

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7357
AWARD NO. 10, (Case No. 11)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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 (dismissal) imposed upon Claimant Dustin A. Wydeen for the alleged violation of GCOR Rule 1.13 Failure to Reporting and Complying with Instructions, per Certified Mail #7006 2760 0003 5764 2566 dated April 23, 2009, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (Carrier's File 8-00706).
2. As a consequence of the violation referred to above in Part 1 above, Mr. Wydeen's record shall be expunged of all discipline assessed and he shall be made whole and restored to the service of the Carrier with pay for all lost time, seniority and and vacation unimpaired."

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 May 12, 2009, the Carrier notified Claimant to appear for a formal Investigation on May 22, 2009, which was postponed and subsequently held on June 11, 2009, concerning in pertinent part the following charge:

"...The purpose of this investigation will be to determine your responsibility,

if any, for your alleged violation of GCOR Rule 1.13. Failure to respond to Certified Mail #7006 2760 0003 5764 2566 dated April 23, 2009...."

The subject Rule in dispute is as follows:

"General Code Of Operating Rules (GCOR)

1.13 Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when instructions apply to their duties."

On June 25, 2009, Claimant was notified that he had been found guilty as charged and he was dismissed from service.

It is the position of the Organization that the Claimant was denied a fair and impartial Investigation because the Hearing Officer did not render the decision and the Charging Officer did render the decision. It argued that on that basis alone the Board should sustain the claim without even addressing the merits.

On the merits the Organization argued that there is no dispute that Claimant suffered from depression as well as alcoholism and chemical dependency. It further argued that he was prescribed Oxycontin by his doctor and was instructed to take such only during the sudden rise or urge of chemical dependency (i.e., the want to use illegal drugs and/or alcohol). Also according to it the record proves that Carrier was well aware of the severity of Claimant's afflictions and that he had enrolled, through his own volition, in the Carrier's Employee Assistance Program (EAP) prior to the instant dispute.

It contended that after spending three months in a rehabilitation center Claimant was set for a return-to-work physical which he failed because just before taking the test he used the prescribed drug Oxycontin account of having an urge to use an illegal drug after which he was incarcerated because he tested positive. Because he was in jail he was unable to respond to the Medical Services, even though his mother did so in his behalf. It closed by asking that the discipline be set aside and the claim be sustained as presented.

It is the Carrier's position that the evidence substantiates that Claimant was afforded all of his contractual rights and "due process". It argued that Claimant violated his probation by taking

a prescription drug and by doing so was incarcerated. The use of unauthorized drugs also resulted in the violation of his Personal Program Agreement that he signed with the Carrier.

The Carrier further argued that the facts confirm that Claimant was approved to return to work on January 26, 2009 and he failed to respond to Carrier letters sent to him on January 23 and April 23, 2009 as to what his employment status was and whether he wanted to be on Medical Leave. Additionally, it stated he failed to respond to phone calls and letters sent to him by Medical Services between April 1 and April 7, 2009, in violation of Carrier instructions. It concluded that dismissal was proper and requested that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Organization's allegation that Claimant was denied "due process" is found lacking substance in this instance.

The record verifies that in October 2008, the Claimant reported off for medical reasons and on January 23, 2009, the Claimant was sent a letter, by the Manager of Track Programs, requesting information on his employment status. Shortly, thereafter, the Claimant entered into the EAP program for drug and alcohol wherein he agreed and signed a Personal Program Agreement with the Carrier in March 2009. The Claimant completed the program April 1, 2009, and on April 23rd the Carrier wrote him the following:

"As part of our return to work process, the Health Services Department has tried to contact you by telephone numerous times the week of April 1 to April 7, 2009. On April 7, 2009 a letter was sent to you requesting that you contact their office at 651-772-5925 within the week (before April 14, 2009). To date, the requested phone contact has not been received.

Please contact the Health Services Department, at the above number, within ten (10) days of date of this letter. Failure to do so can result in formal investigation, and possible disciplinary action...."

The Organization alleged that the reason Claimant did not personally respond to the letter cited above was because while waiting for his return to work physical he began to feel the pressure of Chemical Dependency and he took a prescription drug (Oxycontin) to eliminate the need for alcohol and drugs. It asserted that drug subsequently caused a positive result when he was again tested by the EAP which resulted in a violation of his probation and incarceration.

In the Carrier's letter of December 29, 2009, it stated the following:

"...In response to the above, Mr. Wydeen was not waiting for his return physical, as Mr. Wydeen never responded to the Carrier's numerous phone calls and certified letters, which were in regards to his required return to work drug and alcohol screen.

The Carrier would like to clarify that the Carrier's Employee Assistance Program Counselor (EAP) had nothing to do with Mr. Wydeen being incarcerated. Mr. Wydeen violated his probation by taking a prescription drug and by doing so was incarcerated. The use of unauthorized drugs also resulted in the violation of Mr. Wydeen's personal program agreement that he signed with the Carrier...."

The Carrier's recitation of the facts were not refuted. On pages 16 and 17 of the Transcript the Claimant testified that he had been in and out of various drug and alcohol rehabilitation programs for three plus years and he explained why he did not report for a company physical as follows:

"...A The reason I didn't reply to the company physical is because I had a relapse with my addiction and was facing consequences that would not allow me to respond.

Q That was your probation violation?

A Yes, it was.

Q What prescribed drug did you take at that time?

A The prescribed drug that I took was Oxycontin that I had - - I've had two back surgeries and deal with pain management. It was no excuse to take the medicine being that I'm an addict. Narcotics are no good for me...."
(Underlining Board's emphasis)

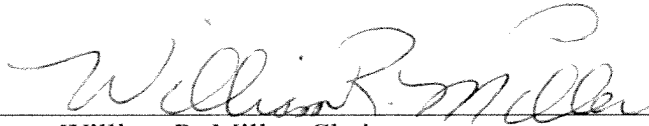
Claimant did not testify that he took the prescribed drug to lessen his urge to use illegal drugs, but instead testified that he used the drug to satisfy his addiction, which arose only days after having completed the EAP Program. Because the Claimant's mother responded in his behalf while he was in jail does not eliminate the fact that he did not respond. The record is clear that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately seven years of service with a good work record. On page 9 of the Transcript the Manager of Track Renewal, T. Lomax, testified that Claimant had been: **"...a safe and conscientious worker..."** up until his recent addiction problems. The record is

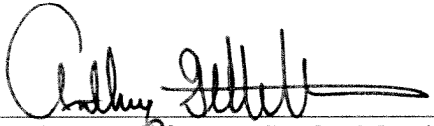
clear that the Claimant was a worthy employee that was ill. Therefore, the Board finds and holds that the discipline was excessive and it is reduced from a dismissal to a lengthy suspension with no back pay, but seniority rights intact and benefits unimpaired. The Claimant is forewarned that he is being returned to service on a "**last chance basis**" and must be able to pass Carrier required drug and alcohol tests before being allowed to work.

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 Stillitano, Carrier Member



Timothy W. Kreke, Employee Member

Award Date: July 14, 2010