension.

A W A R D

Claim sustained in accordance with 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.

A handwritten signature in cursive script, appearing to read "Sinclair Kossoff", is written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
February 2, 2009