In the Matter of Arbitration

United Transportation Union - Yardmasters' Department	)	Regular Yardmaster: Weldon R. Hamlett
vs	)	
CSX Transportation, Inc. - formerly The Baltimore and Ohio Railroad Company	)	Discharge Docket 11-(89-43)/P923484467

Grievance

Claim and request that former Yardmaster Weldon R. Hamlett be reinstated with all rights and seniority unimpaired, and compensated for all time lost including overtime and holidays, as the result of discipline of dismissal assessed following investigation held March 2, 1989.

Background

On February 22, 1989 the grievant was advised to attend an investigation to determine facts and place responsibility, if any, concerning his behavior while on duty at about 1700 hours on February 18, 1989. According to the charge against him levied by the company, the grievant was using an unauthorized television set, and sleeping while on duty, while covering his assignment on the above date at Locust Point Yard, Baltimore, Maryland.

The investigation was held on March 2, 1989 in the Conference Room of the company's Division Office Building, 4724 Hollins Ferry Road, Baltimore, Maryland.

On March 14, 1989 the grievant was advised by the company that he had been found guilty as charged, and the "discipline assessed is dismissal from the service of CSX Transportation

effective immediately".

On April 3, 1989 the discipline was appealed by the General Chairman of the union on grounds that the company was in error because of both procedural defects, and because of merits. After this appeal was declined, the General Chairman then appealed the discipline up to the highest Carrier officer designated to hear such. Absent resolution of the claim it is now before this arbitrator and this committee for final adjudication.

Company Rules and Contract Provision(s)

The following company Rules and collective bargaining contract provisions are applicable here, in pertinent part:

General Rule 500

> Employees must give immediate written notice to their supervising officer of a change in their address or their telephone number.

Article 21

> (a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the Officer of the Carrier authorized to receive same, within 60 calendar days from the date of the occurence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Carrier shall, within 60 calendar days from the date same is filed, notify the employee or his representative of the reasons for such disallowance. If not so notified, the claim or grievance shall be considered valid and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar grievances.
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> (c) The procedure outlined in paragraphs (a) and (b) pertaining to appeal by the employee and decision by the Carrier, shall govern in appeals taken to each succeeding

officer except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. All claims or grievances involved in a decision by the highest officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to.

Article 22

(a) Yardmasters shall not be discipline, disqualified subsequent to their being qualified, or dismissed without a fair and impartial hearing before a proper officer. Such employee shall be apprised in writing of the precise charge against him, with copy to the Regional Chairman, and hearing will be held within ten (10) days, if possible. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented by the duly authorized representative. He may, however, be held out of service pending such investigation.

Stenographic report or tape recording will be taken of all hearings or investigations and the employees involved and the Regional Chairman shall be furnished with one copy.

(b) A decision shall be rendered within twenty (20) days after completion of investigation, with copy to the Regional Chairman and charged employee.

(c) An employee dissatisfied with the decision shall have the right to appeal to the next higher officer. If an appeal is taken, the appeal and decision must be within the time limits specified in Article 21.

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Procedural Objections Raised by the Union and Findings

Prior to potentially ruling on the merits of the claim the arbitrator must address a number of procedural issues raised

by the union both during the investigation itself which was held on March 2, 1989, and during the appeal process while the claim was being handling on property.

The union alleges that the company was in violation of Article 22 because the investigation was not held within ten (10) days of when the charge against the grievant was filed. Since the notification was dated February 22nd, and the investigation took place on March 2nd, the ten (10) day requirement of this Rule was met. The arbitrator believes that the union officer wishes Rule 22(a) to read from the time of the incident, not from the time of the notification, to use as basis for this procedural objection. Although the Carrier does not seem to disagree with such interpretation, albeit not supported by language of the Agreement itself, the latter does state that a ten (10) day requirement shall be met "if possible". Evidence of record is insufficient to show that the company did not meet such stipulation in a reasonable manner and this objection must be dismissed.

Secondly, the union objects on due process grounds because one of the witnesses it felt necessary to have at the investigation did not show. The Rules of the Agreement provide for the grievant and his representative to call whom they wish to testify at the investigation and it is their responsibility to see that such witnesses appear if they feel such represent an important defense to their case. In the letter of charge the Carrier stated to the

grievant in language which is both clear and unambiguous that: "...(y)ou are responsible for arranging for a representative and any witnesses you may desire". The Agreement provides privilege of defense, and the grievant has the obligation, with his union, to devise the substance thereof, as the company correctly advised the grievant. Further, if witnesses were absent during the investigation, call for continuance until such witnesses could be called would not have been inappropriate. Objection raised here cannot be honored.

Thirdly, an objection is raised with respect to the specificity of the charge as required also by Rule 22. A review of the original letter of charge shows that it reasonably states that the charges against the grievant deal with his unauthorized use of a TV while on duty, and with sleeping while on duty. The transcript of the investigation shows that the grievant clearly understood the issues at stake by the manner in which he testified. Rule 22 was not contravened by the manner in which the company notified the grievant of the charges against him.

Rule 22 also provides that the grievant and his representative shall be "furnished with one copy" of report of the investigation. Objection by the union is that the grievant never received his copy. Response by the company is that the grievant had not provided his "supervising officer" with written notification of change of address as required by General Rule 500, cited in the foregoing.

An additional objection by the union, related to same Rule 500,and Rule 22 of the Agreement, is that the grievant also had not received the decision after the investigation as required "within twenty (20) days". Both of these issues are related to whether or not the company had the grievant's correct address on hand when it attempted to forward these documents, respectively, to him. According to correspondence to the Carrier by the union representative the grievant had moved in December of 1988 and when called up for his physical in January of the following year talked to a secretary on or about January 23rd and gave her information about his new address. If such were done, and this committee has no reason to doubt that it might have been done, it did not fulfill the requirements of Rule 500 which requires "immediate" written notification to supervising officer. Clearly notification was not given immediately since there was close to a month lag from the latter part of January to the latter part of December of the preceding year, and there is no evidence that the grievant gave other than an oral notification to the secretary in question, who was in either case evidently a different person than his supervising officer as required by Rule 500. On June 29, 1989 the Carrier could write to the union representative that it "still (did) not know the Claimant's correct address". Clearly, the grievant was negligent in these matters and the objection raised by the union with respect to alleged violation by the company of Rule 22 must be dismissed.

Nextly, the union contends that there was a procedural flaw because the initial appeal by the union officer was not handled by the proper company officer. The first appeal was addressed to Division Manager Hutson in Baltimore by the union representative. At least one conference took place over this issue between the latter and other Carrier officers, in order to attempt a settlement, prior to declination of the appeal by the Superintendent of Operations Gibson. Rule 21(a) does not state that the same officer to whom the appeal is addressed need necessarily rule on it. It only states that the "...Carrier shall, within sixty (60) days..." notify the concerned parties of the "reasons for such disallowance". There was no violation of the Agreement by the manner in which the declination(s) were handled and this objection must be dismissed.

Lastly, the union alleges that the grievant was inappropriately held out of service in violation of Article 22(a). The language under scrutiny here is the following: "...(an employee)...may be held out of service pending such investigation". The factual record before the arbitrator on this point is not totally clear. It is true that the grievant continued to work for several hours after it was first discovered that he was watching TV while on duty. Testimony by witnesses shows, however, that this was because there was an effort made by one of the Assistant Trainmasters to work with the grievant after this point albeit he had continuing

problems keeping awake. After this measures were taken to have him replaced by the Terminal Trainmaster and another Yardmaster came in early on his shift to finish the work of the grievant's assignment. Given the evidence of record, and his evident inability to properly perform his job on the day in question, it was not unreasonable to have him replaced and to hold him out of service. One of the witnesses, also an Assistant Trainmaster, testified that the grievant was in an "unsafe condition". The latter was additional reason to hold him out of service. The grievant had crews working for him. It was not unreasonable that the company's application of Article 22(a), prior to the time of the investigation,was to hold the grievant out continuously during this time-frame. What is not clear is contention by the union that the grievant had come back to work anyway for several days during the time-frame. He may have. The arbitrator cannot find factual evidence for this in the record. Nor would such change the conclusion that it was more reasonable than not to hold him out of service, given the type of behavior he exhibited on February 18, 1989 and which is subject of the merits of the claim before this committee. The company's actions did not represent a violation of the Agreement, and this last procedural objection raised by the union must be respectfully dismissed. Who made the decision to take the grievant out of service on February 18th? It was the Terminal Trainmaster who was called at this home and who issued such instructions to "relieve" the grievant.

Merits of the Claim: Findings and Discussion

Two company witnesses, both Assistant Trainmasters, testified that they saw the grievant watching TV while on assignment on February 18, 1989, and that after he was instructed to turn it off and put it away, around 5:00PM, the grievant continued to have problems from about 5:00 PM to 6:00 PM keeping awake. As one witness put it, the grievant just continued to sleep off and on for about an hour. A second witness testified that he tried to work with the grievant after the TV was shut off. He testified as follows, in pertinent part:

> "...(the greivant) put the TV set away and after telling him to put the TV set away, I said to (him)...get your counts together cause you got grain empties and I also told him that I didn't want the West going to Curtis Bay that I was going to run them West with the grain empties out of Locust Point. I said give me some car numbers and tonnage so I can put it on. He said okay he would ...".

In fact, the grievant fell asleep. The Assistant Trainmaster then went up to the grievant and "shook him", and repeated his request. The grievant proceeded to again fall asleep rather than honor the request.

In his own testimony at the investigation the grievant admitted that he had a TV and was watching it while on duty, and he also admitted that on February 18th he had dozed off "once or twice". The grievant explained during the investigation that he

had slept very little the preceding two days because of an illness in his family and that when he came to work he was upset and nervous. He was also experiencing a little pain that day with his arm which had been lost in a railroad coupling accident prior to the time of the incidents here under scrutiny.

There are no evidentiary issues to be resolved in the instant case. There is sufficient substantial evidence to warrant the conclusion that the grievant is guilty as charged of both insubordination for doing other than what he was supposed to have been doing while covering his assignment, and for sleeping while on duty. Not only do reliable witnesses testify to this, but the grievant himself admits as much.

Precedent in this industry has treated insubordination as a dismissable offense under certain circumstances (Second Division 8390; also Second Division 6489,8223,7193). Insubordination has been defined as "...failure to perform...duty"(Second Division 7193). In the instant case the grievant ostensibly could not have been performing his duties while watching TV nor could he have been covering his assignment while sleeping. The latter has generally been put into a special category of grievous offense in this industry because of the potential safety problems for both the employee who is sleeping, as well as for fellow workers (Second Division 8537, 8886 and more recently, 11684; also Public Law Board 3895, Award 3; Public Law Board 3986, Award 5). Such is particularly so in the

instant case since the grievant was in a position to supervise others. One of the witnesses stated that he closely monitored the grievant on the day in question after he continued to fall asleep because of concerns about safety. "It has (also) been consistently held that sleeping while on duty is a dismissible offense" (Second Division 11684).

The arbitrator is not insensitive to the fact that the grievant has, according to standards of this industry, considerable tenure nor that he had sustained, in the past, considerable injury while on duty. Such is insufficient to off-set, however, the gravity of the offenses here at bar, particularly that of sleeping while on duty. The consequences of this pose not only potential grave liability to the company, but also potential grave dangers to the grievant's fellow workers who must follow his sagacity and experience as their supervisor. Additionally, the reasonableness of any discipline imposed by the company must be viewed in the proper context of an employee's past record which is an important criterion used by arbitral forums in this industry. During the past decade the grievant had received four suspensions, one reprimand, and was discharged once. The latter, for a Rule G violation, was changed by the company, after some sixty days out of service, to leniency return to work. In view of this record, which is not good, as well as the grave safety issues involved because of the type of infraction(s) at bar in this case, the arbitrator has no alternative but to arrive at the most reasonable conclusion, which he does not do here lightly,

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that the claim before him cannot be sustained on merits.

Award

The claim is denied.

For the Arbitration Committee

Edward L. Suntrup, Arbitrator

J. P. Arledge, Carrier Member

R. C. Arthur, Employee Member

Jacksonville, Florida

Date: November 22, 1989