Award No. 47
Case No. 47

PUBLIC LAW BOARD NO. 7120

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

STATEMENT OF CHARGE:

By letter dated September 7, 2007, T. C. Whitley, Manager SPT Teams, notified B. L. Faulknier ("the Claimant") to attend a formal Investigation on September 24, 2007, in Wilmington, Delaware, to determine the facts and place his responsibility, if any, "in connection with your failure to protect your assignment as Backhoe Operator on System Production Team CXC8 on Sunday August 26, 2007, as I instructed." The letter stated that the Claimant was "charged with failure to follow instructions, insubordination, being absent from work without proper authority, and failure to protect your assignment." His actions, the letter continued, "appear to be in violation of, but not necessarily limited to, CSXT Operating Rules General Rule A; General Regulation GR-1, and GR-2, as well as Rule 26 of your working Agreement." At the Union's request the hearing was postponed and rescheduled to December 5, 2007, in Somerset, Pennsylvania.

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 on June 19, 2000. At the time of this dispute he held the job of Backhoe Operator, position 6XC8-67D, with a floating headquarters, . The Claimant's team had been working a Sunday schedule since July 2, 2007. For the week beginning Sunday, August 26, 2007, the team was informed that it would be working a Monday through Thursday schedule, but on Wednesday, August 22, 2007,[1] the Director of Rail Services for the Carrier determined that it would be necessary for the team to work on Sunday, August 26.

At the job briefing held on Wednesday, August 22, David Maxwell, foreman of the group, informed the team that the schedule had been changed and that they would be working from Sunday through Wednesday. This upset a number of employees, including the Claimant, who said that if the Carrier was going to work Sunday through Wednesday they weren't going to show up. Foreman Maxwell testified that he had individual conversations with several of the employees who complained about the Sunday work and that his response to all of them was "we can only let so many off for one given day."

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[1] Where a date is given hereinafter without a year, the year is 2007.

Foreman Maxwell testified that several employees asked permission to be off on Sunday, August 26th, including the Claimant, but that "we had too many men off to allow him to be absent that particular day." Asked by the hearing officer whether he told the Claimant that he could be off that Sunday, Mr. Maxwell testified, "No I did not let him know that he could have it off, I was pretty explanatory I thought about the fact that we had too many guys off for that particular one day." According to Foreman Maxwell, the Carrier could not allow more than two employees to be off with permission on the same day, and two members were on vacation and the team was working shorthanded besides.

Samuel Lee Jordan, a coworker of the Claimant's, testified that when the employees were notified on Wednesday morning of the schedule change, the Claimant informed Bill Sickles, who was filling in for Manager Whitley, who was on vacation, that he would not be able to work that particular day. "Mr. Sickles," Mr. Jordan stated, "then informed Mr. Faulknier, and I believe everybody as a whole, that he was just a fill-in supervisor" and that they should "take it up with your foreman or your supervisor."

Mr. Jordan testified that he, Claimant Faulknier, and an employee named Mr. Lease were behind the fuel truck as they were filling the equipment coming out of the hole, and the Claimant informed Foreman Maxwell that he was not going to be able to work on Sunday, August 26th because he had prior obligations. Asked by the hearing officer whether Foreman Maxwell granted the Claimant permission to be off that Sunday, Mr. Jordan answered, "I do not recall." Mr. Jordan was also asked by the hearing officer

if he knew if Claimant Faulknier had permission to be off on August 26th, and testified, "As far as hearing them say yes or no, no sir I do not." He clarified, in response to questioning by the Organization representative, that even though he did not hear Foreman Maxwell tell the Claimant that he could be off, Foreman Maxwell did not specifically tell the Claimant that he could not be off.

Mr. Jordan testified that on December 3, 2007, two days before the formal hearing in this case, he signed the following statement that was prepared by Claimant Faulknier:

> RE: Following Mr. Sickles' instructions to "take it up with the foreman."
>
> Wednesday August 22, 2007
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> After being instructed by Mr. Sickles (acting supervisor) to "take it up with the foreman" about working Sunday August 26, 2007; I notified Foreman Dave Maxwell I could not work Sunday August 26, 2007. This conversation took place between me, Sam Jordan, Aaron Lease and Foreman Maxwell. No one there was informed that they could not have that Sunday off. (Note: Again Mr. Whitley was not present.)
>
> Signed by the following CSX employees:

Claimant Faulknier, Samuel L. Jordan, and Aaron R. Lease all put their names to the statement.

The hearing officer questioned Mr. Jordan about what Foreman Maxwell said to Claimant Faulknier. Mr. Jordan stated that Mr. Maxwell "never denied any of us time off and after the fact, after this incident on August 26th the day in question, of being missed[,] we were told that the C8 could have no more than 2 people off at one time." Mr. Jordan

emphasized that Mr. Maxwell did not mention that only two people could be excused until after Sunday, August 26th. "I had no knowledge of that prior to Sunday, August 26th," Mr. Jordan testified.

The Organization representative[2] of the Claimant then asked Mr. Jordan, "So it was your knowledge Mr. Jordan that whoever wanted to take off could take off at their convenience?" Mr. Jordan answered:

> I am not going to say that but in 6 plus year[s] there's never been a question that I can recall about time being off, no sir. Under the different supervisors, road masters, assistant road masters, whoever was the acting official of the company, no sir, no personally and none that I can recall ever being in question.

Mr. Jordan testified that he did not work on Sunday, August 26, 2007. He stated that on Wednesday he asked Mr. Sickles, the timekeeper, and Foreman Maxwell to be off the following Sunday, August 26th. "Did any of those folks grant permission to be off?" the hearing officer asked. Mr. Jordan answered, "No sir they never denied my permission to be off and I contacted Supervisor Whitley on Saturday, August 25th and he did not deny my request to be off of work."

Claimant Faulknier testified that on Wednesday, August 22, 2007, he notified both acting supervisor Bill Sickles and Foreman David Maxwell that he would be off on Sunday August 26, 2007. Neither of them, the Claimant stated, told him that he could not

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[2]According to the transcript at page 42 the question was put to Mr. Jordan by the Organization representative, but from the fact that the preceding question and the following question of the witness were both by the hearing officer, it would seem that the transcript is in error and the question was actually put to Mr. Jordan by the hearing officer.

be off on that Sunday. There are at least four other employees on the gang, the Claimant testified, who are familiar with operating the backhoe.

The Claimant testified that as of Tuesday, August 21st, the gang had been told that they would work a Monday and Thursday schedule the following week. He told his wife on Tuesday afternoon after getting off of work that he would not have to work the next Sunday. He was looking forward, he testified, to spending the day and going to church with his family on that Sunday.

By letter dated December 21, 2007, L. E. Houser, Assistant Chief Engineer System Production Teams, notified the Claimant that a review of the transcript of the hearing confirmed his "failure to protect your assignment on the date at issue. Consequently," the letter continued, "you failed to comply with CSX operating rules, policies and Supervisor instructions as indicated in the initial letter of charge." Because of the violations found and the Claimant's prior record, the Assistant Chief Engineer stated, the Claimant was being "assessed a ten (10) calendar day suspension that will be served as five (5) days actual suspension starting November 13, 2007 and continuing, up to and including November 17, 2007, with the additional five (5) days suspension to be held overhead for a period of one year from the date of this letter."

By letter dated January 20, 2008, the Vice Chairman of the Allied Federation of the Organization appealed the discipline assessed by the Assistant Chief Engineer Production Teams to the Senior Director Employee Relations of the Carrier. The Vice

Chairman contended that the evidence presented at the Investigation showed that the Claimant did properly notify proper supervision that he could not protect his assignment on August 26, 2007, and acted in accordance with Rule 26(a) of the collective bargaining agreement, CSXT General Rules GR-1 and GR-2, and the SPT Attendance Policy.

The appeal letter also argued that contrary to the assertions in the charge letter and the letter of discipline, the Claimant did not have a "prior record" concerning attendance. The Claimant's attendance record, the appeal asserted, had been corrected to show that an "absent without permission" placed on the record by a previous supervisor at another location was, in fact, "absent with permission" or "sick no pay." The Investigation, the appeal contended, established that the charges against the Claimant were without merit and that he was entitled to be exonerated and reimbursed for all lost wages and benefits.

The appeal was discussed in conference on July 1-2, 2008. By letter dated July 25, 2008, the Carrier's Director, Labor Relations denied the appeal. The denial letter stated that the transcript of the Investigation showed that Claimant's due process rights provided in the applicable rules of the Agreement were fully protected and that the hearing was conducted in a fair and impartial manner. The evidence presented at the Investigation, the Director asserted, established that the Claimant absented himself improperly on August 26, 2007, without permission from his supervisor.

The Director, Labor Relations stated that the Claimant's statement during the job briefing that he was not going to work any more Sundays did not constitute a request to

be absent on a particular Sunday. The Director acknowledged that Team Foreman Maxwell testified that the Claimant asked him if he could be off on Sunday, August 26th, but cited the testimony of Mr. Maxwell that he told the Claimant that he (Foreman Maxwell) "had too many guys off for that particular one day."

Regarding the reference in the appeal to the Claimant's prior attendance record, the Director, Labor Relations asserted in the denial letter that the Claimant's record was not clean, that the Claimant's PS-10 showed that he had previous issues with attendance and protecting his assignment.

Although this case was originally processed as an appeal pursuant to Rule 25 of the collective bargaining agreement, the parties subsequently agreed, as confirmed in a letter dated July 28, 2009, to move the case to this Board for determination. In its submission before this Board the Carrier reiterated its arguments made in its denial of the appeal. In addition, the Carrier asserts that the hearing officer chose to credit the testimony of other witnesses than the Claimant and that "the hearing officer's credibility determination satisfies the Carrier's burden of proof." The discipline assessed was fully justified, the Carrier contends, because by failing to follow the instructions of his supervisor and absenting himself from service on Sunday, August 26th, without proper permission the Claimant committed a serious offense for which the discipline given cannot be deemed excessive or unwarranted. Citing Award No. 8 of Public Law Board No. 7104, the Carrier argues that many awards on the Carrier's property have upheld a

higher degree of discipline in similar situations.

In its closing statement at the Investigation the Organization takes issue with the statement in the charge letter by Manager Whitley that the Claimant failed to protect his assignment on Sunday, August 26, 2007, "as I instructed." It notes that Mr. Whitley was on vacation prior to that Sunday. In addition, the Organization contends, the testimony it presented at the Investigation "greatly refutes the testimony given by the CSX management witnesses." For these reasons, the Organization argues, the Claimant should be exonerated of the charges placed against him.

It is clear from the record that the Claimant was not specifically given permission to be off work on Sunday, August 26, 2007. Neither the Claimant himself or any witness in his behalf testified that Foreman Maxwell or any Carrier supervisor or other official told him that he could take off work that Sunday. Moreover, the SPT Attendance Policy expressly states in pertinent part, ". . . you are expected to be at work every day unless you are sick, disabled, on vacation, observing a holiday, bonus day, rest day, or personal leave day." From the Claimant's own testimony it is clear that he did not come within any of these exceptions permitting an employee to be off work.

On the other hand, the Carrier has failed to present substantial evidence that Foreman Maxwell denied the Claimant's request to be off work on Sunday, August 26th. It is clear from the record that employees have been allowed to take off work with permission even where none of the exceptions in the SPT Attendance Policy applies. In

addition, employee Samuel Lee Jordan expressly testified that it was not until "after the fact," namely, "after this incident on August 26th the day in question," that Mr. Maxwell first told the employees that no more than two employees could be off at a time (Tr. 42).

Mr. Maxwell did not deny that it was not until after Sunday, August 26th, that he first told employees that only two employees could be off at a time. In his testimony Mr. Maxwell used qualifying language that would prevent an impartial observer from characterizing his testimony as being straightforward and free from evasiveness. Thus when the hearing officer asked him, "Did Mr. Faulknier come up and ask you to be off on Sunday, August 26, 2007?", Mr. Maxwell answered, "Yes sir I believe that he did, if I can recall correctly, he did ask me if he could be off that Sunday. I did state that we had too many guys off on that particular day." (Tr. 17).

The words, "if I can recall correctly," raise a question about the accuracy of Mr. Maxwell's account. For all we know, he did not recall the events of Wednesday, August 22nd correctly. Further, Foreman Maxwell testified that in the job briefing he had individual conversations with several of the employees who said that they would not be at work on Sunday and that his response to all of them "was we can only let so many off for one given day." (Tr. 18).

Foreman Maxwell did not mention any other site of a conversation with the Claimant than in the job briefing. He made no specific reference to the conversation testified to by Mr. Jordan that took place behind the fuel truck where, besides the

Claimant, employees Jordan and Lease were also present. He was not recalled by the hearing officer to give testimony about that conversation after Mr. Jordan testified about it and identified a written statement he, the Claimant, and Mr. Lease signed regarding the conversation that was introduced into evidence as an exhibit.

Thus Mr. Jordan's testimony, corroborated by the written signed statement, remains undenied in the record that in that conversation Claimant Faulknier informed Foreman Maxwell that he was not going to be able to attend work because of prior obligations, and that Foreman Maxwell did not specifically tell the Claimant that he could not be off (Tr. 36, 42). The testimony is credible on its face, and in the absence of a denial by Mr. Maxwell, the Board accepts it as true.

The evidentiary issue here is not whether the Board should accept the credibility determination of the hearing officer with regard to Foreman Maxwell's testimony vis-à-vis that of the other witnesses, as argued by the Carrier. The evidentiary issue is whether there is substantial evidence that Foreman Maxwell denied the Claimant's request to take off work on Sunday, August 26th. For the reasons explained above, the Board finds that there is not substantial evidence in the record that Foreman Maxwell told the Claimant that he could not take off work on Sunday, August 26th. On the contrary a preponderance of the evidence indicates that prior to the Sunday in question the Claimant was neither given permission or denied permission to take off work that Sunday.

According to the Carrier's rules and regulations, however, an employee must have

permission to take off work. Thus General Regulation GR-1 states. ". . . Without permission from their immediate supervisor employees must not: 1. Absent themselves from duty . . . ." The SPT Attendance Policy states, ". . . Again, if an employee is absent without permission, it will be addressed under the Individual Development and Personal Accountability Policy, and under the terms of the collective bargaining agreement."

The Board finds it significant that in the present case, the Claimant's coworker, Mr. Jordan, who basically had the same conversations with Foreman Maxwell as the Claimant, did not conclude from the fact that Mr. Maxwell had not specifically denied his request to be off on Sunday, August 26th, that this was tantamount to permission to take off. Instead as late as Saturday, August 25, when he put in a telephone call to Manager Whitley, he was still attempting to find out if he had permission to be off Sunday. This shows that he did not believe that Foreman Maxwell's failure to say that he could not take off was tantamount to providing permission to take off. The same was true in regard to the Claimant. The absence of a clear denial was not the equivalent of an affirmative grant of permission to be absent from work where the Claimant did not fall within any of the exceptions listed in the SPT Attendance Policy from the requirement to be at work every day, namely, sickness, disability, vacation, holiday, bonus day, rest day, or personal leave day.

Nevertheless Foreman Maxwell's failure to make clear to the Claimant that he did not have permission to be absent is a strong mitigating element in this case. When an

employee asks permission to be absent, he is entitled to an unequivocal answer. He should not be put in a situation where he has to guess if he is permitted to take off. Not every employee has the self-discipline and persistence of Mr. Jordan to keep on seeking a definite answer.

Even in Mr. Jordan's case, however, according to his unchallenged testimony, he finally decided to take the day off when as late as Saturday night before the scheduled Sunday workday he was unable to get a definite answer to his inquiry of whether he had permission to take off work on Sunday. Because of the strong element of mitigation present in this case, the Board has decided to reduce the Claimant's discipline by removing the overhead portion of the suspension. The five-day actual suspension will remain, however, because the fact is that the Claimant did not receive permission to be off work on August 26, 2007. Without such permission, an employee who does not fall within the exceptions to the requirement of being at work every day listed in the SPT Attendance Policy must come to work.

AWARD

Claim sustained in accordance with the findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the date the signed Award is transmitted to the parties.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
October 15, 2009