

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7529
AWARD NO. 28, (Case No. 28)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE
(Organization File: D21900213)**

vs

**CSX TRANSPORTATION, INC.
(Carrier File: 2013-137884)**

William R. Miller, Referee and Neutral Member
P. E. Kennedy, Employee Member
R. Miller, Carrier Member

QUESTION AT ISSUE:

Did the Carrier comply with Rule 25 of the Agreement when it charged C. Wager with violation of Operating Rules - General Rule A and General Regulations Rules GR-1 and GR-2 and was substantial evidence adduced at the Investigation on December 19, 2012, to prove the charges; and was the discipline assessed in the form of permanent dismissal warranted?

FINDINGS:

Public Law Board No. 7529 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.

The Board has thoroughly reviewed the record and determined that the Carrier complied with Rule 25 of the Agreement and the Claimant was afforded all of his "due process" Agreement rights.

On November 16, 2012, Claimant was directed to attend a formal Investigation on November 27, 2012, which was mutually postponed until December 19, 2012, concerning in pertinent part the following charge:

"...to determine the facts and place your responsibility, if any, in connection with your alleged failure to protect your assignment on Thursday, November 1, 2012, and failure obtain appropriate permission from proper authority to absenting yourself from your assignment of Machine Operator on System Production Team 5XT4.

In connection with the above incident, you are charged with failure to protect

your assignment, failure to follow instruction, abandoning your assignment, absenting yourself without proper permission or authority, and possible violations of, but not limited to, CSXT Operating Rules - General Rules A; and General Regulations Rules GR-1 and GR-2."

On January 8, 2013, Claimant was notified that he had been found guilty as charged and was assessed discipline in the form of permanent dismissal. On January 24, 2013, the Claimant requested expedited handling of his case as provided for in Appendix (N) Expedited Discipline Agreement of June 1, 1999 BMW/CSXT Agreement.

The facts indicate the Claimant was scheduled to work on November 1, 2012. On October 29, 2012, Claimant advised his Foreman that he had a doctor appointment on November 1, 2012. The Foreman instructed the Claimant to obtain permission from Supervisor Holder. It was undisputed the Claimant did not obtain permission from his immediate Supervisor Holder. On page 28 of the transcript the Claimant was questioned as follows:

"Murphy: ...did you make any arrangements with a manager of CXS Transportation to be off on Thursday, November 1st?"

Wager: No I did not, because to be honest with you, I wasn't talking to him because he can't - his words hold no water with me...."

Claimant went on to allege that his immediate Supervisor had not been honest with him in the past which is why he chose to deal with his Foreman. The problem with that argument is the Foreman specifically testified that he told the Claimant he needed to obtain permission to be off from Supervisor Holder thus he failed to follow the Foreman's instructions. In reviewing the testimony of the Foreman it is clear that he had no stake in the outcome of the Investigation and had no reason to fabricate his rendition of the incident under charge whereas the Claimant's testimony is best described as being self serving.

After first asserting that he was not instructed to seek Supervisor Holder's permission to be absent he altered his testimony stating that he lacked the opportunity to speak with his Supervisor to obtain the required authority for a personal day. On page 29 of the transcript Claimant testified that his Supervisor was not present on the job site to request permission for the day off. On page 31 the Claimant again changed his version of what transpired on October 29th stating that he did see the Supervisor, but did not have an opportunity to speak with him. Claimant also testified that he never saw the Supervisor at the morning job briefing of October 29. Supervisor Holder testified on page 35 of the transcript that he attended and spoke at every job briefing from October 29, 2012, through November 1, 2012, which meant that the Claimant had multiple opportunities to obtain the required permission from his Supervisor. Supervisor Holder's testimony was not effectively refuted.

Lastly, the Claimant argued that he acted in accordance with the System Production Team (SPT) Attendance Policy by advising the Foreman that he needed a personal day off. Review of the aforementioned Policy reveals that personal leave days must be requested from the proper carrier official and in this instance it clear that the Claimant did not seek approval from Manager Holder who was the correct official to gain approval from. It is determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

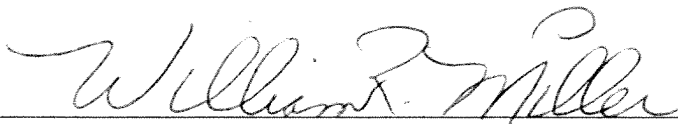
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had 34 years of service with prior discipline involving failure to protect his assignment. The Claimant is no stranger to Public Law Board No. 7529 as he was the Claimant in Award Nos. 1 and 2. In Award No. 2 the Board dealt with a similar case wherein the Claimant had been dismissed in part for absenting himself without proper permission. In that Award Claimant was reinstated without back-pay on a "last chance" basis. The Board stated in pertinent part:

"...The dismissal is reduced to a lengthy suspension which is both corrective and progressive in nature. Therefore, the Board finds and holds the Claimant is to be reinstated to service on a "last chance" basis with seniority intact and all other rights unimpaired with no back-pay. The discipline is reduced and the appeal/claim is partially sustained. The Board also forewarns the Claimant that he needs to protect his assignment and diligently follow all instructions and directives upon reinstatement." (Underlining Board's emphasis)

The Board is always reluctant to dismiss a long term employee, but it is clear that in this instance the Claimant chose not to heed the Board's warning as he was again guilty of a nearly identical charge. The Board finds and holds that the discipline was not arbitrary, excessive or capricious and was in accordance with the Carrier Progressive Discipline Policy. The discipline will not be set aside and the appeal/claim is denied.

AWARD

Appeal denied.



William R. Miller, Referee

Dated: May 20, 2013