

BEFORE PUBLIC LAW BOARD NO. 6043

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
and
ILLINOIS CENTRAL RAILROAD**

Case No. 56

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's decision to dismiss Trackman Travis McCloud for violation of USOR Rules H and I in connection with falsifying time and excessive absenteeism is unjust, unwarranted and in violation of the Agreement (System File S.A090507.0/134-107-23).
2. As a consequence of the violation referred to in Part 1 above, on behalf of Mr. McCloud, the Organization requests that the Carrier ' . . . rescind and remove the dismissal discipline from the Claimant's record, and that he be reinstated to service and made whole in accordance with Rule 33(i).'"

FINDINGS:

By notice dated July 20, 2007, the Claimant was directed to attend a formal investigation to determine whether he had been excessively absent and whether he had falsified payroll time. The investigation was conducted, as scheduled, on July 27, 2007. By letter dated August 3, 2007, the Claimant was notified that as a result of the investigation, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to discharge him. The Carrier denied the claim.

The Carrier initially contends that the investigation was fair and impartial. The Carrier asserts that during the handling of this claim on the property, the Organization never raised any argument that the investigation was procedurally flawed. The Carrier

argues that the Claimant and his representative were present at the investigation and were afforded the opportunity to hear all testimony, to question and cross-examine all witnesses, to review all information in the record, and to make statements.

The Carrier maintains that the record clearly demonstrates that the Claimant violated U.S. Operating General Rules H and I. The Carrier emphasizes that after asking for and receiving permission to take May 31, 2007, as a vacation day, and after receiving vacation pay for that day, the Claimant subsequently attempted to falsely claim that he had worked on that day. The Carrier asserts that the Claimant's own testimony confirms that he was in violation of Rule H in that he knowingly caused his payroll records to be altered by making false and dishonest statements. The Claimant further received pay for a day that he had not worked, and he was dishonest when he failed to report it so it could be corrected. The Carrier argues that this act, standing alone, justifies the Claimant's dismissal from service.

Turning to the charge of excessive absenteeism, the Carrier points out that between March 8 and July 24, 2007, the Claimant was absent from his entire shift on twenty-three separate occasions. Moreover, he either reported for work late or left work early on five other dates.

The Carrier emphasizes that there is no documentation to confirm the Claimant's implication that he was on "medical leave" from July 12 to July 24. The Carrier acknowledges that the Claimant was in contact with the Medical Services Department, but the Carrier denies that the Claimant was, in any way, authorized to be absent from his job for any period of time. The Carrier argues that the obvious weakness in the

Claimant's assertion that his involvement with Medical Services should somehow excuse him for his nine consecutive absences in July 2007 is the fact that the Claimant was not working during that period. The Carrier contends that the Claimant clearly violated Rule I.

As for the Organization's attempt to limit the investigation to a consideration only of those absences occurring less than fifteen days prior to the date of the investigation notice, the Carrier emphasizes that absenteeism is a continuing event that derives from repeated action over a period of time. The Carrier argues that to limit the Carrier's ability to review an employee's record to only a few days immediately preceding issuance of an investigation notice would effectively deny the Carrier any reasonable opportunity to prove that absenteeism actually was occurring and thereby deny any opportunity to appropriately correct it.

The Carrier maintains that the record demonstrates that the Claimant was given warnings and a suspension relative to his absenteeism, and he was given a break on a number of occasions. Moreover, although the Claimant was instructed that he could not be absent unless he contacted the track supervisor or his assistant, the Claimant took this to mean that he need only leave them a message. The Carrier argues that the Claimant failed to follow instructions and did not change his behavior. The Carrier asserts that there can be no dispute that the Claimant violated Rule I.

The Carrier goes on to contend that the discipline at issue was not arbitrary, capricious, or excessive. The Organization did not assert any procedural flaws or deficiencies during the handling on the property, nor has it provided any mitigating

evidence. Citing a number of Board Awards, the Carrier asserts that its decision to discharge the Claimant should be upheld based upon his serious proven and/or repeated rule violations. The Carrier has an inherent right to expect its employees to regularly report for work as scheduled. The Claimant was warned that his obvious failure to live up to that expectation was unacceptable and would subject him to discipline, but the Claimant failed to alter his behavior, even after he was suspended.

The Carrier emphasizes that the record contains substantial, probative evidence that the Claimant failed to comply with the rules and instructions. Moreover, the Claimant sought and received payment for a day when he did not work and for which he already had received vacation pay. The Carrier asserts that by doing so, the Claimant attempted to recapture the vacation already paid him, which would have resulted in the Claimant's receiving more vacation pay than that to which he was entitled. The Carrier insists that such behavior cannot be condoned.

The Carrier then maintains that the Organization is seeking an excessive remedy in this matter. If the Board concludes that some compensation is due the Claimant, that amount would be offset by any other employment earnings, as set forth in Rule 33(i).

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier failed to prove the charges in this matter. In connection with the charge of falsifying time, the Organization points to a number of Board Awards in asserting that this charge must be proven by clear and convincing evidence because the charge implies an element of moral turpitude, if not

criminal liability. The Organization argues that although the payroll records show that the Claimant's time was changed on May 31, 2008, the record reveals that a simple mistake was made. The Organization emphasizes that the Carrier has failed to show that the Claimant had any intent to defraud or claim that to which he was not entitled. The record does not support an accusation of dishonesty, and any discipline imposed in connection with this is improper and cannot stand.

The Organization then addresses the charge of absenteeism. The Organization points out that there is no evidence of recurring absenteeism between the August 2, 2005, letter of caution and March 8, 2007. The Claimant was absent for several days between March 8 and July 2, 2007, and the Claimant was issued a one-day suspension for "not reporting to work" on July 2, 2007. The Organization acknowledges that the Claimant thereafter was absent on July 5 and 6, 2007, and he then was absent with the permission of the Carrier's Medical Department from July 11 through July 24, 2007. The Organization argues that there is no evidence that the Claimant failed to comply with the May 4, 2007, instructions on his responsibility for reporting absences.

The Organization insists that after the July 2, 2007, disciplinary suspension, the only subsequent unexcused absences on the Claimant's record occurred on July 5 and 6, 2007. The Organization argues that dismissing the Claimant for two consecutive days of absence, with the only prior discipline imposed being a one-day suspension, is excessive and not in line with the principles of progressive discipline. The Organization asserts that because the Claimant previously had received only a single-day suspension, the appropriate discipline here was a five-day suspension, not dismissal.

The Organization maintains that the purpose of discipline is to rehabilitate, correct, and guide employees, but the Claimant's dismissal serves no purpose other than punishment. The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that the Carrier has met its burden of proof that the Claimant violated Carrier Rule H when he was dishonest and knowingly caused his payroll records to be altered so that he received pay for a day that he had not worked. In addition, the Claimant was excessively absent on numerous occasions during the period March through July 2007. The record shows that he was absent for his entire shift on twenty-three separate occasions during that period; and on five other days, he was either late for work or left early.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was guilty of several very serious rule violations. Given the seriousness of those offenses, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim will be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 5-20-09



CARRIER MEMBER

DATED: 5/20/09