

**BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1044**

**UNITED TRANSPORTATION UNION (YM)**

**and**

**CONSOLIDATED RAIL CORPORATION**

**Case No. 40**

**STATEMENT OF CLAIM:**

Claim is made on behalf of Yardmaster L.K. Jackson for his reinstatement to service immediately. We request that he be made whole and compensated for all time lost due to the Carrier's inappropriate assessment of discipline. In addition, we ask that he be granted proper credits towards his vacation pay and his Railroad Retirement Board credits. We further request that his seniority rights and his health and welfare benefits be fully restored and that his record be cleared of this entire incident.

**FINDINGS:**

At the time of the events relevant to this matter, Claimant L.K. Jackson was employed by the Carrier as a Yardmaster.

On August 28, 2002, the Claimant was displaced from his yardmaster position at Stoney Creek Yard, and he subsequently exercised his seniority to the second trick yardmaster position at Morrisville Yard. As a result of an investigation into the Claimant's qualifying progress, the supervisor at Morrisville determined that the Claimant was reporting late for work, leaving his assignment early without permission, claiming pay for time not worked, and failing to follow the direct orders of his qualifying schedule. By letter dated October 11, 2002, the Claimant was advised to attend a hearing on October 18, 2002. The Carrier issued an amended notice of hearing on October 14, 2002.

The hearing commenced as scheduled, but the Organization asserted that the hearing had been cancelled and the second notice, which had not been received by the Claimant or his representatives, could not be a correction to a cancelled notice. The Claimant and his representative left the hearing. The Carrier proceeded with the hearing in the absence of the Claimant and the Organization. As a result of this hearing, the Carrier issued a Notice of Discipline on November 1, 2002, informing the Claimant that he was dismissed in all capacities. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to dismiss him from its service. The Carrier denied the claim.

The Carrier contends that the testimony of Road Foreman Farina and Trainmaster Malizia provides credible and direct evidence that the Claimant arrived late for work, left work early, or did not report for work at all on the cited dates. Moreover, Malizia also testified that he personally and directly ordered the Claimant to complete his tours of duty on September 28-29, 2002, by posting in the Yardmaster's office, but the Claimant chose to leave the property on both dates while still under pay and in direct disregard of these instructions. The Carrier points out that all of this testimony was unrefuted.

The Carrier maintains that, based on this evidence, the Claimant was properly found guilty of stealing time and compensation. The Claimant is guilty of theft by claiming eight hour's pay on each date involved, despite the fact that he performed partial service or no service on each of these dates. The Carrier asserts that there can be no

justification for such conduct, which amount to theft by falsely claiming compensation that was not earned.

The Carrier further emphasizes that it has sufficiently proven the charges against the Claimant, and the Claimant's dismissal was fully warranted in light of the seriousness of the offense. The Carrier asserts that falsification of records in order to obtain pay is a dishonest act that cannot be tolerated. The Claimant's actions have proven him to be a dishonest individual with no concern for the Carrier's interest. The Carrier maintains that such conduct warrants outright dismissal, and the Board should make no changes to the Carrier's decision.

As for the Organization's contention that the disciplinary hearing was cancelled, the Carrier argues that the transcript demonstrates that the General Chairman made the unilateral decision to leave the hearing room. The hearing officer did not cancel the proceedings, nor did he release the participants. The General Chairman made an arbitrary and calculated decision to withdraw from the proceedings, rather than remain and have the Claimant explain his reported absence from work. The Carrier argues that the Organization's withdrawal from the hearing was at its own peril; the Organization cannot now complain that the investigation was somehow improper or tarnished by its absence. The Carrier maintains that when it chose to leave the hearing, the Organization waived its right to question Carrier witnesses or request additional witnesses. The Organization now must accept the proffered evidence and testimony as fact.

The Carrier goes on to argue that the rules do not support the Claimant's behavior. The Carrier asserts that the rules do not permit the Claimant to customize his minimal work schedule, while maximizing his compensation. Moreover, the Claimant's belated effort to report an overpayment for a date not worked, after he was charged, lacks credibility. The Carrier points out that neither the Claimant nor the Organization offered any explanation for why the Claimant was compensated with eight hours of pay for a date on which he did not report for work.

The Carrier then points out that the Agreement provides that an employee suspected of committing a major offense may be removed from service pending a formal hearing and investigation. The Carrier maintains that in this instance, it had reliable information to suspect that the Claimant was engaged in a pattern of theft and absenteeism by arriving late for work, leaving early from work, or not working at all, yet claiming eight hours' pay on each date as though he had worked a full tour of duty. The Carrier requires that the rules do not require a written notice to remove an employee from service, and the Organization acknowledged that the Claimant was verbally advised of the reasons why he was being withheld from service. The Carrier argues that there was no due process or rule violation associated with its decision to withhold the Claimant from service pending investigation.

The Carrier then asserts that it called those witnesses who it believed were directly involved and who could present evidence and testimony that supported the charges. The

Carrier points out that any question about the need for additional witnesses properly would have been raised at the hearing. The Carrier maintains that by choosing to arbitrarily leave the hearing, the Organization cannot now claim that additional witnesses should have been presented. The Carrier additionally argues that there is no basis for any claim that the hearing officer's conduct was improper or that he failed to conduct a fair and impartial hearing.

The Carrier then asserts that the notice of hearing and the notice of discipline were not defective. The Carrier argues that the charges set forth in the notice of hearing were specific and detailed. There is no support for the Organization's self-serving arguments that it somehow was unable to understand the charges or prepare a defense. The Carrier maintains that the Claimant's dismissal was warranted because the evidence demonstrates that the Claimant is guilty of stealing time and compensation for which he was not entitled by misrepresenting his time at work. The Carrier asserts that such deliberate and dishonest behavior fully justifies the severe penalty of dismissal.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Claimant did not do anything that had not always been done by yardmasters. The Organization emphasizes that a yardmaster who already is on the roster and a member of the craft may "post" on a new assignment in order to learn the "little things" that are unique to the yard. The Organization points out

that it often has been suggested that an experienced yardmaster comes in for certain situations only or leaves once the unfamiliar tasks have been accomplished. This practice has been going on forever, and it is not new or unusual.

The Organization argues that the charges of reporting late for work and being absent from duty without permission are without merit or foundation. The Claimant was given a schedule with a note from Malizia that he should "fill in where needed." The Organization emphasizes that there were no instructions that the Claimant should arrive at starting time and leave at the end of the shift. Given the practice of "posting" yardmasters coming in and leaving, the Organization argues that this charge lacks all credibility.

The Organization then argues that the Claimant was entitled to eight hours' pay for each day he was taken off his regular position, plus additional compensation which he never claimed. The Claimant, however, was not aware of what his actual compensation was, and the Organization points out that the Claimant did not sign any time sheets. Payment was authorized by management. The Organization maintains that it would have been prudent and proper for Malizia to determine whether the Claimant was at work before he authorized payment. Moreover, Malizia easily could have denied the Claimant's claim for eight hours' pay, if there was a claim.

The Organization contends that the Claimant was a solid and conscientious employee. The Claimant knew that it was the practice for train crews to be allowed to leave with early quits and for posting yardmasters to be allowed to come in late and leave

early. The Claimant did only what he thought was "okay" because it never was an issue. The Organization then asserts that the act of "failing to show up to work on time, leaving your assignment before the end of your tour of duty or failing to protect your assignment" is a minor violation, subject to a conference, scolding, or reprimand. This does not represent a major rule violation that subjects someone to "dismissal in all capacities." As for the charge that the Claimant had been insubordinate, the Organization maintains that the Claimant complied with his verbal and written instructions. Having accomplished his tasks, and in keeping with the prevalent practice, the Claimant left when he was finished. The Organization argues that Malizia's accusation that he told the Claimant to "finish his tour of duty" is self-serving.

The Organization goes on to contend that the Carrier committed a number of procedural errors in this matter that are fatal to the Carrier's case. The Carrier must provide the Claimant with his contractual rights, but the Carrier has acted in an unreasonable and discriminatory manner throughout these proceedings. Moreover, the discipline assessed in this case is arbitrary, capricious, and without just cause. The Organization points out that the accused is entitled to fairness, impartiality, and equity, as encompassed in "due process," and they are prerequisites for the imposition of discipline.

The Organization maintains that the Notice of Discipline reveals that the Carrier apparently elected to exercise a measure of discretion by surrendering any opportunity to administer discipline for any and all dates of occurrence except for October 6, 2002. The

Organization argues that it is unequivocally clear that October 6, 2002, is the only date as to which the Carrier believes that it may be able to meet its burden of proof. The Organization contends, however, that the Carrier has failed to meet its burden of proof for the alleged occurrence on October 6, 2002, and the Carrier committed a number of fatal procedural errors that denied the Claimant his due process rights.

The Organization points out that the Carrier attempted to prove its case through Malizia's testimony, the only witness who testified to events that allegedly took place on October 6, 2002. The Organization argues, however, that all of Malizia's testimony relating to the Claimant is hearsay; Malizia was not on the property at Morrisville Yard on October 6, 2002, so he is in no position to say whether or not the Claimant was on the property. Malizia testified that Erskin told him that the Claimant was not coming in to work, but Erskin was not at the hearing to confirm or deny this allegation.

The Organization contends that Malizia also testified that he instructed Erskin to put the Claimant on the pay sheet for eight hours. The Organization maintains that because the Claimant did not sign the pay sheet to claim this eight hours' pay, it is fair to say that the Claimant did not misrepresent or falsify his time on October 6, 2002. Moreover, because the transcript shows that Malizia told Erskin to falsify the pay sheet for the Claimant, and because Erskin submitted the claim pursuant to Malizia's instructions, and because Malizia authorized payment for the alleged time claim, and because there is no evidence of a pay sheet with the Claimant's signature on it, the record



does not reflect any information that verified any assertion that the Claimant submitted a signed pay sheet or claim for October 6, 2002. The Organization emphasizes that when the Claimant realized that he supposedly was going to be paid for this date, the Claimant called the Payroll Department and told them that he did not work on this date. The Organization contends that Malizia violated Carrier rules and policy when he told Erskin to falsify the pay sheet and when he authorized payment of this claim.

The Organization argues that the Carrier failed to meet its burden of proof, and there is no merit to this case. The Carrier proved only that the Claimant was falsely accused of an act that was committed by others, Malizia and Erskin. The Carrier further proved that there was an obvious conspiracy and a plan to single out the Claimant and effectuate his dismissal. The Organization maintains that the actions of the Carrier and its supervisors are wholly inconsistent with employees' expectations of fair play and equal treatment. The Claimant is not guilty of any rule violations.

The Organization goes on to assert that the Carrier cannot impose discipline for charges the employees did not receive under "proper notice," nor can the Carrier impose discipline for charges that it failed to prove. The Organization maintains that the testimony of the witnesses at the hearing demonstrates that the Claimant did not commit the alleged violations listed on the Hearing Notice for the date of October 6, 2002. The Organization emphasizes that the Carrier cannot cut corners when it comes to its responsibility to ensure employees' due process rights. The rules require specific charges,

as well as fair and impartial proceedings. The Carrier, however, assessed discipline by a predetermination of guilt, and it acted in an unreasonable, arbitrary, capricious, and discriminatory manner throughout these proceedings.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. The record reveals that the Organization representative decided to leave the hearing because a minor correction had been made to the Notice of Investigation Trial or Hearing. The original notice was issued on October 11, 2002. That notice read, in part:

Your reporting late for work and absenting yourself from duty without permission on the following dates: October 3, 2002, when you reported at 12:15 a.m. (9/4/02) for a 10:15 assignment and left at 1:40 a.m.; October 4, 2002, when you reported at 10:55 p.m. for a 10:15 assignment, and left the property at 11:12 p.m.; . . . (Emphasis added.)

The Carrier apparently recognized that the above-referenced typographical error had been made in the notice and on October 14, 2002, issued an Amended Notice of Investigation Trial or Hearing which corrected that date emphasized above to read "10/4/02." The Carrier apparently did not serve the corrected Notice of Investigation on the Claimant or on the Organization representative prior to the hearing. Based on that

change in the wording, the General Chairman determined that it was a cancelled hearing and he and the Claimant left before any evidence was presented. This Board finds that that slight correction in the date of an obvious typographical error did not constitute a cancellation of the hearing, nor did it render the original Notice of Investigation invalid. It was still clear from the balance of that notice the nature of the charges that were being brought against the Claimant.

The balance of the procedural arguments raised by the Organization related to what occurred at the hearing. According to the Organization, the Carrier failed to call additional witnesses, failed to conduct a fair and impartial hearing, and failed to guarantee other due process rights of the Claimant. However, we find that since the Organization representative and the Claimant left the room, none of those rights were preserved by objections on the part of the Organization. There is a danger in leaving a hearing and allowing it to proceed without representing the interests of the Organization and the Claimant. Consequently, all of the procedural arguments raised by the Organization are found to be without merit and its objections are overruled.

With respect to the merits, this Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of leaving early and reporting late on several days. He also was properly found guilty of failing to follow the instructions of the senior trainmaster on September 28, 2002. Although the records indicate that he may have misrepresented and

falsified his time on September 21 and October 6, 2002, by being paid for time that he did not work, the evidence is not that clear as to whether or not the Claimant was fully aware of what had actually occurred that day and nor is it clear that he engaged in intentional wrongdoing. Nevertheless, there are sufficient violations of the rules here to support the issuance of discipline to the Claimant.

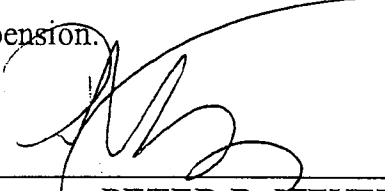
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

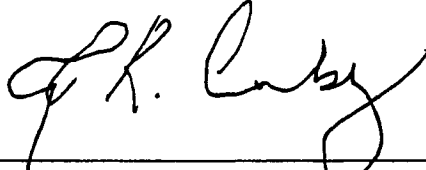
The record reveals that this Claimant has been employed by the Carrier since May 23, 1994. He has a train service seniority date of May 5, 1994, and an engine service seniority date of February 2, 1998. The Claimant established a yard master seniority date on May 23, 1999. There is no evidence in the record of any previous disciplinary problems with respect to the Claimant. Consequently, given that lengthy seniority and the clean disciplinary record, this Board finds that the Carrier's action in terminating the Claimant was unreasonable and must be set aside. This Board orders that the Claimant be reinstated to service, but without back pay. The period of time that the Claimant was off shall be considered a lengthy disciplinary suspension. We hold that this Claimant was guilty of some serious wrongdoing, but it did not rise to the level of "theft" that was charged by the Carrier and it certainly did not justify his permanent removal from


employment.

**AWARD:**

The claim is sustained in part and denied in part. The Claimant shall be returned to service but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.

  
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**PETER R. MEYERS**  
Neutral Member

  
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ORGANIZATION MEMBER  
DATED: 4/14/04

  
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CARRIER MEMBER  
DATED: 4/20/04  
I Dissent.