

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7357
AWARD NO. 5, (Case No. 6)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**CP RAIL SYSTEM/DELAWARE AND HUDSON
RAILWAY COMPANY, INC.**

**William R. Miller, Chairman & Neutral Member
Timothy W. Kreke, Employee Member
Anthony Stillittano, Carrier Member**

Hearing Date: March 26, 2010

STATEMENT OF CLAIM:

- "1. The discipline [removed and withheld from service and an assessment of twenty-five (25) demerits by letter dated October 27, 2008] imposed upon Mr. D. Hupp for alleged violation of GCOR Rules 1.2.7, 1.4, 1.6, 1.13 and 1.15 for allegedly leaving the work site without authority on September 30, 2008 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File 8-00641).
2. As a consequence of the violation referred to in Part 1 above, '...the Organization requests that the 25 demerits assessed to Mr. Hupp's record be removed and that Mr. Hupp be made whole for all losses incurred to him while removed from service from the Carrier wrongfully."

FINDINGS:

Public Law Board No. 7357, upon the whole record and all the evidence, 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 herein; and that the parties to dispute were given due notice of the hearing thereon and did participate therein.

On October 2, 2008, the Carrier notified Claimant to appear for a formal Investigation on October 9, 2008, which was changed to October 8, 2008, (pursuant to the Organization's request) concerning in pertinent part the following charge:

"...The purpose of this investigation will be to determine your responsibility, if any, on your alleged violation of GCOR Rules 1.2.7, 1.4, 1.6, 1.13 and 1.15.

This is with reference to alleged leaving the work site without authorization on the Colonie Main September 30, 2008, leaving the carrier in a position where your absence caused considerable delays, rescheduling and rendered the 23 Rd Street Road Crossing in Watervliet out of service for an extended period of time...."

The aforementioned Rules in dispute deal with conduct, compliance with instructions and authorized absence.

On October 27, 2008, Claimant was notified that he had been found guilty as charged and the Carrier imposed 25 demerits.

It is the position of the Organization that the Claimant did not receive a fair and impartial Investigation because of the Hearing Officer's improper conduct and the fact that he did not issue the decision and instead the Charging Officer rendered the decision. It argued that on the basis of the procedural violations alone the Board should sustain the claim without even addressing the merits.

On the merits the Organization argued that the Claimant did not leave the property until the end of his regularly assigned hours. It contended that there is also no dispute that the Claimant came in early on September 30, 2008, as requested by Foreman Boyce. It further argued that the Claimant was not given a clear direct order to remain after the regularly scheduled hours and perform any work and, therefore, any implication that he did not follow Carrier instructions, or that he somehow needed authorization to leave the work site upon completion of his shift is incorrect. It concluded by requesting that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that the evidence indicates that Claimant was afforded all the contractual rights to which he was entitled. It argued that Claimant was properly notified of the charges, he attended the Hearing, was properly represented and his defense was not hindered, therefore, it reasoned that the Claimant was afforded a fair and impartial Investigation.

It further argued that the facts reveal that on September 29, 2008, Claimant did not inform his Foreman and Supervisor, that he was leaving the property prior to the completion of a special project as per instructions of his Supervisors. It asserted that his actions caused a hardship to the Carrier and added expense as the project had to be rescheduled and a slow order remained on the track. In addition, the city of Watervliet had to close the road for another day.

It closed by stating that the project had been planned out weeks ahead of time and was clearly explained numerous times to all employees assigned to the project and Claimant and no one else took exception to it and they understood that it might require additional overtime to get it done in time. It asked that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and notes that the instant dispute is a companion case to Award No. 3 and is identical other than a different Claimant. For the same reasons expressed in that Award this case will not be resolved on the basis of alleged procedural violations.

Turning to the merits the facts indicate that one week prior to beginning of the September 29th startup of the 23rd Street crossing renewal project in Watervliet, NY, Track Maintenance Supervisor Kulzer reviewed the project and his expectations for its completion with the surfacing crew. The crew consisted of Track Foreman S. Boyce, Asst. Track Maintenance Supervisor Z. McHale and Machine Operators S. Bologansky and Claimant with the assigned work hours 9:00 a.m. to 5:00 p.m. Testimony at the Hearing confirmed that the plan was to remove the crossing on Monday the 29th and the track structure to be surfaced by the Claimant and others. On the following day, Tuesday the Crossing was supposed to be completed and the surfacing crew would move to the next project. On Wednesday, the rubber crossing was to have been installed and on Thursday the crossing approaches were to have been paved.

Review of the Transcript substantiates that on Monday, September 29, 2008, Supervisor Kulzer reviewed the project plan with the crew. On Tuesday, September 30th there were unexpected delays and because of that the surfacing crew had a late start. It is clear from the record that overtime was required to complete the project on time. At approximately 5:00 p.m. the Claimant departed the work site without authorization, leaving the 23rd Street Crossing uncompleted. On page 137 of the Transcript the Claimant testified as follows:

"Q. So, Mr. Hupp, you understood that Dave Kulzer, the TMS, would like to get the project done. That's your understanding?"

A. Right.

Q. What is your response to that?

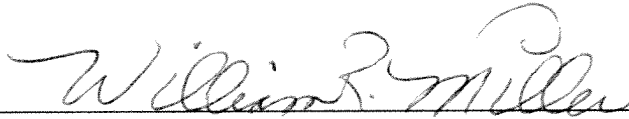
A. What was my response? My response was that I wasn't I didn't want to go back out." (Underlining Board's emphasis)

Despite the Organization's vigorous defense of the Claimant it was apparent that the Claimant understood that overtime was necessary and that he should not have left the site without permission. The Carrier met its burden of proof that Claimant was guilty as charged.

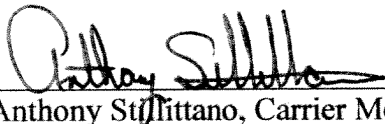
The only issue remaining is whether the discipline was proper. At the time of the incident the Claimant had approximately nine years of service with an unblemished record. Therefore, the Board finds and holds that the discipline was excessive rather than corrective in nature and it will be reduced to 20 demerits with time served.

AWARD

Claim 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 by the parties.



William R. Miller, Chairman



Anthony Styllitano, Carrier Member



Timothy W. Kreke, Employee Member

Award Date: July 14, 2010