

Public Law Board No. 6025

Parties to Dispute

CSX Transportation, Inc./
Baltimore & Ohio Chicago Terminal

VS

Brotherhood Railway Carmen Division/
TCIU

Case 1/Award 1

Statement of Claim

The claim is on behalf of Carman, H. Goldsmith, Riverdale, Illinois for reinstatement of service, compensation for all time lost with all benefits restored, all rights unimpaired, compensation for mental anguish endured, and removal of all letters regarding Claimant Goldsmith's dismissal.

Background

On February 23, 1996 the Claimant was advised to attend an investigation to determine facts and place responsibility, if any, in connection with being absent from (his) assignment without proper notice or permission from proper authority on February 20, 21 and 22, 1996".¹

On March 27, 1996 the Claimant was advised that he had been found guilty as charged and he was dismissed from service. This discipline was appealed by the Organization in the proper manner under Section 3 of the Railway Labor Act and the operant Agreement. Upon rejection of the appeal by the Carrier the instant case was conferenced accordingly on property by the Claimant's labor representative and by the Carrier's assigned officer. Absent settlement of the appeal on property the instant claim was docketed before this Board for final adjudication.

¹Carrier's Exhibit A.

Discussion

A review of the transcript of the investigation held on February 29, 1996 in the Carrier's Chicago Division Office Building shows that the Carrier's wife called in on February 7, 1996, which was a Wednesday, to Carrier's supervision with information that the Claimant would be off the rest of that week. The work week after that, February 13-17, 1996 was a scheduled vacation week for the Claimant which he took. The Claimant's next scheduled work day after that was February 20, 1996. The Claimant should have reported for work on that day. He did not. The Claimant's Foreman testified that the Claimant did not call in, however, until after he received the Notice of Investigation to report off. The Claimant was, therefore, cited for being absent without permission.

Testimony by two Car Foremen and an Assistant Car Foreman, at the investigation, is that the Claimant had not notified anyone in supervision to the effect that he was sick on the dates he is accused of being off without permission. According to testimony, the Claimant had his Foreman's home telephone number as well as his pager number, in addition to the Carrier number to call in. There is no evidence that the Claimant used any of these information channels, according to the Carrier's witnesses, to call in off on the two days in question.

Contention that the Claimant witnessed a work fatality is unfounded, according to the Carrier. According to the Carrier there is no evidence that the Claimant witnessed the fatality, or that he even knew the employee in question. The Claimant did call supervision at the Shop on February 26, 1996, after receiving the Notice of Investigation on February 23, 1996 with information that he would be off with a medical condition until further notice. But this was, according to the Carrier, long after the Claimant had already missed the days off without

permission.

According to the Claimant his wife called in on February 7, 1996 with information that he would be off indefinitely. He also states that he notified supervision on February 12, 1996 that he would be off indefinitely and that he was under the care of a doctor. During his testimony the Claimant makes allusions to the fact that a death also affected his behavior. He testifies, for example, as follows:

"...I'd like to say for the record that I could not have chosen a time for somebody to die or the way in which I might have seen it or how it might have affected me..."²

Or again:

"I've been dealing with a tragedy and a very tragic occurrence. It has turned my entire life upside down, inside out and it's caused me a lot of grief and pain, and I feel victimized by (the supervisor) in particular (and) CSX in general because I'm suffering from something that is...no fault of my own..."³

Findings

There is conflicting testimony in the record with respect to the narrow issue of whether the Claimant called in to obtain permission to be off for the dates of February 20-22, 1996. He claims that he did call in and asked to be off "indefinitely" prior to those dates. According to Carrier's witnesses, there is no record of such a call. With respect to this issue the Board must underline that it is an appellate forum and "...by long established precedent (it cannot set itself up) as a trier of fact and particularly not to resolve patently conflicting testimony...so long as the

²Transcript @ p. 22.

³Transcript @ p. 23.

testimony by Carrier's witnesses (is not) per se arbitrary and unreasonable...".⁴ A review of the record shows corroborating evidence presented by management witnesses with respect to the Claimant's absence on the dates in question.

The Board also notes that the Claimant refers to a death of an employee and the extent to which such affected him. But a review of the Claimant's own testimony fails to convince the Board that the Claimant actually witnessed such an event. The Claimant never says he did. He only testified about the way "...in which (he) might have seen it...". In testimony at the investigation which is both curious and convoluted the Claimant makes references to a tragedy --- which the death of a fellow worker certainly was --- without providing any information other than the fact that he may have been aware of such tragedy. The Carrier observes in its Submission to this Board:

"With regard to Claimant's alleged witnessing of a fatality, there is no evidence on record that (the Claimant) witnessed the fatality, or even knew the employee who was killed. Moreover, the accident did not happen in Claimant's work area, and if he elected to go to that area, which cannot be proven at this time that he even did, such was of his own volition".⁵

There is no evidence of record to support other than what the Carrier states with respect to this issue. The death may have affected the Claimant. But there is no evidence that such was in any way the cause of his not notifying supervision about not being at work on the three days in question. On merits, the record in this case, as it exists, supports the position of the company and not that of the Claimant.

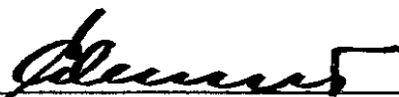
⁴See National Railroad Adjustment Board (NRAB) Third Division Award 21612; also Awards 10113, 10791, 16281 & 21238, all of which deal with the issue of credibility.

⁵Carrier's Submission @ p. 8.

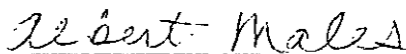
The only remaining issue which the Board must address is whether the discipline issued by the Carrier was appropriate. Under title of extenuating circumstance this Board may take into account an employee's past record in order to arrive at reasonable conclusions relative to the quantum of discipline assessed.⁶ The Board notes that the Claimant was counseled on two different occasions that his absentee record was excessive. During the first three quarters of 1995 the Claimant was off work a total of 28 times. By any measure in this industry such is extreme. Nevertheless, the Board will take into consideration the fact that the Claimant states, at the investigation, that he has taken measures to attempt to correct this situation. In view of this the Board will put the Claimant back to work to his old position with the Carrier, without back pay for any time held out of service, but with seniority unimpaired. If the Claimant continues to miss work in the future the Carrier is free to take proper measures accordingly. A company in this industry cannot function when employees do not come to work.

Award

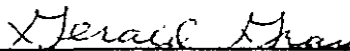
The claim is sustained only in accordance with the Findings. The Claimant shall be re-instated to his old position within thirty (30) days of the date of this Award.



Edward L. Suntrup, Neutral Member



Albert Males, Carrier Member



Gerald Gray, Employee Member

Date: 2-2-98

⁶NRAB Second Division 5790, 6632; Third Division 21043, 22320.