

**BEFORE  
PUBLIC LAW BOARD NO. 7526  
CASE NO.1  
AWARD NO. 1**

**Union File: 193361  
Carrier File: 2011-089903  
NMB Subject Code: 119**

|  |   |                       |
|--|---|-----------------------|
| <b>UNITED TRANSPORTATION UNION (Yardmasters)</b> | ) |                       |
| <b>vs.</b>                                       | ) | <b>PARTIES TO THE</b> |
|  | ) | <b>DISPUTE</b>        |
| <b>CSX TRANSPORTATION, INC.</b>                  | ) |                       |

**STATEMENT OF CLAIM:**

*"Please accept this claim for regular Yardmaster J.W. Litteral, ID 208738 at Russell, KY for all time lost on account of the discipline assessed from the investigation held on February 15, 2011. Furthermore, I make claim for all days of lost earnings, all vacation entitlement and all railroad retirement credits restored. Also, an additional eight (8) hours pay for Yardmaster Litteral for February 15, 2011....this Committee request that Yardmaster Litteral's personal record be cleared of this incident."*

**FINDINGS:**

The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Organization involved in this dispute are respectively Carrier and Organization within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Public Law Board Agreement dated January 25, 2012, that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

After a thorough review of the record and the eloquent and well-presented arguments by both parties at a hearing in Jacksonville, FL on April 4, 2012, the Board concludes that on August 5, 2010, Yardmaster Litteral, an employee with some 5 years of service, was on a Yardmaster Guaranteed Extra Board at Russell, KY, with a designated rest day of Wednesday. On Thursday, August 5, 2010, a Carrier Clerk unsuccessfully attempted to contact the Claimant to fill a first shift Yardmaster vacancy at 0430, 0440, 0450, and 0500 hours. The nature of the Claimant's position requires that he be available for call on days other than his rest day. As a result of the missed calls, the Claimant was charged by letter dated August 11, 2010 with a violation of the Carrier's Operating Rule GR-1. After a series of agreed-upon postponements, an investigation was held on February 15, 2011. Following the investigation, the Carrier determined that the Claimant was guilty of the charge and dismissed him on March 8, 2011.

The Carrier's Operating Rule GR-1, states, in pertinent part:

*"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 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..."*

## **Organization's Position:**

### 1. Procedural Issues

The Organization argues that the Carrier failed to meet its due process obligations and failed to conduct a fair and impartial investigation.

They state that the Notice of Investigation was both [not] specific and too broad to allow a proper defense. They claim that the Carrier found fault with the Claimant prior to the investigation being held and that he was pre-judged. They rely on Article 21 of the Collective Bargaining Agreement, which states, in pertinent part:

*"(a) Yardmasters shall not be disciplined, disqualified subsequent to their being qualified, or dismissed without a fair and impartial hearing before a proper officer. Such Yardmaster shall be apprised in writing of the precise charge against him ... He shall have reasonable opportunity to secure the presence of necessary witnesses ..." [emphasis by the Organization]*

They note that the Charge Letter says:

*"The purpose of this investigation is to develop the facts and place your responsibility, if any, in connection with information received that on August 5, 2010, at approximately 0430 hours, you missed a call, and all circumstances relating thereto."*

They say that "...all circumstances relating thereto" does not provide a specific charge against the Claimant.

They also say that the Carrier did not call, as a witness, the clerk who made the telephone calls in question to the Claimant on August 5, 2010. While not explicit, they seem to argue that this is a lack of due process.

### 2. Burden of Proof

The Organization also states that the Carrier failed to meet its burden of proof, by not calling the Clerk as a witness. Instead of having the Clerk present to testify as to whether he or she called either the Claimant's cellular telephone or his home telephone, they say that the Carrier did not meet its onus. Instead, the Carrier simply had the call log introduced into evidence by a Company officer who was not on duty the morning in question. As further evidence, they refer to the investigation transcript at p14, lines 24-27, where the Claimant states that the cell number is correctly listed on the call sheet, but that it does not work at home due to a lack of cell service.

In oral argument, the Organization said that when the Claimant admitted, during the investigation, to missing the call, it was tantamount to saying "if the Carrier says I missed the call, I must have missed the call", rather than an admission that he had, in fact, missed the call.

### 3. Medical Issues

The Organization also states that the Claimant had medical issues the morning in question. They offer proof by way of layoff records of the Carrier which show the Claimant calling in at 12:50 pm on August 5, 2010 due to a doctor appointment. The Claimant states, in the investigation, that he had medical issues affecting his ability to work and that he was subsequently off for approximately seven months due to these issues. He states that he provided the requested medical information to the Carrier Medical Department.

### 4. Discipline Was Harsh and Excessive

The Organization quotes an extensive array of awards wherein the Public Law Boards found that the discipline meted out by the Carrier was harsh and excessive. They say that in this case, the discipline was similarly harsh and excessive.

## **Carrier's Position:**

### 1. Procedural Issues

The Carrier says that the investigation was conducted in a fair and impartial manner, as evidenced in the transcript of the proceedings. They also say that the Claimant was given proper notice of the charges, sufficient time to prepare a defense, and the opportunity to produce and examine evidence and witnesses.

They say that the issue of failure to call the Clerk as a witness fails on several grounds. Firstly, it was not an issue raised during the course of the investigation, and therefore cannot be raised thereafter. The Carrier references Referee Brian Clauss in NRAB First Division Award 26527 for the proposition that failure to object to the lack of a witness at the investigation waives the issue. Secondly, they say that the Organization was perfectly within its rights to call any witness it chose, including the Clerk, if they felt it was necessary. There is no evidence that the Organization attempted to do so. They say that the Carrier is not obligated to supply witnesses for the Organization or the Claimant. To this effect, they quote NRAB Third Division Award 23857 (Sharp).

### 2. Burden of Proof

The Carrier says that the evidence of the Clerk was not necessary to meet their burden. They had the evidence of Trainmaster Davidson (for whom the Organization had notice of change of witness and did not object), who introduced the call log combined with the admission of the Claimant that he had missed the call. They also say that the issue of home vs. cell phone is irrelevant – the issue is whether the call was missed. They say, in oral argument, that the GR-1 language "*...Employees subject to call for duty must be at their usual calling place or furnish information as to where they are located*" means that if an employee knows he has no cell service at the location he intends to be at, he must furnish

another number. In any event, the Carrier says (and the Organization agreed at the hearing) that the normal practice is to call all numbers listed on the call sheet. In any event, the Claimant's admission in the hearing that the call was missed is sufficient alone for the Carrier to have met its burden of proof for the charge in question. They reference the investigation at pp. 12-13 where the investigating officer asked "Reyes: Did you miss the call on August 5, Mr. Litteral? Litteral: Yes sir...Reyes: All right. So, referencing Carrier's Exhibits 1 and 4, did you comply with Operating Rule GR-1? Litteral: No sir."

### 3. Medical Issues

The Carrier points out that the Claimant called to book off for medical reasons at approximately 12:50 pm – some 8 hours after the missed calls. The Carrier refers to GR-1, *supra*, in stating that the Claimant had an obligation to get proper authority to absent himself from work prior to being called for duty.

### 4. Discipline Was Harsh and Excessive

The Carrier says that the discipline was warranted given their Absenteeism Policy for Yardmasters, the Attendance Discipline Progression Process (which is contained in said Policy) and the Claimant's record.

They introduced evidence that the Claimant has been disciplined 6 times for attendance issues from August 2007 to, and including, the incident in question on August 5, 2010 (within the 3 year period specified in their Absenteeism Policy). This began with calling in to advise of an illness in August of 2007 whereby he could not attend class (Informal Corrective Action assessed), to marking off on call in May 2008 (Coach and Counseling #1), to a missed call on August 27, 2009 (Coach and Counseling #2), to a missed call on April 18, 2010 (Step 1 – 2 days overhead – signed waiver), to a missed call 4 times on April 30, 2010, followed by the Clerk calling again 50 minutes later when the Claimant accepted the call, followed by him calling back 20 minutes later to book off sick (Step 2 – 3 days actual + 2 days overhead – signed waiver), to this incident.

The Carrier states that, under these circumstances, dismissal is fair and warranted.

## **Result:**

### 1. Procedural Issues

The issue of the Clerk not being called as a witness may not have been raised during the course of the investigation, but it was raised during the on-property handling. Specifically it was raised in the appeal letter by the Organization dated March 25, 2011. As stated, the Carrier references Referee Clauss in Award No. 26527 for the proposition that failure to object to the lack of a witness at the investigation waives the issue. However, a careful reading of Referee Clauss' award reveals something a bit different. In that award, he said that the failure to object to the calling of a witness during the investigation was a waiver of the issue. On the issue of failing to call a witness, he said that there was no showing that the said failure to call the conductor affected the outcome, since both the Claimant, in that case, and the conductor had given written statements and that the Claimant had even

testified that he had ran the switch. Therefore the failure to call the Conductor did not affect the outcome.

In this case this Board finds that it is not improper to raise the issue concerning the failure to call the Clerk in the submissions, as the issue was raised, by the Organization, in the on-property handling of the case.

However, that does not end the matter. The calling records produced were not challenged as to accuracy or authenticity. In fact, the calling records clearly indicate, on their face, that of the several calls to Yardmasters on the date in question, only Yardmaster Litteral shows as a missed call – not one time, but four separate times. It was common ground at the hearing that the past practice of the clerks is to call all numbers listed for a person on the call sheet. While it might have been perfectly acceptable for the Organization to call the Clerk in question, it is not fatal to the Carrier's case that it failed to do so – it had properly-introduced evidence that there was a missed call.

With respect to the allegations that the Charge Letter was either over- or under-inclusive, this Board is not persuaded. The purpose of a Charge Letter, absent specific language in the Collective Bargaining Agreement to the contrary (which is not alleged here) is to give the Claimant (and any proper representative) sufficient information to know the case to be met and to prepare a proper defense. That standard was clearly met here.

## 2. Burden of Proof

If the Board finds that Mr. Litteral has admitted missing the calls, during the formal statement process, this Board need go no further on the issue of burden of proof. As stated above, the following exchange is found at pp. 12-13: Reyes: Did you miss the call on August 5, Mr. Litteral? Litteral: Yes sir...Reyes: All right. So, referencing Carrier's Exhibits 1 and 4, did you comply with Operating Rule GR-1? Litteral: No sir." While the Organization's argument that Mr. Litteral is really saying that "if the Carrier says I missed the call, I must have" might have some appeal, and is indeed a valiant argument, on the whole, this Board finds that a more natural reading of the evidence is that Mr. Litteral did, in fact, admit he missed the calls. This Board so finds, and therefore the Carrier has met it's burden of proof. The call log evidence, introduced through the Carrier officer, further supports this conclusion.

## 3. Medical Issues

The clear evidence in this case is that the Claimant booked off-duty for medical reasons some 8 hours after missing the calls in question. By then, according to the Carrier rule, it is too late. One must book-off in advance of a call. Further, this Board finds that being off for medical reasons, even legitimate ones, after the missed calls does not excuse the prior failure to abide by the rule.


## 4. Discipline Was Harsh and Excessive

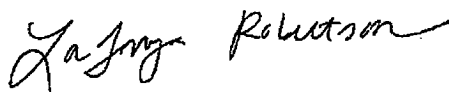
If this were a long service employee or one who had only missed a call, dismissal might indeed seem overly harsh, as the Organization suggests. However, this short-service employee has been disciplined 5 or 6 times (the Carrier says 6, the Organization says 5) in

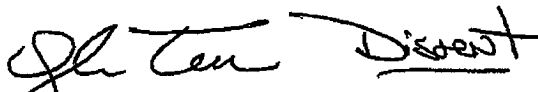
a three year period, for attendance-related matters. The discipline assessed in each instance was in keeping with the Carrier's policy and was progressive. It seems to this Board that given these particular circumstances and this Claimant's pattern of repeated behavior, even if there were only 5 instances of discipline, the discipline assessed by the Carrier was not unreasonable.

**AWARD**

The claim is denied.

  
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**Roger K. MacDougall**  
**Chair and Neutral Member**

  
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**LaTonya Robertson**  
**Manager Labor Relations**  
**Carrier Member**

  
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**Doyle Turner**  
**General Chairman, UTU L&N & C&O**  
**Yardmasters**  
**Organization Member**

Dated: 6/5/2012 At: Chicago, IL