

BEFORE PUBLIC LAW BOARD NO. 7566

CASE NO. 169

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DIVISION – IBT RAIL CONFERENCE

and

WISCONSIN CENTRAL LTD.

Carrier's File WC-BMWED-2019-00023

Claimant: D. JEROME

STATEMENT OF CLAIM

“Claim of the System Committee of the Brotherhood that:

1. The dismissal imposed upon Mr. D. Jerome for alleged violation of the USOR Rule I Duty - Reporting or Absence and AMC Attendance Guidelines dated February 15, 2019 in connection with information indicating absence on January 2, 2019 was arbitrary, capricious and in violation of the Agreement (Carrier's File WC-BMWED-2019-00023 WCR).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Jerome's personal record shall be cleared of the charges immediately and he shall be provided the remedy prescribed in Rule 31 of the Agreement, as well as having his seniority restored, his accredited months of service and made whole for all benefits that were not received during his time out of service. In addition, the Claimant is entitled to be made whole for all out of pocket insurance premiums, copays, deductibles, prescriptions and any other medical costs that would have been otherwise covered had the Claimant not been unjustly dismissed.”

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

Claimant received a letter dated January 8, 2019 which provided in relevant part:

The investigation is being held to develop the facts and to determine your responsibility, if any, in connection with the information indicating that your absence on January 2nd, 2019, when considered with other absences during the 12 weeks including and immediately preceding January 2nd, 2019, may be in violation of requirements of the attendance guidelines.

Following a continuance, an investigation was held. Carrier notified Claimant that he was dismissed from service.

The Carrier maintains that the dismissal was appropriate because Claimant violated the attendance policies. This is not a zero-tolerance policy, but rather a rolling “look back” policy. Claimant had too many unexcused absences within the review period. Further, Claimant has had a continuing attendance problem and the instant discipline was part of that continuing conduct. Claimant called off at 0400 due to a doctor’s appointment. This establishes that Claimant knew beforehand of the appointment, yet sought no excused time off from his supervisor.

The Organization responds that the Carrier’s policy discusses unexcused absences within the review period, but does not discuss how to obtain an excused absence. Claimant had a medical excuse for not calling off. On the January 2 unexcused date, he had no available vacation time and decided to call off. His prescriptions indicate that he had a medical condition and the Carrier improperly disregarded that medical condition.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier’s judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier’s actions were an abuse of discretion.

Here, the Carrier asserts a difference between whether an Employee follows the proper procedure for calling off and whether the day for which they called off is an excused absence. The Union asserts that the Carrier did not properly assess whether Claimant had a valid medical excuse. A review of the evidence in this matter reveals the following colloquy with Claimant’s supervisor that underscores the issue in the instant matter:

Q: Mr. Hoppe's not here. You're in his place. So again, I would ask, if he's not able to be alert and attentive, do you want your employee at work?

A: I guess define alert and attentive. I mean, what's --

Q: Able to focus on his job 100 percent and not have any issues that either medically or otherwise, where he's knowingly coming to work not focused on his job.

A: No. That's why we have the -- that's why we have the hotline. I mean --

Q: So then they would need to call into the attendance guidelines.

A: Correct.

Q: But you're not sure if they'd be excused or not.

A: I'd like -- yeah, I would like Mr. Jimenez to answer that question.

Q: Okay. And then looking at Exhibit Number 10, Rule I that you entered in, can you explain what the procedure for marking up would be for marking off time?

A: I would ask, again, that you'd ask Mr. Jimenez that question. He would be a lot more knowledgeable than I would on that.

Q: Are you qualified under these rules?

A: Yes. I am. I've never had to mark off before. I've not ever been in the union.

Q: Well, what does mark off mean? I mean, that's not a union term, by the way.

A: When you call the AMC Guidelines outside of 24 hours before your start time of service, I believe.

Q: Okay. That's kind of in direct -- there's an issue, I guess you could say, with the actual policy, and the policy says you have to call in two hours prior to your shift. This rule is saying 24 hours.

A: Well, that's --

Q: So which one do we follow?

A: I said 24 hours, I meant two hours.

Q: Okay. But my question I guess, is, you know, we're looking at rule -- you said he's in violation of Rule I, duty-reporting or absence. This rule says, employees are required to work regularly and without excessive layoffs or absences. An employee who is permitted to lay off is expected to mark up promptly within 24 hours or less of the mark off time, unless the employee requests and receives permission to be off for a specific period of time longer than 24 hours. I guess my point is that this rule seems to be aimed at transportation and not necessarily engineering. So I have a hard time coming to terms with the fact that we're using it to say that he's in violation of something, because we don't have those terms at all

in our agreement and it's not found in this policy, as far as marking up, marking off, laying off.

A: Well, I -- the way I would interpret that is it's kind of outside the AMC if there's a -- if Dyllan has an issue, or not even just Dyllan. Any employee has an issue, would like to take a personal day, you know, Fred or I need to know 24 hours in advance, and like I told Mr. Frappier earlier, if we have less than three employees off, no problem at all giving them a day off.

A: In concerns with this rule particularly?

Q: Yeah.

A: The way I interpret it is, you know, if you are sick, within the 24-hour period, then The, you know, by general Rule I, you need to be at work if you don't have that 24-hour notice. But then, you know, you have the AMC hotline, which you stated you can call two hours prior. That's why that that's here, as a safety for you.

In addition to the above, the Claimant's testimony indicates that he had prior unexcused absences during the review period. Although he had available vacation days, for the first two, he did not utilize vacation time. Claimant had a number of attendance issues leading up to the instant matter. It is troubling to this Board that Claimant did not seek to alleviate those issues by using available time for his prior call offs.

It is also troubling to this Board that the Carrier's witness, Mr. Jimenez, assumed that Claimant had a pre-scheduled appointment because there is no support for that conclusion in the record. He had no idea when Claimant made the appointment. Similarly, he offered no recourse for an employee who was legitimately ill to be excused on short notice. According to the above-cited exchange, Claimant's supervisor expects him to report even when ill. This presents a legitimate public health concern.

Despite the above concerns, Claimant is familiar with his attendance issues and the attendance policy. If he was seeking to prove that he was ill and could not work it was incumbent upon him to establish his illness. He has not. The Carrier has produced substantial evidence that Claimant violated the attendance policy.

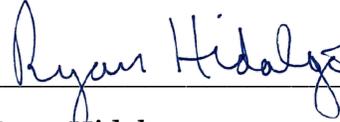
The Board has reviewed the evidence. Claimant was seeking medical treatment and appropriate medication with reduced side effects for a serious condition that contributed to his absences. Accordingly, the Carrier exceeded its authority when it terminated Claimant.

The Claim is sustained in part and denied in part. Claimant should be returned to work with seniority unimpaired. As mentioned above, Claimant is not blameless, and is responsible for his own attendance. Accordingly, there is no award of backpay.

In Dissent:



John Ingoldsby
Carrier Member



Ryan Hidalgo
Organization Member



Brian Clauss
Neutral Member

Dated: 12-18-20