

**BEFORE
PUBLIC LAW BOARD NO. 7526
CASE NO.3
AWARD NO. 3**

**Union File: 210334
Carrier File: 2011-100241
NMB Subject Code: 119**

UNITED TRANSPORTATION UNION (Yardmasters))	
vs.)	PARTIES TO THE
)	DISPUTE
CSX TRANSPORTATION, INC.)	

STATEMENT OF CLAIM:

"Please accept this claim for Regular Yardmaster R.S. Jonio, ID 210334, at Birmingham, AL. for all time lost on account of the discipline assessed from the investigation held on May 4, 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 Jonio for May 4, 2011...the Organization again request[s] that Yardmaster Jonio'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 Yardmaster Jonio, was hired on September 25, 2005, and attained yardmaster seniority on December 27, 2006. On December 16, 2010, the Claimant was scheduled to work the mainline yardmaster job on third shift, which starts at 2300 hours. However, the Claimant arrived at work approximately 40 minutes late. He was charged with failing to report for duty at the proper time.

An investigation was held, after agreed-upon postponements, on May 4, 2011. As a result of that investigation, the Carrier determined that the Claimant was guilty of violating CSX Transportation Operating Rules GR-1 and he was dismissed from the service on June 2, 2011. The Organization appealed the dismissal and the Carrier denied the appeal. The case was conferenced on the property and is now properly before this tribunal.

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 transcript of the on-property investigation was incomplete and inaccurate. They claim that there are significant gaps in the record, indicating that there was a lack of fairness and impartiality. They state, further, that the Carrier transcription person certified a copy of the transcript on May 9, 2011, and then, after input from the Hearing Officer, changed the transcript on May 13, 2011 and mailed it out. They allege that the Carrier manipulated testimony given during the course of the investigation. They have provided this Board with no evidence as to what the transcript of May 9 might have contained that would have been different from that of May 13.

2. Burden of Proof

The Claimant and the Organization admit that the Claimant was 40 minutes late to work on December 16, 2010. They say, however, that the sign-in document retrieved by the trainmaster from the garbage should not have been admitted into evidence, since the person who retrieved it, Yardmaster Lovelady, was not available for questioning at the hearing. They say that merely having the Carrier officer, who received the document from Mr. Lovelady, at the investigation is hearsay evidence which should not be admitted.

3. Discipline

The Organization says that being 40 minutes late for work does not justify dismissal. They quote 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.

Further, they say that the Claimant was off sick from December 20, 2010 to the end of March 2011. They say that the Claimant's medical condition should have been taken into account when assessing discipline.

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.

The Carrier says that the transcript provides a sound basis from which the Carrier could make a determination of guilt and assess discipline. They say that the purpose and effect of the statements can be achieved by viewing the context of the witness' testimony and that there is no evidence to indicate that the transcript is lacking substantial testimony. They quote Neutral Simon in Public Law Board 5990, Award No. 2, wherein he held that the blanks in the transcript did not result in a procedural error that was so grave as to prevent

the Board from reaching the merits of this case. They say that undoubtedly, the transcript shows that the Carrier ensured that the Claimant's due process rights were protected and he received a fair hearing. They do not address the issue of edits between the May 9 and May 13 version of the transcripts. Even if there was a procedural flaw, they say the Claimant admitted that he was 40 minutes late to work.

(Tr., p. 22, ll. 6-9):

Williams: Mr. Jonio, on the night mentioned in the charge letter did you report for duty on time?

Jonio: No.

The Carrier quotes arbitral cases which hold that the Claimant's admission of guilt overcomes any alleged procedural errors.

2. Burden of Proof

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..."

The Carrier says that the Claimant admits having to be at work at 2300, but showing up 40 minutes late.

3. Discipline

The Carrier points out that their Absenteeism Policy for Yardmasters contains minimum availability standards and establishes an Attendance Discipline Progression Process. Under the Policy, the Claimant first receives two notifications by management that an attendance issue exists. Then, the employee is subject to investigation if any subsequent attendance infraction is committed. After an investigation is conducted, the evidence and testimony presented is assessed. If the employee is found guilty, he will be disciplined in accordance with the progressive policy.

The penalties in the Policy are as follows:

- First investigation – 2 days overhead suspension for 6 months
- Second investigation – 5 days actual suspension
- Third investigation – Up to dismissal

The Carrier says that the Claimant's attendance history proves that he is a recidivist and therefore, is incorrigible.

Since December 2008, the Claimant has had six absenteeism handlings:

- 12/16/10 -- Failure to report to work on time -- Step 3 -- Dismissal (Current)
- 10/16/10 -- Failure to report to work -- Step 3 -- 30 days Actual Suspension (Waiver Signed)
- 7/22/10 -- Failure to report to work on time Step 2 -- 3 days Actual Suspension, 2 days Overhead (Waiver Signed)
- 4/10/10 -- Failure to report to work on time Step 1 -- 2 Days Overhead (Waiver Signed)
- 4/7/10 -- Failure to report to work on time -- Coach and Counseling 2, no discipline
- 12/4/08 -- Failure to report to work on time -- Coach and Counseling 1, no discipline

In short, says the Carrier, the Claimant has been progressively disciplined but to no avail. The Claimant is unwilling to timely protect service on a full-time and consistent basis. They point out that numerous Board decisions uphold the Carrier's inherent right to expect satisfactory attendance from employees and to impose stringent standards to improve efficiency when poor attendance adversely affects railroad operations.

With respect to the Claimant's medical condition, the Carrier says that his condition cannot excuse his failure to report for duty in a timely fashion, nor did he make any request or receive permission to come in late prior to his late arrival on December 16 (as presumably would have been allowed by the Rule). The Carrier points out that the Claimant's first visit to a medical doctor was on January 12, 2011, nearly 1 month after his absence. Similarly his first visit to the social worker was apparently on January 17, 2011.

For all of these reasons, the Carrier says that dismissal was warranted.

Result:

1. Procedural Issues

With respect to the gaps in the transcript, the Organization made a very compelling, summary in their brief, of all of the gaps in testimony. What becomes evident, however, when one reads the full transcript, is that the gaps generally resulted from the Organizations Local Chairman attempting to talk over top of either the witness or the Hearing Officer during the course of the investigation. Upon a complete review of the transcript, this Board is left with no doubt that the Hearing Officer gave full opportunity for all parties to be heard, and gave reasoned decisions for over-ruling any objections raised during the course of the hearing. Therefore, on the face of the record, this Board finds that the gaps in the testimony are of no consequence to the fairness granted the Claimant.

However, the Organization argument about the changes in the transcript are more bothersome. It is clear that on p.41 of the transcript, on May 9, 2011, Transcriber Jay Bunker signed his name, certifying that the transcript was "...typed to the best of my ability from recording and it is true and accurate." It is also clear that on May 13, 2011, Mr. Bunker

signed again, this time stating that he had corrected the transcript on behalf of Hearing Officer Williams. It appears that Mr. Bunker is not saying the corrections are his – rather they are those of the Hearing Officer.

Article 21 of the UTU(Y) / CSXT CBA states, in relevant part, in the last paragraph of 21(a) that “*Stenographic report or transcript of tape recording will be taken of all hearings or investigations. The Yardmaster involved, Local Chairman and General Chairman shall each be furnished with one copy...*”

The implication (and indeed, arguably the universal industry practice) is that the Carrier shall provide such a copy. The Carrier uses this transcript to review the evidence prior to assessing discipline. It is also a substantial portion of the evidence before this tribunal. For all of these reasons, it is important that the transcript is fair and accurate, although the CBA is silent on this matter.

Unfortunately, this Board has nothing before it but the bare, “corrected” transcript. There is no evidence, by appeal letter, by affidavit, by alternate tape, or any other source, as to what the corrections might have been. Therefore, other than issuing a strong caution to the Carrier about the danger of this practice, this Board has no evidence before it to deal with this issue. The Organization would bear the burden to show that any alterations in the transcript would have had a material effect on the outcome of the investigation or the decision of this tribunal. This Board strongly hopes that any corrections were made with the aid of the tape recording taken at the time of the hearing, and that they were immaterial. We shall never know.

Finally, as argued by the Carrier – the Claimant and the Organization, both in the transcript and in the appeal documents, have clearly admitted that the Claimant was 40 minutes late coming to work on the day in question. These admissions, in this case, overcome any of the potential procedural issues raised.

2. Burden of Proof

As stated above, all parties agree that the Claimant was 40 minutes late for work. The Carrier has, therefore, met its burden of proof.

3. Discipline

On its face, the Organization’s well-presented argument that being late 40 minutes for work does not justify dismissal has appeal. However, this is not this short-service Claimant’s first offence. It is uncontroverted that his discipline record includes 6 instances of attendance issues. It appears from the record that not only did the Carrier follow their Policy of progressive discipline, they actually added a step on 10/16/10 wherein they gave the Claimant a 30 day suspension, rather than dismissing him, as the Policy may have allowed. The Claimant should have taken this to heart. Unfortunately for him, he did not.

The issue of the medical and social worker notes are as characterized by the Carrier – perhaps not too little, but certainly too late. It seems that the Claimant sought the assistance of these professionals only after he was in serious trouble. Therefore, this Board holds that they have minimal value in mitigation of the discipline assessed.

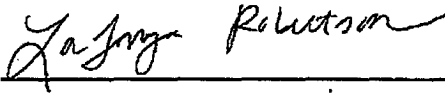
On the whole, this Board sees no reason to disturb the discipline assessed by the Carrier.

AWARD

The claim is denied.



Roger K. MacDougall
Chair and Neutral Member



LaTonya Robertson
Manager Labor Relations
Carrier Member



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

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