

**PUBLIC LAW BOARD NO. 7163
CASE NO. 386**

CSXT File No: 18-85752

PARTIES)	BROTHERHOOD OF MAINTENANCE OF WAY
)	EMPLOYES DIVISION - IBT RAIL CONFERENCE
)	
TO)	VS.
)	
DISPUTE)	CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier’s discipline (dismissal) of Mr. J. Auman, by letter dated March 19, 2018, in connection with allegations that he violated the CSX Transportation Crew Attendance Policy System (CAPS) was arbitrary, unsupported, unwarranted and in violation of the Agreement (Carrier’s File 18-85752 CSX).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant J. Auman’s record shall be cleared and he shall be returned to service with all rights, benefits and compensation unimpaired, included all lost straight time, overtime and other compensation.”**

FINDINGS:

**The Board, upon the whole record and all the evidence, finds that:
The Carrier and the Employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.
This Division of the Adjustment Board has jurisdiction over the dispute involved herein. Parties to said dispute were given due notice of hearing thereon.**

The Carrier hired the Claimant on June 26, 2006. The Carrier enacted a new attendance policy on April 1, 2017. The CSX Field Administration Specialist testified at the investigative hearing Claimant violated the Carrier's APS policy. The Specialist also provided a detailed description of the APS policy explaining the policy is a reasonable and objective means to assist employees in understanding their attendance obligations, sets forth a points schedule for attendance incidents, and is tied to the online portal allowing an employee to have access and track the points accumulated for attendance incidents. She also testified about each event leading up to Claimant meeting the 20-point disciplinary handling threshold. The Specialist also testified that all employees were mailed a copy of the attendance policy and had access to the policy on the employee gateway. The Claimant denied receiving the letter on the policy change.

The Carrier issued a Notice of Investigation letter dated December 28, 2017, which stated as follows "...to determine the facts and place your responsibility, if any, in connection with information received on December 20, 2017, that you have reached or exceeded the threshold for discipline handling under CSXT Engineering Attendance Point System (APS) Policy, on or about December 7, 2017, and all circumstances relating thereto ..."

Following some postponements, the investigation hearing was held on February 28, 2018. Following the investigation hearing, the Claimant received a Discipline Notice dated March 19, 2018, finding a violation of CSXT Crew Attendance Policy System (CAPS). The Claimant was dismissed. The Organization appealed the Carrier's decision by letter dated March 19, 2018, and the Carrier denied the same on May 13, 2018. The Organization responded in its letter dated May 21, 2018. A formal conference was held with no change in the position of the Carrier on April 16, 2018. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- 1) Did Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?

- 2) If so, did the Carrier establish by substantial evidence that Claimant was culpable of the charged misconduct or dereliction of duty?
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?

The Carrier contends that the Claimant was afforded a fair and impartial hearing. The Carrier asserts that the Agreement does not require that the specific charge be listed in the charge letter. The Carrier asserts that the discrepancy between offenses in the charge letter (APS violation) and the discipline letter (CAPS violation) is a scribner's error. The charge letter, testimony and exhibits presented at the hearing only referenced the APS policy. The Carrier also contends that the Carrier has established by substantial evidence that the Claimant violated the cited rules by substantial evidence. The Carrier asserts that the regulation of attendance is a legitimate concern of the Carrier in the railroad industry. The Carrier's attendance policy is a progressive, 4 step process, and when an employee reaches Step 4, the employee is dismissed. The Carrier provided notice of the policy to the Claimant, and more importantly Claimant received prior discipline under the policy. The Carrier further contends that the Organization failed to present sufficient evidence to support its defense of FMLA protection. Moreover, the Carrier contends that the discipline was justified and assessed in accordance with the Carrier's policy. It is the Carrier's position that the claim should be dismissed.

The Organization contends that the Claimant was denied a fair and impartial hearing and the Carrier failed to comply with Rule 25 of the Agreement. The Organization argues that the Claimant was dismissed for violation of the CAPS policy although he was charged with violation of the APS policy. The Organization argues that the CAPS policy was never introduced or discussed at the formal investigation and the two policies are separate and distinct. The Organization maintains that it is a denial of due process to charge the Claimant with one offense and then convict him of another. Further, the Organization contends that the Carrier failed to meet its burden of proof. The Organization asserts that the Carrier did not introduce or outline the CAPS policy during the formal investigation and offered no evidence of a violation of the policy. Moreover, the Organization argues that the penalty is arbitrary and unwarranted. It is the position of the Organization that the claim should be sustained and the Claimant be reinstated to the service.

The Carrier charged the Claimant with violation of CSX Transportation APS policy; said policy is incorporated herein as if fully rewritten. The Claimant was dismissed under a different attendance policy, the CAPS policy. The Organization challenges the discipline letter which states that the Claimant was dismissed for violation of the CSXT Crew Attendance Policy System CAPS policy. The discipline letter clearly contradicts the Notice of Investigation which states that "you have reached or exceeded the threshold for discipline handling under CSXT Engineering Attendance Point System (APS) Policy." The Claimant was placed on notice for the APS policy. During the course of the investigation the Carrier admitted the APS policy as an exhibit, and the Organization and the Claimant was granted opportunity to cross examine on the application of the APS policy as it relates to this claim. The Board also notes that the witnesses referenced these policies interchangeably during the hearing. The issue was raised by the Organization by letter dated May 21, 2018. The Claimant was noticed of the acts that he failed to perform in violation of the specific terms of the policy. The record fails to reflect any significant difference in the specific terms under the provision of APS or CAPS. The Board finds no prejudice to the Claimant in this instance.

The attendance policy sets forth the Carrier's expectation for regular attendance and provides notification to the employee when discipline may result due to excessive absenteeism. The Carrier witness testified that this is a new policy and was mailed to all employees; the Claimant denied receiving the letter. The Carrier did not introduce any evidence verifying that the letter was sent to the Claimant. The Claimant was mailed his first counseling letter on September 8, 2017. Further, the Claimant signed a waiver in lieu of formal disciplinary proceeding; the Claimant should have been placed on notice at this time. The Specialist testified that the policy was not intended as a punitive measure for those employees who have a chronic illness nor is it intended to significantly impact employees whose attendance is normally consistent but is temporarily affected by special circumstances.

The evidence established that the Claimant exceeded the points threshold for discipline handling policy. The Carrier has met its burden of proof; the Claimant has violated the policy. However although the Carrier may promulgate policies and procedures, the Board must still determine if the penalty is within the bounds of reasonableness. The Claimant provided explanation for his absence for several dates which he had local manager approval. He used sick time to attend family court on

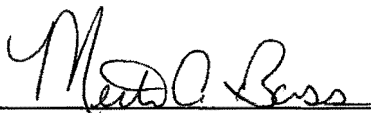
December 7, 2017. This was four (4) points. The Claimant was in a car accident and transported to the hospital on August 14, 2017, and then was scheduled off from August 15-18th. The Claimant did contact his manager about the accident. The Claimant testified that he provided the form to his physician to complete. This was sixteen (16) points. It appears that the Claimant was taking affirmative steps to comply with the verification but relied on third parties to submit the information. On December 8, 2017, the Claimant used FMLA to address his son's medical concerns at that time. The Claimant was assessed ten (10) points on an FMLA absence. The Carrier argued that the Claimant did not bring said FMLA verification; however, FMLA is approved by the Carrier. The Claimant had approximately twelve (12) years of service at the time of the incident. The Board finds the penalty to be excessive, and modifies the same to a time-served suspension with no impairment to his rights and benefits.

AWARD

Claim sustained in accordance with these findings.

ORDER

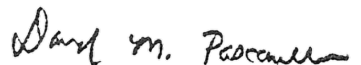
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Meeta A. Bass
Neutral



Katrina Donovan
Carrier Member



David Pascarella
Organization Member

Dated at Chicago, Illinois, this 26th day of NOV. 2019.