

SPECIAL BOARD OF ADJUSTMENT NO. 6199

In the Matter of the Arbitration Between:
CSX TRANSPORTATION, INC.

and

NMB Case No. 45
Claim of J. W. Cantrell
Dismissal; Violation of
Rule 501

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF THE CLAIM: T. W. Cantrell, Engineer on the Nashville Zone, claim due to discipline of dismissal from service for violating Rule 501. Request is for the discipline to be canceled, Claimant reinstated and the discipline removed from Claimant's personal file and that Claimant be paid for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant(s) employees within the meaning of the Railway Labor Act, as amended; that the Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing, which was held on April 16, 2001, at Jacksonville, Florida. Claimant was not present in the hearing. The Board makes the following additional findings:

Claimant, an employee with three years of service, was promoted to the position of Locomotive Engineer in March, 2000, and was stationed in Nashville, Tennessee. On June 25, 2000, he claimed a second shift job starting at 8:00 a.m. Claimant testified that at approximately 12:20 p.m. he marked off sick because he was suffering from a headache. He went home to rest. Claimant testified that he started feeling better and marked back up at 10:26 p.m. At approximately 10:30, Claimant testified, C. A. Morgan, a fellow Engineer and Claimant's then-housemate arrived home. Claimant testified that he and Mr. Morgan decided to go partying that night and both returned to Claimant's home at approximately 3:00-4:00 a.m. on June 26, 2000. They went to bed, woke up at approximately 1:00 p.m. and went about their separate business.

On August 8, 2000, the Carrier issued Mr. Morgan a letter informing him that he was charged with misuse of his Corporate Lodging Card in violation of Rule 501. The charge stemmed from Mr. Morgan's use of his Corporate Lodging Card while staying at the

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Best Western Traveler's Inn in Brentwood, Tennessee on June 25, 2000, and in other lodgings facilities on separate dates. An investigative hearing in this matter was held on August 17, 2000. Mr. Morgan was found guilty of all charges and received the discipline of removal from the service.

During the August 17, 2000, hearing, Mr. Morgan testified he had not checked in at the Best Western on June 25, 2000; the registration card filled out in his name must have been a mistake. The Carrier presented sworn written testimony from David A. Barrows, the Best Western's front desk clerk who checked in Mr. Morgan on June 25, 2000. The Carrier also presented the testimony of a Conductor R. G. Harris, who was present at the Best Western on June 26 and saw Mr. Morgan check out some time in the afternoon. Claimant testified on behalf of Mr. Morgan. He testified he marked off sick on June 25, but late that night he felt better and went out with Mr. Morgan, who had moved into his residence sometime in late March or late June. The conducting official did not credit Claimant's alibi testimony and, as stated earlier, Mr. Morgan was removed from service.

Based on his August 17, 2000, testimony during Mr. Morgan's hearing, the Carrier issued Claimant a charge letter dated August 25, 2000. The letter informed Claimant that he was to attend a hearing to determine his responsibility for conduct unbecoming an employee when he allegedly made false statements and concealed facts under investigation during his testimony on behalf of Mr. Morgan. He was also accused of being dishonest, marking off under false pretenses and wilfully neglecting his duties because of his testimony that he marked off sick on June 25, 2000, yet late that night felt well enough to go partying all night.

On September 7, 2000, the Carrier held an investigative hearing concerning the charges against Claimant. During the hearing, the Carrier used a corrected transcript of Mr. Morgan's hearing which had not been made available to the Organization. The Organization objected to the use of the corrected transcript and requested an adjournment of the hearing so they could compare the corrected transcript with the original version made available to the Organization. The Conducting Officer denied the request, but made available to the Union a copy of the corrected transcript of

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the previous hearing. The Organization also objected to the hearsay nature of Mr. Barrows' sworn written statement, and to the testimony of Conductor R. G. Harris, claiming he was biased against both Mr. Morgan and the Claimant.

Subsequent to the hearing, on September 27, 2000, the Carrier issued a letter to Claimant finding him guilty of all charges and imposing the discipline of dismissal from all service effective immediately. The Organization appealed the Carrier's decision by letter dated November 11, 2000. On December 12, 2000, the Carrier denied the appeal.

Having failed to resolve this issue on the property, it is now properly before this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that it has met its burden of proving Claimant violated Rule 501 by engaging in conduct unbecoming an employee when he made false statements and concealed facts under investigation, was dishonest, marked off under false pretenses and wilfully neglected his duties. Claimant was afforded a fair hearing, the Carrier argues; the corrected transcript it used in the hearing did not in any material way alter the original transcript previously made available to the Organization. Additionally, the Carrier contends, lacking subpoena powers, it could not compel the presence of Mr. Borrow to testify at the hearing. The record in Mr. Morgan's hearing and in the instant proceedings prove that Claimant was lying when he testified on behalf of Mr. Morgan, and was dishonest when he signed off under false pretenses on June 25, 2000, the Carrier maintains. The seriousness of the offenses fully warrant the discipline of dismissal from the service, the Carrier argues. It urges that the claim be denied.

The Organization argues that the claim must be sustained because Claimant never lied on the stand. Moreover, the Carrier relied on an inaccurate transcript of Mr. Morgan's hearing, the Organization insists. The Carrier did not produce Mr. Barrows to testify at the hearing, the Organization urges; Claimant's guilt was established almost exclusively by hearsay evidence. The claim must be sustained, the discipline rescinded, Claimant must be reinstated in service, any mention of the discipline must be

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deleted from Claimant's personnel records, and the Carrier must make the Claimant whole for any losses in wages, benefits and seniority, the Organization urges.

DISCUSSION AND ANALYSIS: The Board is persuaded that the Carrier established that Claimant violated Rule 501 when he provided false testimony on behalf of Mr. Morgan during the August 17, 2000, hearing. The evidence provided by Mr. Barrows sworn statement, though challenged on the basis of hearsay, was clear, convincing and was not contradicted in any effective way by Claimant. The Board also credits Mr. Harris testimony. Claimant's alibi testimony is not credible when weighed against the rest of the evidence. The Board is convinced that Claimant's testimony was motivated by a sense of misguided loyalty to his friend Mr. Morgan.

As to the Organization's allegation that the Carrier relied in an inaccurate transcript of Mr. Morgan's August 17, 2000, hearing, the Board finds the argument unpersuasive. The Carrier would have been well advised to provide the Organization a copy of the corrected transcript in advance of the hearing, or short of that, grant an adjournment to provide the Organization the opportunity to compare both versions of the transcript. This would have avoided unnecessary procedural challenges. The Carrier would also have been well advised to provide the Board a copy of both versions of the transcript so it could make its own independent comparison and determine if there were any material differences between them. However, the Board has determined that there was sufficient competent evidence on the record to find Claimant guilty of providing false testimony on Mr. Morgan's behalf even in the absence of any evidence contained in the August 17, 2000, transcript.

In response to the Organization's objection to the unavailability of Mr. Barrows to testify in person and its inability to cross-examine the witness, the Board concludes that the Carrier has no subpoena powers and therefore cannot compel the presence of a witness. If Mr. Barrows refused to appear voluntarily because of conflicts in his schedule, there is little the Carrier could do to secure his presence. The only alternative was to obtain written sworn testimony from the witness. Investigative hearings are not court proceedings. They do not operate under the strictures imposed by the rules of evidence. The fact that any

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testimony may be hearsay does not make the evidence inadmissible; if anything, it may have an impact on the weight given the evidence. The Board finds that Mr. ~~Bar~~row's written declaration was credible and that it was not effectively challenged by the Organization.

The Organization also challenged the admissibility of the testimony of Conductor R. G. Harris because he stood to gain seniority points for becoming an engineer if both Mr. Morgan and Mr. Cantwell were removed from service. His testimony is therefore biased and suspect; it should not be considered in reaching a decision in this case. The Board disagrees. Any question of bias created by interest in the outcome of the case goes to a determination of the credibility of the evidence, not to its admissibility. The proper way of dealing with a concern over bias or improper motive in the testimony of a witness is to raise it on cross-examination and attempt to impeach the credibility of the witness. The Organization failed to do this during the hearing; in fact, Mr. Harris testified he had no interest in becoming a Locomotive Engineer. The Board finds that Mr. Harris testimony was credible.

The Board does find, however, that the Carrier failed to meet its burden of proof to establish that Claimant was dishonest and wilfully neglected his duties by marking off under false pretenses on June 25, 2000. The Carrier relies solely on Claimant's admission on the record that he marked off sick with a headache at 12:20 p.m. and ten hours later, at 10:26 p.m. he marked back on and shortly thereafter went out partying all night. The Carrier would have us believe that if Claimant felt well enough to go out partying at 10:30 p.m., he must not have been ill when he marked off that afternoon. To the contrary, it is plausible that Claimant was indeed suffering from a headache and after resting for a period of ten hours he felt well enough to go out. The Board finds that absent any corroborating evidence, the Carrier has not met its burden of proving this charge.

As to the nature of the discipline imposed, the Board finds that lack of honesty and concealing facts under investigation is indeed a serious offense. The Carrier has a right to rely in the honesty of its employees when carrying out its mission. However, given the facts and circumstances in this case, the Board finds the

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penalty of dismissal from the service is excessive. Claimant acknowledged the seriousness of his actions and appears truly remorseful for his mistake. Under such circumstances the Board will order that the Claimant be reinstated to service, but with no back pay for time lost. The terms of the reinstatement are set forth in the Award.

AWARD: The claim is denied in part and sustained in part.

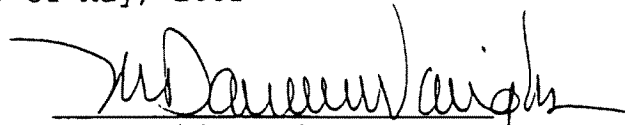
The Carrier presented sufficient evidence to find Claimant guilty of providing false testimony during the August 17, 200 disciplinary hearing involving Mr. Morgan.

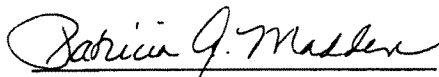
The Carrier failed to meet its burden of proving Claimant was dishonest and wilfully neglected his duties by marking off under false pretenses on June 25, 2000. The Carrier is ordered expunge all disciplinary notices related to this incident from Claimant's personal file.

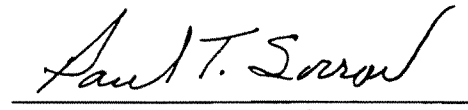
The Board further finds that the discipline of dismissal from the service was excessive. The Carrier is order to rescind Claimant's dismissal, and a suspension for time served imposed in its place.

The Carrier shall implement this Award within 30 days from the date of issuance of this Award.

Dated this 22nd day of May, 2001


M. David Vaughn,
Neutral Member


Carrier Member


Organization Member