Public Law Board No. 6462

Parties to Dispute

United Transportation Union	)	
	)	
vs	)	**Case 62/Award 62**
	)	
Port Authority Trans-Hudson Corporation (PATH)/New York	)	

Statement of Claim

Request that the one hundred and eighty (180) day suspension assessed Claimant Thomas Esposito be rescinded, that he be made whole and paid for all time held out of service, and that the suspension be removed from his record.

Background

The Port Authority Trans-Hudson Corporation (PATH) is a governmental agency that is a wholly owned subsidiary of the Port Authority of New York and New Jersey. PATH operates a short turn-around railroad which carries in excess of 180,000 daily commuters between Newark, Jersey City and Hoboken, New Jersey to points in midtown and downtown New York city across the Hudson river.

The United Transportation Union (UTU) is the union certified to represent the employees at PATH who perform trainmen work as conductors and tower workers.

On October 1, 2001 the parties established a Public Law Board under Section 3 of the Railway Labor Act, as amended by Public Law 89-456. The Board has jurisdiction over the instant case.

The Claimant was advised on August 31, 2004 by the Carrier's superintendent of

its transportation division to attend a hearing at the Carrier's Journal Square Transportation Center in Jersey City, New Jersey to determine facts and place responsibility, if any, in connection with his alleged violation of Article XIII (C) of the parties' labor Agreement and Rule E.1 of the PATH Book of Rules.

Discussion

The labor Agreement provisions and the Carrier's policy at stake in this case which are referenced by the Carrier are the following which are cited here in pertinent part.

Article XIII (C.)

Medical examinations conducted by PATH shall be required of all employees as determined by PATH. Employees who are found by PATH to be medically unqualified to perform the duties of their positions shall be placed on sick leave before returned to service, at which time they may be required to re-qualify before being returned to service. Nothing herein shall preclude the union from asserting any claims or grievances under the Railway Labor Act by reason of any medical disqualification hereunder, provided that no such claim or grievance can be made challenging the finality of the decision of a Board of Doctors convened pursuant to Paragraph K hereof. Employees shall be allowed four (4) hours at their regular rates when required to take their periodic medical examination outside of their regularly scheduled hours.

Employees will not be scheduled for their periodic medical examinations on their rest days.

Rule E.1

To enter and remain in the service, employees must be of good character and must not act with indifference or neglect, or commit a dishonest, immoral, illegal, violent, insubordinate, disruptive, destructive or reckless act. They must conduct themselves at all time, whether on or off PATH property, in such a manner as to not bring discredit upon PATH.

According to the record the Claimant to this case experienced a panic attack while at work on August 16, 2004 "...in response to his exposure to a 'suspicious' (at times referred to as: 'unattended') package on the PATH platform at the station where he was to begin work..." on the day in question. According to a document submitted for the record by the licensed psychologist whom the Claimant had been seeing since his exposure to the 9/11 attack on the World Trade Center in New York, as a PATH conductor at that time, he required psychotherapy for the treatment of a variety of post-traumatic stress disorders from the time of the attack until the incident happened at work on August 16, 2004.[1]

Although there is a little more to the history of what happened immediately after August 16, 2004, the main thrust of what occurred, which has a bearing on this case, is that on August 19, 2004 the Carrier's Office of Medical Services' (OMS) attending physician wrote a memo stating that the Claimant was "...not fit for work...", and scheduled a follow-up examination on August 26, 2004. The Claimant was, therefore, put on medical leave. That leave extended to September 8, 2004.

At an earlier point in time, on June 3, 2004, before the August 16, 2004 incident ever happened, the Claimant wrote a note to the assistant superintendent of the Carrier's transportation division requesting that his scheduled vacation in August of 2004 be changed because his wife's job schedule at a school where she worked had changed. The

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[1]PATH Exhibit I.

Claimant asked that his vacation be scheduled during the week of August 22-28, 2004 in lieu of the original time slot he had requested which was the week of August 29 - September 4, 2004. The request was approved the following day, June 4, 2004 and the assistant superintendent wrote a memo to the Claimant to that effect. The Claimant's vacation was changed from pay period 36 to pay period 35.[2]

The instant case centers on the single fact that the Claimant did not go to the scheduled follow-up medical examination on August 26, 2004. He did make a request that this examination be scheduled later because it was on a date during the time of his scheduled vacation albeit he was now on medical leave. The Carrier had no objection to the Claimant accompanying his family on its vacation while on medical leave. It just wanted him go to the follow-up exam which had been scheduled during the week when he had scheduled his vacation. On August 20, 2004 the Claimant wrote the following to the attending physician at the Carrier's OMS:

> "Dear Dr. Francis:
>
> "I am writing to inform you that I am unable to attend the appointment with you scheduled for Thursday, August 26th. As I told you during our last meeting I am scheduled for my family vacation during that week. I have decided to maintain my vacation plans...I would appreciate your concern and cooperation with regard to this matter...It would greatly alleviate my anxiety if the appointment could be changed...I will be available to report to your office on Monday, August 30th, two business days after this appointment...".[3]

There is no record of any response that Francis made to the Claimant. On August 26,

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[2]This is all documented in PATH Exhibit A.

[3]PATH Exhibit G.

2004, however, Martin Duke who is PATH's chief medical officer, wrote a memo to PATH's superintendent of transportation that "...Mr. Thomas Esposito failed to keep his appointment with the (OMS) on August 26, 2004. Since we are unable to evaluate his fitness for duty, he is being referred for administrative disposition...".[4]

On August 30, 2004 the Claimant was advised that his status had been changed from "sick" to "out of service without pay" for his failure to make the scheduled August 26, 2004 medical appointment. He was also advised that since he was now being held out of service there was no longer any need to to report to medical. Thereafter he received the notice to attend an investigation for being insubordinate for failure to keep his medical appointment and that this was a violation of Article XIII (C.) of the labor Agreement, and Rule E. 1 of the PATH Book of Rules both of which are cited earlier in this Award.

Findings

This case exists because the OMS scheduled an appointment during the time the Claimant had scheduled a week of vacation prior to his going on sick leave. The Carrier disciplined the Claimant when he did not show for a medical appointment for violation of Article XIII (C.) of the labor Agreement. There is no doubt that OMS has the right to schedule an examination at any time under Article XIII (C.).

This Board is not in the position to, nor would it, second guess medical opinion of the staff of the Carrier's OMS. But given the set of facts before it the Board certainly has

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[4]PATH Exhibit H. Curiously, this memo is written on a Human Resource Department letterhead and not on an OMS letterhead.

to wonder why OMS' medical staff contributed, in part, to the genesis of this case by insisting that the Claimant come in for a medical examination on one date rather than another. There is not a scintilla of evidence to suggest that a medical appointment by the Claimant on August 26, 2004 or after August 30, 2004 would have made any difference given the nature of the Claimant's illness as outlined by his psychotherapist in a number of clear and lucid memos written to OMS. Although OMS has the technical right to schedule an appointment when it wants, there is no reasonable basis, in the record of this case, at least, for why the appointment had to be made when it was. Nevertheless, the Claimant had the obligation, under the labor Agreement, to keep the medical appointment as scheduled.

The Carrier argues that the Claimant could have made his appointment, and still have remained on vacation, which it had no objection to the Claimant taking with his family given the circumstances of his illness, which appears to mean that he would have lost about a half day of his originally scheduled, vacation time.

Both the OMS' staff and the Claimant acted less than wise with respect to the narrow issue before the Board in this case. The Board also understands that the superintendent did what she thought she had to do in order to safeguard the principles at stake in Article XIII, which this Board has clearly supported by its rulings in the past, once the OMS's staff concluded, for reasons that only it understands best, that it needed to schedule an appointment for the Claimant exactly when it did and not a few days later.

The full record in this case can only be understood in its highly unorthodox

context from which surfaces a number of extenuating circumstances that the rule of reasonableness instructs a Board such as this that it must consider in framing its ruling.

Irrespective of the issue of merits, the Board also frames it ruling here in view of additional extenuating circumstances which include the long tenure of this Claimant with this employer, as well as his prior clean record. A long line of arbitral precedent has used the latter two variables over the years when considering the reasonableness of the quantum of discipline, in given cases, in this industry.[5] This Board can find no reason to diverge from such practice in this case. Further, there is no evidence of premeditation in this case, albeit the Claimant did violate Article XIII (C.) by not appearing for his medical appointment. The more appropriate route would have been for the Claimant to have obeyed the order to go to the medical appointment and then to have filed a grievance if he thought that his contractual rights had been violated in some manner.

In view of the full record in this case, as it exists, the Board rules that the suspension assessed the Claimant by the Carrier shall be reduced to a thirty (30) day suspension. The Claimant's personnel file shall be amended to reflect this ruling by the Board. The Claimant shall be made whole by the Carrier for all other days improperly held out of service. The Claimant's seniority shall be unimpaired and he shall be paid for any vacation days he had coming which he was required to forfeit.

This case is idiosyncratic. The ruling by the Board in this case and the Award

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[5]See NRAB Second Division 5790, 6632; Third Division 21043, 23508 inter. alia.

rendered here shall not be used as precedent on this property.

Award

The claim is sustained in accordance with the Findings. Implementation of this Award shall be within thirty (30) days of its date. The Board holds jurisdiction over this Award until it is implemented.

Edward L. Suntrup, Neutral Member

Cynthia L. Bacon, Carrier Member

C.A. Iannone, Employee Member

Date: 6-27-05

Public Law Board No. 6462

Parties to Dispute

United Transportation Union	)	
	)	
vs	)	**Case 62/Award 62**
	)	**INTERPRETATION**
Port Authority Trans-Hudson	)	
Corporation (PATH)/New York	)	

Background

The following claim was docketed before this Board for final and binding adjudication under title of Case No. 62:

> Request that the one hundred and eighty (180) day suspension assessed Claimant Thomas Esposito be rescinded, that he be made whole and paid for all time held out of service, and that the suspension be removed from his record.

This Board issued an Award on June 27, 2005 wherein it ruled as follows:

> In view of the full record in this case, as it exists, the Board rules that the suspension assessed the Claimant by the Carrier shall be reduced to a thirty (30) day suspension. The Claimant's personnel file shall be amended to reflect this ruling by the Board. The Claimant shall be made whole by the Carrier for all other days improperly held out of service. The Claimant's seniority shall be unimpaired and he shall be paid for any vacation days he had coming which he was required to forfeit.
>
> The Board held jurisdiction over this Award until it was implemented.

In their attempts to implement the Award a dispute arose between the parties over the meaning and application of the phrase: "...shall be made whole..." for the days the Claimant was held out of service in excess of thirty (30) days. Absent mutual agreement between the parties over the remedy associated with Award No. 62 of PLB No. 6462 the

parties returned to the neutral member of the Board for guidance. An executive session on this issue was held and the parties requested that the neutral member of the Board provide to them an interpretation of the make-whole ruling in this case.

Findings & Interpretation

The record shows that the Carrier requested information from the Claimant and the union pertinent to the Claimant's outside earnings for the dates applicable to the one hundred and fifty (150) days in question. The Claimant provided the Carrier with his W-2 forms for 2004 and no information for 2005. The union, in turn, also provided information to the Carrier on benefits received by Claimant Esposito from the union's Discipline Income Protection Program.

After review of the parties' Briefs on this matter, and after an executive session held with the principals of this Board, the findings and interpretation on remedy on this case is as follows.

First of all, receipt of benefits by the Claimant result of dues he paid for an insurance policy do not represent outside earnings in any accepted sense of the term. The benefits received by the Claimant were the result of a private arrangement he had with the union which protection was paid for by him personally with no cost or liability to the Carrier. Such protective arrangements are extremely idiosyncratic. They are not mandated by law. Nor are they mandated by any other mutually agreed upon provisions between the union and the employer, parties to this case, to which this Board has been apprised.

Benefits from such a plan, if and when they exist, ought have no bearing, as an off-set, to any make-whole order. This conclusion is not one of first impression. Public Law Board 3797, Award 46 came to the same conclusion, in an interpretation on remedy, in a case involving the UTU and the former Southern Pacific railroad. Addressing the UTU's Job Protection Benefit Plan, and its role in a back-to-work order with back pay, that Board ruled as follows which the instant findings and interpretation here cite with favor:

> "Such benefits (from the Job Protection Benefit Plan) derive from a private arrangement entered into between the Claimant and his labor organization in which the Carrier had no involvement whatsoever. The Carrier makes no contribution toward payment of the premiums and neither the Plan nor the negotiated agreement between the Carrier and the Organization provides for recovery by the Carrier in the event a covered participant in the Plan receives benefits thereunder".[1]

This Board does not view benefits from a private insurance plan as integral to an argument dealing with windfall.

Secondly, however, this Board finds and will rule that other sources of outside earnings by a Claimant ought be considered as off-sets to a make-whole remedy. Although there is mixed arbitral thinking on this issue, the majority of the precedent, and certainly the more recent precedent, supports such conclusion.[2] The position taken here

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[1]PLB 3797, Award No. 46 @ p. 4.

[2]The issue centers on arbitral authority to fashion a make-whole remedy in the absence of language of contract addressing the details. Awards concluding that off-sets are inappropriate almost all originate from the NRAB First Division (See Awards 14696, 16911, 19553 & 21088 inter alia. and the interpretation attached to 21088) as well as from various Awards issued off Public Law Board 3304. These were issued mostly prior to 1970 and most of the Awards were associated with two arbitrators by the name of Preston Moore and Raymond Cluster. More recently there have been an avalanche of Awards reversing that earlier reasoning. These Awards stem not only from the First Division of the NRAB (25971 and its interpretation), but also from the Second (1628 and its interpretation) and the Third Division (32485 and its interpretation)

by this Board is also consistent with judicial thinking on this matter. In Soules v. ISD the Minnesota Supreme Court ruled, for example, that the "...reduction (of outside earnings in a make-whole Award) is consistent with the objective underlying the rule of damages for breach of contract which seeks to restore the party harmed by the breach to as good but no better position that he would have been in had the contract been fully performed...".[3]

The Carrier requested information on the Claimant's earnings during the period: September 26, 2004 to February 22, 2005. The Claimant provided his W-2 form from PATH for 2004. He provided no information for 2005. There may be no more information to provide. Whether such is so or not can be determined and documented by the Claimant's federal tax returns for 2004 and 2005.

The finding and ruling is that the Claimant shall provide to the Carrier and to his union representative copies of his 2004 and 2005 federal tax returns so that calculations dealing with any off-sets can be made. In the event that he has not yet filed his 2005 tax returns, which is a possibility in the event that extensions for filing have been applied for, the Claimant shall provide to the Carrier and to his union representative all documentation on outside earnings in 2005 up through the date of February 22, 2005. This is the same documentation that the Claimant will have to use to file his 2005 federal

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as well as from various Public Law Boards such as PLB 2576 (Award 4) and PLB 4901 (Awards 127, 207 and 240).

[3]Soules v. ISD No. 518, 258 N.W. 2d 103 (1977).

taxes if they have not yet been filed.[4]

The Claimant shall provide the information cited above, to the Carrier and to his union representative, within thirty (30) days of the date of these findings and interpretation. Thereafter a representative of the UTU, and of the Carrier, shall meet in conference in order to mutually determine the amount of compensation due to the Claimant for the one hundred and fifty (150) days he was held out of service. The compensation to be paid to the Claimant for these one hundred and fifty (150) days shall be what his earnings for PATH would have been during the time period in question, minus any outside earnings, excluding benefits he received from UTU's Job Protection Benefit Plan. The compensation determined by the parties shall be made to the Claimant within sixty (60) days of the date of these findings and interpretation.

Should the Claimant fail to provide to the Carrier, and to his union, the information outlined in these findings and interpretation, within the time-frame stated herein, the ruling by the Board is that it will honor the request by the Carrier, in its Brief on remedy, that the "...matter (be) closed and no further remuneration (will be) owed to the Claimant...".

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[4]Under the Internal Revenue Code the Claimant legally has until October 15, 2006 to file his 2005 federal taxes if extensions have been properly requested.

Award

The Award is in accordance with the findings & interpretation. The neutral member of the Board retains jurisdiction over this Award until it is implemented.

Edward L. Suntrup, Neutral Member
Public Law Board 6462

Date: July 31, 2006