

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 1, (Case No. 1)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE
(Organization File: D70145611)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2011-113653)**

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 was substantial evidence adduced at the Investigation on November 21, 2011, 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 will first address the Organization's procedural arguments. It argued that the Claimant was denied a "fair and impartial" Investigation because Claimant was suspended prior to the Hearing and it was denied the right of discovery. Countless Boards have determined that the Carrier has a right to withhold an employee from service prior to a Hearing in a serious matters and in this case it was not refuted that the Claimant was withheld from service in connection with a separate offense that had no bearing on the instant dispute. Additionally, the Collective Bargaining Agreement between the parties has been interpreted to mean that the Organization does not have a demand right to review all investigative material prior to the Hearing (See P.L.B. 7008, Award Nos. 11, 18 and 21). It is determined that the Carrier complied with Rule 25 of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

On October 28, 2011, Claimant was directed to attend a formal Investigation on November 7, 2011, which was mutually postponed until November 21, 2011, concerning in pertinent part the following charge:

"...to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0630 hours, on October 16, 2011, in vicinity of Tiffin, Ohio, when after you had been told that you could not miss work without requesting vacation ahead of time, you failed to report to work on October 16 & 17, notifying your manager after the fact.

In connection with the above incident, you are charged with failure to properly and safely perform the responsibilities of your position, absenteeism, and possible violation of, but not limited to, CSXT Operating Rules - General Rule A; and General Regulations Rule GR-1."

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 first of two dismissal cases involving the same Claimant. The facts of the case indicate that the Claimant was assigned to a Machine Operator Position on System Production Team 6XT4 that was scheduled to work Sunday thru Wednesday, having Thursday thru Saturday as its rest days. Claimant was dismissed for alleged failure to protect his assignment on October 16 and 17, 2011. The Carrier argued that after making a late vacation request Claimant was advised by Supervisor that he was not approved for vacation on the aforementioned dates and if absent, the absences would not be excused whereas the Organization asserted that Claimant was approved for vacation on each and every Sunday after he bid on to the team and on October 16th, while on vacation, he had emergency surgery and needed to be off on the 17th for recovery which is why he called to be off on Monday, October 17, 2011.

The Manager System Production Teams, B. S. Holder, testified on page 11 of the transcript the following:

"...In this case the employee did not notify his supervisor at a proper time, the day before, and did not schedule any vacation prior to October 16th or 17th, 2011...."

Holder went on to testify that the Claimant did not call him until mid-day on the 16th to tell him that he would not be in that day or the 17th at which time Holder stated he told the Claimant that he did not have permission to be off.

On page 17 of the transcript Holder's reiterated that he did not grant the Claimant permission to be off on the 16th and 17th and a few lines later he was asked the following:

"Trawick: Do you recall scheduling any vacation with Mr. Wager?"

Holder: Yes, I do, previously for the 16th." *(Underlining Board's emphasis)*

With the last aforementioned comment Manager Holder rebutted his prior testimony confirming that the Claimant had personally scheduled vacation with him for October 16, 2011. That confirmation is consistent with the testimony of the Claimant who was questioned on page 25 of the transcript as follows:

"Caruth: Did Mr. Holder give you permission to have vacation the 16th or 17th?"

Wager: He gave me permission for all Sundays off.

Caruth: When did Mr. Holder give you permission for all Sundays off?

Wager: When I first got to the gang."

The Claimant further testified that he first called his superior at 7:30 a.m. on the October 16th to advise him that he was in a great deal of pain and was going to the Emergency Room for treatment. According to the Claimant he was unable to reach him at that time. Claimant went to the hospital where they performed a hemorrhoid procedure after which he called Manager Holder to ask for Monday, October 17th off for recovery. Claimant stated that he felt he did not need to take a vacation day for the latter day as he was off for medical reasons.

On page 34 of the transcript Foreman S. Martin was asked whether Claimant requested to be off on Sunday, October 16th and he explained in pertinent part:

"Caruth: Did Mr. Wager ever ask you for those days off?"

Martin: He, it was just well known that he didn't work Sundays.

Caruth: And what do you mean well known that he didn't work Sundays?

Martin: He didn't work any Sundays.

The questioning of Foreman Martin continued on page 35 wherein he was asked whether there was an agreement made between Manager Holder and the Claimant to take Sundays off for vacation purposes. Martin testified as follows:

"Caruth: Mr. Wager previously stated that Mr. Holder told him he could have whatever Sundays he wanted off, does that sound right?"

Martin: He said until he ran out vacation. He said he could all the Sundays off, but he, not sick, you know he wanted to make sure he took a vacation day.

Caruth: Say that again sir.

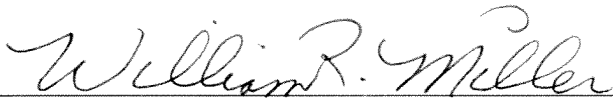
Martin: He said he could as long as he took a days vacation, but once he ran out of vacation he said he couldn't take anymore Sundays off.
(Underlining Board's emphasis)

The record substantiates that the Claimant had been approved to have Sundays off as vacation days and that Supervisor Holder had given the Claimant permission to be off on October 16, 2011, when Claimant still had available vacation days. With respect to the October 16, 2011, telephone conversation, the record is not particularly clear as to what transpired between Holder and the Claimant and whether the Carrier understood the Claimant had a medical emergency, however, Employees Exhibit 2 reveals that the Claimant on October 16th had a procedure performed by a physician. That exhibit and Claimant's statement and testimony that he had an emergency medical situation arise on the 16th which necessitated his call request to be off on the 17th was not effectively rebutted. It is determined that substantial evidence was lacking and the Carrier did not meet its burden of proof.

The Board finds and holds that the dismissal was not appropriate and should be removed from the Claimant's personnel record. The Claimant is to be made whole for all loss of monies at the straight time rate from the date he was removed from service until his second dismissal case charges were filed on November 10, 2011. The Claimant is not reinstated by this Award as that issue will be reviewed in Award No. 2, Case No. 2 of this tribunal. The discipline is rescinded and the appeal/claim is partially sustained.

AWARD

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



William R. Miller, Referee

Dated: May 7, 2012