

PUBLIC LAW BOARD NO. 6823

UNITED TRANSPORTATION UNION)	
)	CASE NO. 40
v.)	AWARD NO. 40
)	
CSX TRANSPORTATION, INC.)	

STATEMENT OF CLAIM:

“Claim of Trainman P. Blair (572320) for all time lost attending investigation held November 1, 2005. Claim is for reinstatement to service and for all subsequent lost time account of being improperly dismissed from service. Claim is also made for all wage equivalents and all health and welfare benefits to which entitled, along with request that any and all notations be removed from his personal file concerning this incident.”

FINDINGS AND OPINION:

Public Law Board No. 6823, upon the whole record and all the evidence, finds that the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended. Parties to said dispute were given due notice of hearing thereon.

On October 27, 2005, the Claimant was issued written notice to report for a formal investigation on November 1, 2005 regarding a charge which specifically stated that he “did not meet the requirements for Weekend Availability Policy dated 10/3/05 for the time period of September 26, 2005, through October 23, 2005, in the vicinity of Cartersville, Georgia, and all circumstances relating thereto.” The charge notice stated that the Claimant was being placed on administrative leave pending the investigation.

The investigation was held on November 1, 2005, as scheduled. On November 2, 2005, the Carrier found the Claimant the guilty of having failed to meet the requirements of the Weekend Availability Policy and dismissed the Claimant from the Carrier’s service, effective immediately. At the time of his dismissal, the Claimant had less than two years of service with CSX-T.

The Organization promptly appealed the Carrier’s disciplinary action and the parties discussed the appeal in conference, the record shows. This matter is now properly before the Board for final and binding adjudication.

The Carrier maintains that the documentary evidence and testimony furnished by Carrier witnesses W. G. Kent, Trainmaster, and Crew Availability Specialist K. Hall established the Claimant's violation of the Weekend Availability Policy. Given the serious nature of the proven offense, and the prior disciplinary suspensions he had been assessed for previous attendance infractions¹, the Carrier argues that the discipline of dismissal was completely warranted and should not be disturbed by this Board.

According to the Organization's on-property arguments, the Carrier failed to afford the Claimant due process, and the record produced insufficient evidence of his guilt. The Carrier bore the burden of proving its case in this disciplinary matter, but failed to do so, it argued. Therefore, the Board must sustain the claim, as presented.

The Board has carefully studied the entire record properly before us. We find that the Carrier failed to establish its necessary burden of proof for the charge as framed in the notice. During the investigation, the Claimant repeatedly questioned the propriety of the charge in light of the fact that the four-week attendance period specified in the charge notice included several dates that preceded the Carrier's implementation date of the Availability Policy with which charged.

The charge as issued and the testimony of record establish that the Carrier improperly applied the new Availability Policy to the Claimant's circumstances in a retroactive manner. Management's action in that regard was clearly prejudicial to the Claimant from the standpoint of due process. The Claimant was not charged with having violated the Carrier's attendance policy that was still in effect at the start of the review period, September 26, 2005, we significantly note.

The record is devoid of any evidence which establishes that the Carrier's implementation of the Weekend Availability Policy, promulgated to employees by System Bulletin/Notice 102 issued on September 30, 2005, was an unreasonable policy or an abuse of managerial discretion. However, again, because the policy specifically cited in the notice had not yet been implemented on the first several dates included within the review period, it is clear that the Carrier's decision to hold the Claimant accountable for compliance with the new policy on those dates was premature. As a result, the discipline imposed in this case warrants modification by the Board. For reasons discussed below, the Board rules that the appropriate

¹ The Claimant's disciplinary record stood as follows: 12/4/04 - 2 day overhead suspension for missed call (Step 1); 6/20/05 - 5-day actual suspension for missed call (Step 2); 8/23/05 - time served for being off without authority (Step 3).

remedy in this matter consists of the Claimant's reinstatement with seniority unimpaired, but without back pay or other benefits.

According to the provisions of the Availability Policy implemented on October 3, 2005, the Claimant was entitled to the due process of having his availability assessed during a full four-week period, we understand. Again, for the reasons explained above, the Board holds that Claimant was deprived of due process given the Carrier's retroactive application of the policy in his specific case. However, the documentary evidence did establish that, subsequent to the effective implementation date, the Claimant had marked-off on Thursday, October 6, 2005 for alleged reason of sickness and remained unavailable during the entire weekend of October 7, 2005, as evidenced by his mark-up on Monday, October 10, 2005.

During the investigation, the Claimant testified that, on the weekend dates of October 7, 8 and 9, 2005, he was under doctor's care and had been taking a prescription medication that caused drowsiness which, he argued, precluded him from safely performing the duties of his assignment. However, as the Carrier established at the investigation, the Claimant produced no evidence in the form of a doctor's note or other documentation to support of his affirmative defense in that regard.

The Board emphasizes that, at the time of the instant alleged offense, the Claimant's disciplinary record at the time of this offense was abysmal. Such an unsatisfactory record, compiled over less than a two-year employment period, along with the aggravating factors discussed above; again, his admitted weekend unavailability "post-policy" and his failure to substantiate his medical assertions, precludes the Board from ordering a make-whole remedy in this matter.

Accordingly, for the foregoing reasons, the Claimant shall be reinstated, with seniority intact, but without back pay or other benefits lost. The period of dismissal shall be shown on his record as a disciplinary suspension. Moreover, the Claimant's reinstatement is subject to his successful completion of the Carrier's customary return-to-duty examinations. In the event the Claimant should fail to meet the Carrier's return-to-work requirements, the discipline of dismissal will be reinstated, so we rule.

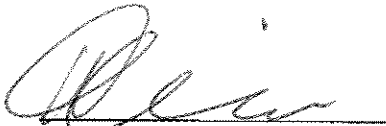
In closing, the Board emphasizes to this Claimant that the Carrier maintains an inherent right to expect its employees to comply with rules governing satisfactory attendance. See the following on-property awards: Award 541 of Special Board of Adjustment No. 955 and Award 37 of Public Law Board No. 6610.

AWARD:

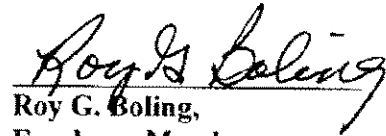
Claim sustained in accordance with the Findings. The Carrier is ordered to comply with this Award within 30 days of its date.

Lynette A. Ross

Lynette A. Ross, Neutral Member



H. Joseph Garcia,
Carrier Member



Roy G. Boling,
Employee Member

Written dissent attached

Dated: 2-5-07

Public Law Board No. 6823

Award No. 40

Organization's Written Dissent

The contents of this decision appear to condone Carrier's reliance upon policy (Weekend Availability Policy) versus what should have been the proper application of Agreement provision, Article 26. All in the industry are aware of the precedent that establishes to the contrary, that Agreement provisions cannot be modified by the simply development of a policy by a Carrier. Should future reviewers of this decision consider this appearance as precedent, this dissent should resolve that miss understanding of the language.

Respectfully submitted,

A handwritten signature in cursive script that reads "Roy G. Boling".

Roy G. Boling, VP
Employee Member