

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYEES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated August 15, 2008, Jimmy Parrott, Engineer Track, instructed C. O.

Kearney ("the Claimant") to attend a formal hearing on August 26, 2008, in the Nashville Division Headquarter Building in Nashville, Tennessee, "to determine the facts and place your responsibility, if any, in connection with your unexcused absence from work beginning on July 28, 2008, and continuing up to and including August 14, 2008, as the Vehicle Operator on SLWT gang 5N33."

The letter stated that the Claimant was "charged with being absent without proper authority, abandoning your position, and failure to protect your assignment in possible violation of CSX Operating Rules GR-1 on the following dates.

"July 28 – Absent Without Permission
July 29 – Late Docked - 30 minutes late reporting for work
Aug 01 – Left work early
Aug 04 – Absent Without Permission
Aug 11 – Absent Without Permission
Aug 12 – Absent Without Permission
Aug 13 – Absent Without Permission
Aug 13 (sic) - Absent Without Permission"

On August 25, 2008, the Organization requested a postponement of the hearing scheduled for the next day. The Carrier agreed to the postponement, and by letter dated August 25, 2008, notified the Claimant that the new hearing date was September 11, 2008, at the same location as stated in the original letter. In addition, on August 25, 2008, a second charge letter was sent to the Claimant by Mr. Parrott instructing him to attend a formal investigation on September 11, 2008, "to determine the facts and place your responsibility, if any, in connection with your unexcused absence from work beginning on August 14, 2008, and continuing, as the Vehicle Operator on SLWT gang 5N33." The letter charged the Claimant with the same violations as stated in the first charge letter but listed the following additional dates of absence:

- Aug 14 – Absent Without Permission
- Aug 18 – Absent Without Permission
- Aug 19 – Absent Without Permission
- Aug 20 – Absent Without Permission
- Aug 21 – Absent Without Permission
- Aug 25 – Absent Without Permission
- And Continuing

The time and place of the formal Investigation pursuant to the second letter were the same as for the first charge letter.

On September 4, 2008, the Vice Chairman of the Organization wrote to Mr. Parrott, stating, "At this time we are requesting that this investigation be postponed due to Mr. Kearney contacting the Employee Assistance Program, and is now under their care at one of their facilities. Mr. Kearney has informed me," the letter continued, "that he will

be in their care at least four (4) weeks.” In response the Carrier postponed the hearing one week to September 18, 2008, and so notified the Claimant.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

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

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant began his employment with the Carrier in October, 2005. Prior to July 28, 2008, the Claimant had been on medical leave for approximately four months from a Track Inspector position. He called Roadmaster W. O. Price the week of July 21, 2008, and said that he would be placing himself on gang 5N33 on Monday, July 28, 2008, to fill a Vehicle Operator vacancy. Roadmaster Price checked to make sure that the Claimant had a proper medical release and then gave approval to the Claimant to come onto the gang on July 28th. He told the Claimant which motel the gang was staying at and that they started to work at 0630 hours.

The Claimant did not report for work on July 28th and did not call to say that he would not be at work. According to Carrier testimony, the Claimant reported for work 30

minutes late on July 29th. The Claimant denied being late that day, but the Carrier produced payroll records showing that he was docked 30 minutes on July 29, 2008. The Claimant testified that nobody spoke to him about being late on July 29th. The Claimant worked as scheduled on Wednesday and Thursday, July 30 and 31, 2008.

The Claimant's gang worked a four-day week, Monday through Thursday. He volunteered, however, to work overtime on Friday, August 1, 2008, but left early that day after working approximately five hours. He told the foreman that he needed to catch a train southbound to get home to Chattanooga. The foreman radioed a train to stop so that the Claimant could board it to travel to Chattanooga. The Claimant had not received any permission from the Roadmaster or the Assistant Roadmaster to leave early.

The Claimant was absent from work on Monday, August 4, 2008. He testified that he returned to the motel the night before but was sick that date. He did not call the Roadmaster or the Assistant Roadmaster to inform supervision that he would not be at work that day. He testified that he called his foreman and informed him that he was ill. The Claimant worked as scheduled on Tuesday, Wednesday, and Thursday, August 5, 6, and 7, 2008.

The Claimant was absent from work on Monday, August 11, 2008. Prior to the absence he told Assistant Roadmaster Adamson that he had to be in court, and the Assistant Roadmaster told him that when he returned to work to bring documentation that he had been in court. The Claimant understood this to mean that he had permission to be

off. The Claimant did not provide the Assistant Roadmaster with the documentation but testified that he has not seen the Assistant Roadmaster since then. He stated that he has such documentation but did not bring it to the hearing.

The Claimant was also absent from work on Tuesday, Wednesday, and Thursday, August 12, 13, and 14. Regarding Tuesday, August 12, the Assistant Roadmaster testified that he had no conversation with the Claimant. On Sunday, August 10th, however, the Assistant Roadmaster stated, the Claimant called him and said that his best friend had been shot, that the funeral would probably be on Wednesday, August 13th, and that he needed to attend. On August 12th, the Claimant testified, he was in the hospital with his friend. The funeral did not take place on August 13th as expected, the Claimant testified, but on the following Friday. The Claimant acknowledged that he did not have permission to be absent on August 12 or 13, 2008.

The Assistant Roadmaster testified that about 8:00 o'clock in the morning on Thursday, August 14th, the Claimant's girlfriend called him and said that she could not wake him up. He told her that as soon as he (the Claimant) woke up to give him a call. The Assistant Roadmaster was not called back. The Claimant testified that he had no excuse for his absence on August 14, 2008.

The Assistant Roadmaster testified that about 7:30 on the morning of Monday, August 18, 2008, the Claimant called him and said that he had to go to court to pay a fine related to his court visit the previous week. According to the Assistant Roadmaster, the

Claimant said that he would be in to work that afternoon as soon as he could get a ride. The Claimant did not report for work at any time on August 18 or August 19. He did not call in to say that he would not be at work on the 19th. The Claimant was also absent from work on Wednesday and Thursday, August 20 and 21, and Monday, August 25, 2008, without calling in or having permission to be off. The Claimant testified that he had no excuse for being absent from work on August 18, 19, 20, 21, or 25, 2008.

The Claimant testified that on August 26, 2008, he “made contact with my EAP. And he took me out of service.” Since August 26th, the Claimant stated, he has been participating in the EAP program. He is familiar with General Regulation GR-1, the Claimant stated, and was familiar with it in July and August. The regulation provides as follows:

GR-1 Employees must report for duty at the designated time and place. Without permission from their immediate supervisor employees must not:

1. Absent themselves from duty, or
2. Arrange for a substitute to perform their duties.

Employees subject to call for duty must be at their usual calling place or furnish information as to where they are located. When they wish to be absent or if they are unable to perform their service, employees must notify the proper authority. They must not wait until a call for duty is received to request permission to be marked off.

* * *

The Claimant acknowledged that he violated Rule GR-1.

The Claimant testified that at those times when he told the Assistant Roadmaster

that he was going to be off, the Assistant Roadmaster did not tell him that he could not be off. Neither Engineer Track Parrott, Roadmaster Price, or Assistant Roadmaster Price ever told him what their policy was about missing work, the Claimant stated. Nor, he testified, did any of them tell him that he could not be off work.

In a closing statement at the hearing the Claimant stated that he would like to apologize for missing the days he missed without calling. He said, "My life has really just been a little out of place, and I'm just now trying to get everything back in order." He expressed the hope to get the opportunity to show the railroad what kind of employee he can be. For two years, he asserted, he was what he considered a good employee. He showed up on time, he stated, and was never late. "I'd like to get that opportunity again," he stated. "And I just apologize to everybody that I let down, especially my co-workers – leaving them shy of an employee."

Following the hearing, by letter dated October 8, 2008, Tod Echler, Division Engineer, notified the Claimant of his decision, based on a review of the transcript and the exhibits, to dismiss the Claimant from service. The Division Engineer explained his decision as follows:

A review of the transcript and exhibits of this investigation (copies attached) do support the charges brought against you in the initial letter of charge dated August 15, 2008 and the subsequent Letter of Charges dated August 25, 2008. In as much as you have previously been assessed a Timeout that you accepted by Waiver agreement referencing an incident on January 29, and additionally, you were assessed a 30 day actual suspension that you accepted by waiver agreement on July 08, 2008 referencing an incident that occurred on February 14, 2008, it is my decision that you be immediately dismissed from the

service of CSX Transportation and forfeiture of all rights and seniority.

It is the position of the Carrier that the Claimant was provided a fair and impartial investigation, that it produced substantial evidence of his guilt, and that the discipline assessed was fully justified. The Claimant, the Carrier asserts, admitted that he was absent without permission or excuse beginning August 14, 2005, and continuing through August 25, 2008. He further admitted, the Carrier notes, that he did not contact his supervisor regarding his absences.

In addition, the Carrier argues, the evidence establishes that he failed to report for work on July 28, 2008, although he stated he would report that day; that he was late on July 29, 2008; that he left work early on August 1, 2008, without a supervisor's approval; that he advised his foreman on August 4, 2008, that he was sick but did not inform his supervisor; that he failed to provide documentation for his August 11, 2008, absence to attend court although requested to provide it; and that he took off work on August 12, and 13, 2008, although, as he admitted, the Roadmaster did not give him permission to be off. The Claimant's conduct, the Carrier asserts, violated General Regulation GR-1 and management's right to expect its employees to perform the work for which they were hired. The discipline assessed was fully justified, the Carrier contends, in light of the seriousness of the offense and the Claimant's disciplinary record.

The record amply establishes the Claimant's guilt of the charges against him, and, indeed, he admits that he violated General Regulation GR-1. Between July 28, 2008, and

August 18, 2008, his attendance was sporadic, and on several days he absented himself from duty without the permission of his immediate supervisor. What was especially egregious in the Claimant's conduct, however, were his absences from August 19, through August 25, 2008 – four consecutive days of work – without permission or even calling in to report that he would be absent. This not only violated GR-1 but also amounted to job abandonment and failure by the Claimant to protect his assignment, as alleged in the charge letter.

Conduct similar to that of the Claimant's has been held to constitute ground for dismissal. See Third Division Award No. 37059. The Board believes that in view of the seriousness of the Claimant's offense and his past disciplinary record, dismissal was within the range of reasonable penalties available to the Carrier to impose as discipline in this case consistent with the progression for serious offenses set forth in the Carrier's Individual Development & Personal Accountability Policy. See page 7 of the document.

The Board has taken into account the fact that on August 26, 2008, the Claimant sought help from the Carrier's Employee Assistance Program. There are Third Division awards where the Board has taken into consideration a claimant's rehabilitation through a carrier's employee assistance plan in reversing a dismissal. See Third Division Awards Nos. 29776 and 29145. In the present case, however, except for the fact that the Claimant was participating in the Carrier's EAP, the record is entirely silent regarding pertinent facts surrounding his participation and progress, if any, in the program or the

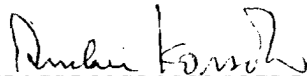
Employee Assistance Program.

A W A R D

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that
an award favorable to the Claimant not be made.

A handwritten signature in dark ink, appearing to read "Sinclair Kossoff", is written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
May 4, 2009