Public Law Board No. 6584

Parties to Dispute

United Transportation Union Yardmaster Division	))	
vs	)	**Case 2/Award 2**
Soo Line Railroad Company Canadian Pacific Railroad	))	

Statement of Claim

Request that Yardmaster H.C. Mikkelson be reinstated with full seniority rights unimpaired; pay for all lost time; pay for any health benefits; pay for any lost vacation entitlement; pay for any other benefits or entitlement and for the removal from his record the discipline assessed.

Background

The Claimant was advised on February 6, 2002 to attend an investigation in order to determine facts, and place responsibility, if any for allegedly being off duty without authority and for failure to work assignment 4745 on February 1-3, 2002 at the Carrier's St.Paul Yard. After postponement an investigation was held on February 15, 2002 with the Claimant in absentia. On February 22, 2002 the Claimant was advised by the Yard Manager at the Carrier's Twin Cities Terminal that he had been found guilty as charged. He was discharged from service This discipline was appealed by the Organization and denied by the Carrier at the first level of handling. Thereafter the denial was appealed and conferenced properly on property in accordance with Section 3 of the Railway Labor Act and the operant Agreement up to and including the highest Carrier officer designated to

hear such. Absent settlement of the claim on property it was docketed before this Board for final adjudication.

Discussion and Findings

There is intimation by the Organization that the investigation held on February 15, 2002 was in violation of due process standards since the Claimant to this case was not present at the investigation. Boards such as this have ruled on numerous occasions that absence from an investigation in and of itself by an employee who has the right to be there under the protections afforded by his labor Agreement is not a violation of due process as long as the Claimant had been apprised of his rights to appear. The record shows that the Claimant had been advised of the date of the investigation and that one postponement had been granted at the request of the Organization. Although the instant case has certain peculiarities about it not found in most discipline cases brought before a forum such as this a Claimant's presence or absence at an investigation is, in the final analysis, directly or indirectly the result of his or her own actions.

Secondly, there is also intimation by the Organization that the circumstances of the Claimant on the date of the scheduled investigation dictated that the investigation ought to have been postponed by the Carrier and held at a later date. Those circumstances involved the incarceration of the Claimant. Boards such as this have also ruled that an employer is not obliged to postpone an investigative hearing over alleged violation of a

Carrier's rules or policy because the employee against whom charges have been levied is in jail.

With respect to the merits of the case, the evidence is not in dispute. The Claimant missed work, without proper permission, on the dates of February 1-3, 2002. These days off from work were but a continuation of a fairly long pattern of work absences, for whatever reasons, on the part of the Claimant which went back several years. On merits, the claim before the Board cannot be sustained.

Being absent from work for three days running without permission is not tantamount to abandonment of work. But it is, nonetheless, a serious infraction. This Carrier, nor any other in the industry, is not able to successfully operate their business if employees working for it randomly take off days at a time, for whatever reason, without permission. This point is so fundamental that the Board need not elaborate further on it.

An additional issue in this case is not whether the Claimant was guilty of violating Carrier's rules by not showing up for work on the three days in question for which he was, on basis of evidence of record, culpable. Of additional concern to the Board is whether the quantum of discipline assessed was appropriate. Was missing three days work without permission sufficient grounds for the Carrier to have assessed the discipline of dismissal? To frame a ruling on this matter the Board must examine extenuating circumstances dealing with why the Claimant missed the three days, as well as the Claimant's prior record, in order to ascertain whether there had been a reasonable application of the principle of progressive discipline.

To come to a proper understanding of these matters it is necessary to reference an earlier case, involving this Claimant, which was heard and ruled on by a Public Law Board under Section 3 of the Railway Labor Act in the fall of 2000.[1]. The circumstances involved in that earlier case bridge those involved in the instant one. Further, the parties have made the Award in that earlier case part of the record here. But even if they had not done so all Awards issued under Section 3 of the Railway Labor Act and by the National Mediation Board are part of the public record. Such Awards can be cited as precedent by any Public Law Board or Special Board of Adjustment when framing rulings even if the Awards in question may not been cited by the parties

According to information in that earlier Award the Claimant was discharged from service a first time on December 9, 1998 for failure to report for duty, which is an infraction similar to the one for which he was discharged from service the second time on February 22, 2002. The Claimant was discharged in 1998 for being absent from duty on November 15, 1998. The cause of that absence, as it was developed in that earlier file, was because the Claimant stated that he had hit a deer on the way to work and his car was too damaged to drive after the accident. The Carrier was wary of this excuse for not showing up for work because no corroborating evidence was provided by the Claimant to show that he actually had been involved in an accident. The accident was never reported to the police. The Claimant stated to that Board that the accident was not reported

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[1]Public Law Board No. 6320, Award 1. Issued: October 16, 2000.

because he was driving on a suspended driver's license under a state of Wisconsin Deferred Prosecution Agreement and he was afraid that if it was reported that he had hit a deer, and had been in an accident, that this might have had some effect on that Agreement. The Carrier levied dismissal against the Claimant in that first instance, in either case, because of his not showing up for work and because of the Claimant's prior record of laying off multiple times from January to November of 1998. The record shows that the Claimant had laid off some 70 times during that time frame. The Organization argued that some of those days were days that the Claimant had voluntarily taken off because, as an extra Yardmaster, he had no assigned days off. The Carrier obviously did not accept this reasoning as valid since the Claimant had received two suspensions in 1998 for having taken so many days off. There is no record that these suspensions had ever been grieved by the Claimant.

On October 16, 2000 the earlier Public Law Board cited in the foregoing put the Claimant back to work because of the extenuating circumstances as they were presented in the record. In the Award the Board reasoned that discharge was too harsh a discipline.[2] Nevertheless, because the Claimant was guilty on merits, and because of his prior disciplinary record, he was put back to work with no back pay albeit his seniority was

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[2]At several times on property after that Award was issued either supervision or a EAP official referred to the Award issued by Public Law Board No. 6320 as having been one issued on "...leniency basis...". This is not correct. Arbitration Boards under Section 3 of the Railway Labor Act have no authority to put discharged employees back to work on leniency basis. Award 1 of PLB 6320 states that explicitly in the text of the Award. Boards can only put employees back to work, when they do, because of extenuating circumstances which a Board rules might make it more reasonable than not for returning an employee to work.

unimpaired.

When the Claimant was returned to work with the Carrier as a result of the Award issued by that earlier Public Law Board it was under what this Carrier calls stage two (2) of its Positive Behavior and Performance Development Policy. This the Carrier had the right to do under the Award that returned the Claimant to work. The Policy in question imposed a requirement on the Claimant that he maintain a clean record for a minimum of two years from the date of his return to work in order to remain employed by the Carrier. That stipulation was clearly conveyed to the Claimant and the conditions under which the Claimant was returned to work were put in writing by the Manager of the Operations Yard at the Twin Cities Terminal.[3] There can be no doubt that the Claimant understood the conditions of his return to work as a result of the earlier sustaining Award.

At the same time the Organization argues before this Board that the Manager of the Operations Yard advised the Claimant that the EAP Program was available to him for the handling and resolution of personal issues. The full extent of these outstanding personal issues may not have ever been made clear to supervision, as they may not have been made clear to this Board, but they included at the very least problems related to drinking and driving, and jumping bail, which went back to early months of 2000, and with the Claimant having had his driver's license suspended prior to that for unspecified legal violations, and with having been charged thereafter with driving on a suspended

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[3]See Union Exhibit K.

license. So the personal problems, as they are referred to in the record, included a considerable array of ongoing legal problems related to violations of the law by the Claimant at the time he was returned to work.

Further, it is also not correct to state that the extent of the Claimant's legal problems went back to before the issuance of the Award off PLB 6320 in October of 2000 that put him back to work. In February of 2001, or well over three months after the Claimant was put back to work, he continued to have legal difficulties that were the result of his own voluntary actions. On February 13, 2001 the senior corrections agent of the Minnesota Department of Corrections advised the presiding judge of the district court of Chisago County that the Claimant was in continuing violation of the order of the court by his failure to pay fines and fees of over $1,000.00 which had been levied . Some three months after his return to work the Claimant was also scheduled for a jury trial in the neighboring state of Wisconsin for operating a vehicle while intoxicated and for operating a vehicle while his operator's permit was revoked.[4]

The Claimant had entered the Deferred Prosecution Agreement on July 29, 1998 for infractions committed prior to that date. He successfully completed the Agreement in July of 1999 and the original pending charges against him were dropped, as the Board noted in Public Law Board No. 6320, Award 1. This may have been so. But in April of 2000 the Claimant was again arrested twice for operating a vehicle while intoxicated.

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[4]Organization's Exhibit N.

Apparently it was for these additional offenses that the Claimant was required to go to a jury trial in Douglas County, Wisconsin in February of 2001. It is unclear if the result of this trial resulted in his being incarcerated and/or if his incarceration on February 1-3, 2002 was the result of an additional set of offenses. The Claimant could have clarified the record on these matters for the Board by providing his union with all applicable information. He did not do so. What is clear, however, is that after completing the original Deferred Prosecution Agreement in July of 1999 the Claimant continued to engage in behavior that put him at odds with the law and created additional absence problems for him at work after he was returned by Public Law Board in October of 2000. The original investigation into the Claimant's first discharge was held on November 30, 1998 and he was discharged on December 9, 1998 which was then appealed and so forth in accordance with proper procedures under the Railway Labor Act and the operant labor Agreement. After that discharge the Claimant engaged in additional illegal acts in February of 1999 (operating with a suspended license); in April of 2000 (operating a vehicle while intoxicated and with jumping bail). The record used by Public Law Board No. 6320 in rendering an Award on the Claimant's earlier discharge did not have this supplementary information on the Claimant's continuing pattern of behavior of flouting the law. Had it been apprised of such information it may well not have arrived at the conclusion it did when the Claimant was returned to work in October of 2000. The report by the Minnesota of Corrections' senior corrections agent to the judge of the district court of Chisago County which is dated on February 13, 2001 and which deals with what it

calls a "probation violation addendum" to the file of Mr. Mikkelson also states under title of additional violations that the Claimant was failing to remain law abiding and to engage in good behavior, as well as failing to pay fines which had been levied.

In view of the full record on this Claimant, as it exists at this point, the Board is unable to conclude, under title of extenuating circumstances, that the Carrier's actions in levying discharge against him on the date of February 22, 2002 was improper. As moving party to this case the Carrier has sufficiently met its burden of proof, both with respect to the merits of the case, and with respect to the quantum of discipline. Reasonable minds could but conclude that the actions by the Carrier in discharging the Claimant a second time were neither arbitrary nor capricious and the determinations by the Carrier in this case cannot be disturbed.

Award

The claim is denied.

Edward L. Suntrup, Chairman & Neutral Member

Larry E. Nooyen, Carrier Member

J. R. Cumby, Employee Member

Date: 1/27/2004