PUBLIC LAW BOARD NO. 2267

Award No. 9
Case No. 11

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes

and

Union Pacific Railroad Company

STATEMENT OF CLAIM:

1. That the Carrier violated the Agreement and particularly Rule 48 thereof when, as a result of a hearing January 6, 1979, it improperly discharged Section Foreman D. A. Hosack and Sectionman J. W. Hobson and assessed the personal records of Sectionmen C. A. Leach, J. C. Rhoads and D. E. Tarver with thirty (30) demerits each.

2. That the Carrier shall now reinstate Section Foreman D. A. Hosack and Sectionman J. W. Hobson to their former positions with seniority, vacation and all other rights unimpaired and compensate them for loss of earnings suffered account the Carrier's wrongful action.

3. That the personal records of Sectionmen C. A. Leach, J. C. Rhoads and D. E. Tarver be expunged of the thirty (30) demerits with which they were improperly assessed.

FINDINGS: By reason of the Agreement dated August 31, 1978, and upon the whole record and all the evidence, the Board finds that the parties herein are employe and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

Section Foreman Hosack and Sectionmen Hobson, Leach, Rhodes and Tarver were assigned to Section 3243 at Hugo, Colorado, which is located at Carrier's Mile Post 535.5 on the Kansas Division. This section gang was and is responsible for track maintenance work in the territory extending from Mile Post 508 near Aroya, Colorado, to Mile Post 547 near Limon, Colorado. Claimants' assigned hours extended from 7:30 a.m. to 4:00 p.m., with a 30-minute meal period. On Friday, October 6, 1978, Limon, Colorado Police Officer B. Paintin called Chief of Police J. Trahern on their dispatch radio at approximately 9:00 a.m., indicating he was following Sectionman J. Hobson's dog who was not on a leash in South Limon in violation of the local leash ordinance. Chief Trahern then proceeded to the residence of Sectionman Hobson and observed a Union Pacific section truck occupied by Claimants in the Hobson driveway. This observation took place at 9:20 a.m., or nearly two hours after Claimants' tour of duty commenced, and at the same time Patrolman Paintin arrived at the scene.

Chief Trahern confronted Sectionman Hobson about the leash law violation and emphasized that he wanted the dog leashed. During the conversation Claimant Hobson purportedly told Chief Trahern it was none of his business, Claimant went to his tool shed, Chief Trahern followed him, and upon detecting Mr. Trahern, Claimant, with a pair of pliers in his hand, took a swing at Chief Trahern, after which he was subdued and handcuffed, taken to the Lincoln County Jail in Hugo and incarcerated on a charge of harassment. The report of the Limon Police Department indicates Section Foreman Hosack and Sectionmen Leach, Rhodes and Tarver appeared at the County Jail in Hugo at 10:45 a.m. the same date to talk to Claimant Hobson, and at approximately 11:15 a.m. they reported at the Town Hall in Limon to allegedly discuss Mr. Hobson's situation with the Sheriff. Claimant Hobson remained confined untill 12:00 Noon, October, 6, 1978, when he appeared before a judge, was found guilty as charged, and a personal recognizance bond of $250.00 was set, with a court appearance scheduled for 10:30 a.m. on November 9, 1978. The payroll submitted for Section 3243 indicated all five Claimants worked the entire eight hour shift on October 6, 1978, although the record later established that time sheets were filed ahead of time to meet payroll needs and later were corrected through initiated actions by Section Foreman Hosack, Mr. Tarver, and Mr. R. Chamberlain, Roadmaster's Clerk.

According to the Carrier, "No Carrier official having jurisdiction or authority in the Track Department became aware of the above incident until Special Agent D. A. Low of the Security and Special Service Department rendered a report of the incident dated November 13, 1978, to his immediate superior, who, in turn, under date of November 15, 1978, forwarded a copy of the report to Division Engineer D. C. Griffin of Carrier's Kansas Division, who has jurisdiction over Section 3243. Mr. Griffin received the report on November 20, 1978, and that was his first knowledge of the incident." Claimants were notified on December 8, 1978, of charges against them in connection with their activities on October 6, 1978. The charges filed against Section Foreman Hosack and Sectionman Hobson involved Carrier's General Regulations 700 and 702, the General Notice, and General Rule "B" of Form 7908. Sectionmen Leach, Rhodes and Tarver were charged with violating Carrier's General Rule "B" and General Regulations 702 and 704 of Form 7908. These regulations read:

"GENERAL NOTICE

Safety is of the first importance in the discharge of duty.
Obedience to the rules is essential to safety.
To enter or remain in the service is an assurance of willingness to obey the rules.
The service demands the faithful, intelligent and courteous discharge of duty."

"GENERAL RULES

* * *

B. Employes must be conversant with and obey the rules and special instructions. If in doubt as to their meaning, they must apply to proper authority of the railroad for an explanation."

"GENERAL REGULATIONS

700. Employees will not be retained in the service who are careless of the safety of themselves or others, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will, or who do not meet their personal obligations.

* * *

702. Employes must report for duty at the designated time and place. They must be alert and attentive and devote themselves exclusively to the company's service while on duty. They must not absent themselves from duty, exchange duties, or substitute others in their place without proper authority.

704. Employes are required to report any misconduct or negligence affecting the interest of the railroad.

Withholding information or failure to give factual report of any irregularity, accident or violation of the rules is prohibited."

The record is clear that Section Foreman Hosack and Claimants were at Sectionman Hobson's home because Mr. Hobson had lost his gloves that morning earlier while on duty.

****

Rule 48(a) reads in pertinent part:

"Formal hearing under this rule, shall be held within thirty (30) calendar days from the date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated."

In the view of the Carrier, charges properly were filed under date of December 8, 1978, with hearing initially scheduled for December 18, 1978, which action was taken after the departmental officials became aware of the October 6, 1978 incident on November 20, 1978, following the receipt of Special Agent Low's report. The Carrier contends that the officials did not become knowledgeable of the October 6 occurrence until November 20, 1978. The Company's argument is stated as follows: "In this regard, the Organization apparently feels the use of the word "Company" in the text quoted hereinbefore from Rule 48(a) means that whenever anyone working for the Union Pacific Railroad has knowledge of an occurrence which could result in a disciplinary proceeding the 30-day period commences, regardless of whether the occurrence is brought to the attention of officials or supervisors who are charged with the administration of discipline involving employes subject to the Schedule Agreement between the parties hereto. To the Carrier's view, such an interpretation and/or application was outside the intent and purpose of the parties

signatory to the rule revision inasmuch as it would be totally unreasonable and unrealistic. In this regard, the revised Rule 48 (Carrier's Exhibit 'A') was distributed only to officers and supervisors within the Engineering Department who are charged with supervising and directing the work activities of their subordinates subject to the collective bargaining agreement between the parties hereto. Obviously then, since such officers and supervisors must apply the agreement rules as written, the only reasonable determination to be made regarding 'the knowledge of the occurrence' is when the officers and supervisors responsible for applying the agreement and administering discipline gain knowledge of same, and this is precisely what resulted."

Rule 48(a) deals with the holding of formal hearing within prescribed time limitations. By necessary implication, the rule presupposes the exercise of managerial authority in the determination of whether formal hearing shall be held. Obviously, without knowledge of the occurrence to be investigated, the managerial authority cannot be exercised. The knowledge of "the Company", and the knowledge of the requisite managerial authority, it would seem, mean the same thing insofar as the purpose of the language goes. It would not be reasonable to require the holding of a formal hearing without knowledge by the requisite managerial authority of the occurrence to be investigated. Even though knowledge of the occurrence might be had by some employee or other of the Company, it would be absurd to expect managerial authority to determine whether to hold formal hearing when managerial authority was ignorant and bereft of knowledge concerning the occurrence. The managerial authority contemplated by Rule 48(a), as urged by the Carrier, constitutes "the officers and supervisors responsible for applying the agreement and administering discipline". Conceivably, however, there may be circumstances in which some other construction of the term "the Company" may be appropriate.

Roadmaster Howland comes within the classification of "the officers and supervisors responsible for applying the agreement and administering discipline", and the Organization contends that Roadmaster Howland had knowledge of the incident on the day of the occurrence, October 6, 1978. The transcript of the investigation quotes him as saying, "I had no knowledge except for rumors...I just heard he got in trouble with his dogs." (p. 11) It does not seem that knowledge about trouble with dogs reasonably would trigger suspicion of such probability as to call for checking into whether there was arrest for harrassment of police. The burden of establishing actual knowledge by Roadmaster Howland has not been satisfied.

In the circumstances of this particular case, however, constructive knowledge by the Roadmaster, rather than actual knowledge, may be sufficient to meet the requirements of Rule 48(a). The facts are beyond question that the Roadmaster's Clerk participated in the correction of the pay-roll records involved. The record is also persuasive that the Claimants went into detail in informing the Roadmaster's Clerk of the occurrence on October 6, 1978. Be that as it may, the fact of pay-roll correction is admitted. The Office of the Roadmaster embraces the Roadmaster's Clerk in its scope, including the transaction of such business as may be delegated to him. The customary duties of the Roadmaster's Clerk include within their scope the responsibilities of being informed and acting upon the irregularities, including pay-roll, of the occurrence of October 6, 1978. The Roadmaster, as principal, is presumed to possess the knowledge of the Roadmaster's Clerk, his agent, acquired by the Roadmaster's Clerk while acting within the scope of his authority.

It follows that the knowledge of the Roadmaster's Clerk, Mr. Chamberlain, must be imputed to be the knowledge of Roadmaster Howland. Since such knowledge was had on the day of the occurrence, October 6, 1978, it is clear that more than thirty (30) days had elapsed within the intendment of Article 48(a) and that Article 48(a) was not complied with.

A W A R D

The Claim is sustained.

PUBLIC LAW BOARD NO. 2267

Joseph Lazar

JOSEPH LAZAR, Chairman and Neutral Member

S. E. Fleming

S. E. FLEMING, Employe Member

E. R. MYERS, Carrier Member

See Dissent

Dated: March 19, 1980

CARRIER'S DISSENT TO AWARD NO. 9,
CASE NO. 11, PUBLIC LAW BOARD
No. 2267

The "claim" before this Board was based on the allegation that Carrier violated Rule 48, Discipline and Grievances, of the Schedule Agreement, as revised effective October 1, 1978, and particularly Paragraph (a) thereof.

The responsibility of the Neutral in the case was, therefore, to interpret Rule 48(a), and particularly that portion of the rule reading as follows --

> "Formal hearing under this rule shall be held within thirty (30) calendar days . . . from the date the Company has knowledge of the incident to be investigated."

Accordingly, the question before the Neutral was "When does the Company have knowledge?"

As Award No. 9 indicates, the Carrier official involved in this case (Roadmaster Howland) did not have knowledge of the incident in question on October 6, 1978. In this regard the Neutral stated --

> "The burden of establishing actual knowledge by Roadmaster Howland has not been satisfied."

In that posture, there is no doubt the Carrier complied with Rule 48(a), having acted within the 30 calendar day period specified in Paragraph (a).

However, the Neutral, obviously desperate to sustain the claim, improperly implied Agency Law. Using such concepts as "constructive knowledge" and "agent-principal relationship," the Referee weaves a tangled web. Furthermore, his reliance on agency principles is specious.

First, the use of the agent-principal concept to describe the relationship between the Roadmaster's Clerk and the Roadmaster is incorrect. A simple review of the basic principles of Agency Law illustrates this point. The following quotation is from W. A. Seavey's Law of Agency:

> "Authority is the privileged power of the agent to bind the principals, the privilege

being based upon the principal's manifestations of a consent to him."

Nowhere does the record in this case indicate that the Roadmaster authorized the Roadmaster's Clerk to act for him in discipline cases. In fact, the record points out that only the Roadmaster received the Carrier's instructions concerning Rule 48. Without a positive showing that the Roadmaster's Clerk was the authorized agent of the Roadmaster in disciplinary cases, there is no basis for the Referee's decision.

Second, even if there was an agent-principal relationship between the Roadmaster's Clerk and the Roadmaster, the Referee's use of constructive knowledge is improper. It is a mystery how the Referee can say that knowledge of the October 6, 1978, incident by the Roadmaster's Clerk may be presumed to be known by the Roadmaster. Again, Seavey on Agency:

"As personal knowledge is required for liability, the knowledge of an agent is not imputed to the principal."

It is the Carrier's position that personal knowledge by the Roadmaster is required in this case. The handling of discipline is strictly a managerial responsibility.

Finally, for the Referee to rule that an agent-principal relationship exists in discipline matters, and that actual knowledge of a disciplinary offense by an agreement employe may be imputed to an officer of the Company, forces a responsibility on the agreement employe which is not his. Specifically, the decision places all agreement employes in a true position of jeopardy. Carrier's General Regulation 704 specifically requires employes to report any misconduct, and the administration of discipline as a result thereof has been and remains solely a management function. In the instant case, the Roadmaster's Clerk, as an agreement employe, was not authorized to act on behalf of the Roadmaster, or management generally, with respect to matters involving the realm of discipline, and the Award is incorrect.

For the reasons contained herein, I dissent.

E R Myers

E. R. MYERS
Carrier Member