Public Law Board No. 6584

Parties to Dispute

United Transportation Union Yardmaster Division	)	
vs	)	**Case 3/Award 3**
Soo Line Railroad Company Canadian Pacific Railroad	)	

Statement of Claim

Request that Yardmaster S. Fettig be reinstated with full seniority rights unimpaired; pay for all lost time; pay for any lost health care benefits; pay for attending investigation held October 31, 2002; pay for any lost vacation entitlement; and the removal from his record the discipline assessed.

Background

The Claimant was advised on April 21, 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 U4405.0700 on August 19-21, 2002 at the Carrier's Glenwood, Minnesota facility. After a number of postponements an investigation was held on October 31, 2002. On November 8, 2002 the Claimant was advised by the Road Manager at the facility at Glenwood, Minnesota 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

At the time of the investigation the Claimant held position as yardmaster and switchman and he also worked as an extra yardmaster.

Testimony at the investigation by road manager Chalich at Glenwood, Minnesota is that on the dates of August 19-21, 2002 the Claimant was scheduled to work the 7:00 AM shift filling a vacation vacancy. He did not show up for work. According to the road manager, it was his understanding that the Claimant did not work on the dates in question because he was incarcerated. According to the road manager the Claimant contacted him on August 20, 2002 and explained his situation. It was this supervisor's understanding that the Claimant had also called in prior to the shift on the 19th with a short message to the clerk advising the latter that he was laying off. The reason for the Claimant laying off was not an excused absence. The General Code of Operating Rules of the Carrier states the following, in pertinent part.

> **Rule 1.15 Duty-Reporting or Absence**
>
> Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.

According to the road manager the Claimant was in violation of this rule for not having worked on the three days in question. Testimony here is that supervision monitors

attendance on a monthly basis and also has the discretion to give excused absences. When the Claimant called in at 7:00 PM on the night before his August 19, 2002 shift started the next morning he did not state why he wanted to lay off on such short notice, nor did he state that he would be off for three days.

Testimony by the Claimant is that he did call in to the chief clerk on duty to take off from covering the vacation relief vacancy since he stated that he was scheduled to have worked on August 19-21, 2002 on the U4405.077 yardmaster position. He states that he just called in that he would be off which is "...standard operating procedure at Glenwood...". He states that he did not ask permission to be off. He just called in told the clerk he would be off "...no questions asked...". When asked at the investigation why he was not able to work on the days in question, the Claimant testified that: "...I don't believe any questions were asked why I was not there. I just laid off...". The Claimant intimated in his testimony that he could have worked on August 21, 2002 had he wished to but that he had been "...pulled out of service by the EAP on the evening of the 20th...". He states that he would not have been able to have worked the other two days due to "...circumstances (beyond) his control...".

On re-call road manager Chalich stated that he was no aware that the Claimant had been pulled from service until the morning of August 21, 2002 when he received a call from medical services stating that the Claimant would need health services' clearance before returning to service.

Findings

There is a due process objection raised by the Organization in this case on grounds that the tape recorder used at the investigation did not capture all of the testimonial evidence from the investigation. Response by the Carrier is that all of the testimony was reproduced except several inudibles that would not mislead anyone reading the transcript of the hearing. A review of this issue by the Board warrants conclusion that recording investigations on this property must certainly be an accepted practice since the Carrier argues that it extends back over ten years. This is not denied by the Organization. The Board would also observe, with respect to this objection, that recording investigations under Section 3 of the Railway Labor Act is a common practice throughout the industry, and it is not endemic to this particular Carrier. Further, after review the Board must conclude that the specific issue related to misleading evidence is insufficiently supported by facts of the record. The investigative record in this case is quite brief, and the facts presented therein are extremely straightforward. In view of these considerations the objections raised here by the Organization is respectfully dismissed. The Board has dealt with a similar objection when issuing Award 1 of this Board and the conclusion reached here is consistent with that earlier ruling.[1]

With respect to the merits of the case, the Carrier states that it is common practice at Glenwood for yardmasters to call to the chief clerk or to another yardmaster prior to

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[1]See Public Law Board No. 6584, Award 1.

laying off but the reason for "...the layoff is reviewed by the responsible manager. If the reason is not valid, the employee is held accountable. At Canadian Pacific Railway, laying off because you are incarcerated in not an excused absence...".

The Claimant was off work on the two days of August 19-20, 2002 because he was in jail. The Board is provided no information on why he was incarcerated on these two days and in his testimony at the investigation the Claimant offers no information. A close study of his testimony shows that he was extremely cautious to avoid admitting that this was the reason for his absence on these two days in the first place. The tone of his testimony was that he had the right to take those days off, without explanation, and apparently in his mind for whatever reason, as long as no one asked him why he wanted off. This is not correct, as the supervisor testified. The road manager further testified that if he had known that the requested days off were because the Claimant was incarcerated that permission to take the days off would not have been granted. This reasoning by the road manager is in sync with numerous arbitral forums in this industry that have ruled, over the years, that being in jail is an insufficient reason for an employee to mark off one's assignment.[2] These forums have also ruled that Carriers are not at fault in assessing discipline if an employee takes off from work for actually being incarcerated without their knowledge. In the instant case it is clear that the Claimant would have been denied permission to take off if the correct reasons for his wanting to take off had been conveyed

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[2] See Third Division 24353 and Public Law Board 5025, Award 3.

to the proper supervisor.[3] Likewise, it was not improper for the Carrier to have levied discipline because the Claimant took off because he was in jail but had failed to convey this information to supervision.

The Organization argues that it was the responsibility of the Carrier to have supplied "...information on why the Claimant was incarcerated..." when it assessed discipline and when it sought to justify these actions in its arguments before this Board. First of all, it is unclear from the record if the Carrier had access to this information. Nowhere in the record does it state that the Carrier knew exactly why the Claimant had been in jail. Secondly, this problem of information could have been resolved if the Claimant had simply been forthright and provided that information to either the Carrier, or for that matter, to this Board. This information may indeed have been viewed under title of extenuating circumstances by this Board in its deliberations in this case when addressing the quantum of discipline, if not the merits of the case. But all that the record states here is that the Claimant was in jail for two days and that he believed that since he called in to the chief clerk with information that he would not be at work on the two days in was incarcerated that this was sufficient to have exonerated his behavior. Obviously, this reasoning by the Claimant is incorrect.

The Claimant also did not show up for work on August 21, 2002. He again is very elusive in his testimony on why this was the case. The Board knows that he was not there

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[3]See Third Division 31627.

because the Carrier's MCMC administrator wrote a memo that he was being "...medically pulled from service..." on August 21, 2002[4] and that a little more than a week later he was admitted to the Trinity addiction center partial hospitalization program.[5] On this count, the Board is aware that the Claimant has certain privacy rights. But the Claimant must also know as a matter of common sense that a Board such as this cannot frame rulings involving extenuating circumstances if such information is not voluntarily provided, even in its most primitive form, to it. The only information that the Board has here is the following: first of all, that this Claimant took days off and refused, as he well knows, to provide information when he did so, to his supervisor on why he was off which happened to have been because he was in jail and, secondly, that a week later he was in a drug rehabilitation center. These are not positive pieces of evidence with respect to the Claimant upon which this Board can frame a ruling in his favor. On merits there can be no question that the Claimant is guilty as charged with respect to his absences on August 19-20, 2002. His absence on August 21, 2002 does appear to have been supported by documentation provided by the MCMC administrator and it could, thus, have been justified. But again, the information related to the Claimant's August 21, 2002 absence did not come from him. It came from another source.

With respect to the quantum of discipline the Board observes that the Claimant's prior record is not good. In denying the claim on property the St. Paul service area

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[4]Company's Exhibit M.

[5]Company's Exhibit N.

manager of field operations also states that the Claimant "...has had numerous absenteeism problems (and) as recently as July, 2002..." and (that he had most recently) waived a hearing on unexcused absences and served 10 days discipline...".[6] This was but a month or so prior to his days of absence in August of 2002. The Board can but logically deduce, in view of the scant evidence on these matters, that this prior absence and the discipline levied because of it, and the absences on August 19-20, 2002, and then again on August 21, 2002, were all related to why he ended up at the Trinity addiction center on August 29, 2002. The Claimant's record of rule breaking goes back to April of 2000. In that month he opted for the Rule 1.5 bypass for violation of the Carrier's drug and alcohol policy and in July of that same year was charged with failure to comply with the treatment program. In August of 2000 he was assessed a 10 day suspension and in June of 2002 he was assessed another suspension. This was followed by his infractions under scrutiny in this case. Given the facts of this case, as they are known, it is far from clear to this Board that this Claimant is committed to working in this industry in a responsible, drug or alcohol free, manner. There is not a scintilla of evidence in the Claimant's testimony, or in the record as a whole of this case, that the Claimant is aware of, or admits awareness of, the gravity of his behavior in this industry that is particularly sensitive to safety matters.

Upon the whole record before it the Board is unable to conclude that there is

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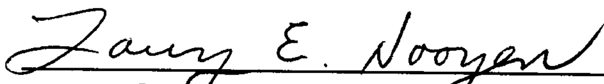
[6]All quotes in this paragraph are taken from Employees' Exhibit D.

sufficient evidence in this case to permit it to do otherwise than not disturb the Carrier's determinations with respect to the Claimant. The Board has no alternative but to rule accordingly.

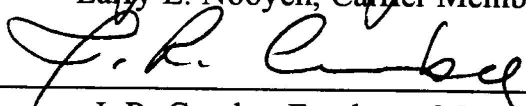
Award

The claim is denied.

Edward L. Suntrup, Chairman & Neutral Member



Larry E. Nooyen, Carrier Member



J. R. Cumby, Employee Member

Date: 1/27/2004