PUBLIC LAW BOARD NO. 2335

Award No. 1

Case NO. 2
File CM-228

Case No. 3
File CM-229

Parties to Dispute: Brotherhood of Railway Carmen of the United States and Canada and Southern Railway Company

Statement of Claim: Claim on behalf of T. K. Williams that he be paid five (5) hours at the pro rata rate for being called in outside his bulletin hours.
Claim on behalf of R. K. Williams that he be returned to service with all rights unimpaired including reimbursement of any expenses incurred account of loss of coverage under health and welfare benefits and that beginning March 30, 1978 he be paid for all time lost until he is returned to service.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated January 16, 1979, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

Claimant entered the Carmen Student Mechanic Training Program and, after the appropriate period of time therein, in Phase 4 thereof, Claimant was promoted. He established seniority on a special seniority roster for promoted student mechanic's and thereby had bidding rights among other promoted student mechanics. As such these student mechanics are obligated to exercise their seniority as promoted student mechanics to fill existing journeymen vacancies and thereby protect Carrier's service.

Claimant informed his Master Mechanic, R. F. Lentz, during March of 1977, that he had become a member of the Worldwide Church of God, and, that as a member thereof, he was required to observe his Sabbath by refraining from performir any duty (work) from sunset on Friday until sunset on Saturday. While Claimant

remained unpromoted the Master Mechanic was able to accomodate Claimant's religious beliefs by giving him assignments which did not conflict therewith. However, Master Mechanic Lentz had forwarned Claimant Williams that at such time as he became promoted he would thereby be required to bid on an assignment and would be required to work each and every day of that assigned position.

Claimant became promoted on February 16, 1978. However, Claimant's seniority did not entitle him to a job with Fridays and Saturdays as rest days. He bid the vacancy of a car repairman and inspector on the third shift, Tuesday through Saturday, with Sunday and Monday as assigned rest days. Claimant was assigned thereto on February 28, 1978. The following Friday, March 3, 1978, he called the General Foreman stating that although he was not sick he would not work that night. The following Friday, March 10th, Claimant again did not work. However, he failed to notify any Carrier official that he would be absent.

Claimant was requested on March 13, 1978 to meet with Master Mechanic Lentz and General Foreman R. R. Roberts. The purpose of the meeting was to discuss Claimant's absences on the two previous Friday nights and to explain to him that he had an obligation to protect his assignment on all five (5) days of his work week. Claimant reintereated that due to his religious beliefs he could not work on Friday nights. The following Friday night, March 17th, Claimant, again, did not work his assigned position.

As a result of these three absences a preliminary investigation was held by his General Foreman on Saturday, March 18, 1978. Claimant was charged with failure to protect his assignment and unexcused absenteeism on three consecutive Friday nights in violation of Rule 30(b). At the conclusion of the preliminary investigation Claimant requested a formal investigation. It was held March 22, 1978. As a result of the formal investigation, Master Mechanic

Lentz concluded that Claimant was guilty as charged, and that,as a result of Claimant's oft-stated refusal to protect his assignment on Friday's in the future, it was determined that progressive discipline would not act as a corrective measure in Claimant's case. Therefore, Claimant was dismissed from service by letter dated March 30, 1978.

There can be no question here, but that Claimant was guilty for his failure to protect his assignment as charged. What is at test here is whether Claimant's absenteeism was excuseable because of Claimant's religious belief as is here contended.

The Board finds that Carrier's conclusion that Claimant's absences were not excuseable because of his religious beliefs is sound, proper and a conclusion that will be here upheld. The issue raised is not a new one in the industrial world. A case involving facts similar to those herein was brought before the United States Supreme Court in Trans World Airlines, Inc. vs. Hardison, 432 U.S. 63 (1977). There, the grievant, Hardison, was employed in a department, which, as here, operated around the clock. Employee Hardison was subject to a seniority system similar to that of Claimant's. There, grievant Hardison, like Claimant Williams here, became a convert to the Worldwide Church of God. There, as here, Hardison informed his Supervisor of his religious beliefs. There, as here, attempts were made by that Carrier to accommodate him. However, such were only temporarily successful. There, as here, Hardison did not have sufficient seniority to hold a position with his Sabbath as an off day. TWA, like Carrier here, agreed to allow the union to seek a change of work assignments, but that union, like the organization in this dispute, was not willing to breach the seniority system. TWA, as did this Carrier, rejected a proposal to allow the employe to work only four days a week contending that such would imperil critical functions in its operations.

When no accomodation could be reached, Hardison refused to work Saturdays and was discharged from service.

Hardison brought an action for injunctive relief against TWA and the Union under Title VII of the Civil Rights Act of 1964, claiming that his discharge constituted religious discrimination. That action ultimately wound up before the U. S. Supreme Court. Hardison and the EEOC argued, before the Supreme Court, that the statuatory obligation to accomodate the religious needs of an employee, imposed by Title VII of the Civil Rights Act of 1964, takes precedence over both the collective bargaining Agreement and the seniority rights of other employees, thereby obligating TWA to order someone else to work Hardison's assignment on the Sabbath. In reply thereto the Court stated in part:

> "Collective bargaining aimed at affecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agree-upon seniority system must give way when necessary to accomodate religious observances. ID. at 79."

The Court, in reversing the decision of the Court of Appeals, rejectad all of the three "reasonable alternatives" suggested by the lower Court. In rejecting the alternative that the seniority system should be breached in order to arrange a "swap" between Hardison and another employee, the Court held, that unless the seniority system is shown to have a discriminatory purpose, following that seniority system is not an unlawful employment practice even though the system might have "discriminatory consequences". It held:

> "It would be anomalous to conclude that by reasonable accomodation Congress meant that an employer must deny the shift in job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far."

Thus, the Court in TWA found that Title VII of the Civil Rights Act of 1964 does not require an employer to violate seniority provisions or to discriminate

against some employees in order to enable others to observe their Sabbath. Furthermore, it does not require the employer to bear more than de minimus additional costs to accomodate one employee's religious needs when no such costs were incurred to give other employees the days off that they wanted. It found that such a requirement would be a due hardship and would involve an equal treatment of employees on the basis of religion.

The TWA ruling has been followed in three recent circuit court of appeals cases. Rohr vs. Western Electric, 562 F. 2d 829 (8th Cir. 1977), upholding the discharge of an employee who refused to work his shift on his Sabbath where modification of the seniority system (four-day work week) or overtime payments were the only available means of accomodation; Chrysler Corporation v. Mann, 561 F. 2d 1282 (8th Cir. 1977), upholding the dismissal of an employee who had shown disinterest in explaining his religious needs to his employer and who did not attempt to use the leave of absence procedure of the collective bargaining agreement to cover his religious absences, but rather insisted on serving punishment with his employer would have waived, and later refused the employer's offer to reinstatement with full seniority; Jordan v. North Carolina National Bank, 565 F. 2d 72 (4th Cir. 1977), upholding the rejection of an applicant who requested a guarantee from the employer that she would never have to work on Saturdays, since such a guarantee would constitute an overdue burden on the conduct of the employer's business.

In applying TWA to the instant case, the Board concludes that Carrier has acted in good faith. It made reasonable efforts to accomodate Claimant. Notwithstanding the highly cooperative attitude of Master Mechanic Lentz and his willingness to accommodate Claimant, said Master Mechanic properly and most timely placed Claimant on notice that once he (Claimant) was promoted then he (the Master Mechanic) must adhere to the contract and that Claimant would be expected to work all assigned days. In fact, Claimant, during the investigation, conceded

that every effort had been made to accomodate his religious beliefs. Claimant was told during his employment interview that the railroad was a 365 day a year continuous operation. He indicated on his employment application that he would work any day any shift.

We do not deem it necessary to fill this record by citing precedential Board authority which supports the right of Carrier to dismiss employees who do not protect their assignment on a full time basis. Carrier has the right to expect its employees to fulfill their obligation to work all of the assigned work days and to protect the duties for which they were hired. See, among others, Awards 6710 and 7348 (Second Division) also PLB 868, Award 41, and also Third Division Award 14601. There can be no question but that Claimant would not work on Friday nights. Claimant perhaps stated it best in the investigation, "I told you that I wouldn't work on Friday's, no way I could work on Friday nights.". In the circumstances dismissal was the justified and appropriate measure of discipline in the instant case.

The Board in regards to Case CM-228 finds that Claimant is not entitled to be paid for attending the March 13, 1978 meeting. Here the Master Mechanic was again trying to accomodate Claimant in finding a solution to his problem. We do not construe that such meeting falls within the language of Rule 5. which reads: "Employees called or notified to return to work outside bulletined hours shall receive pay for no less than five (5) hours". Claimant was neither called to return nor to perform work. In fact no work or service was performed by him under the aforementioned Call rule. Such claim will be denied.

Award Claim denied.

C. E. Wheeler, Employee Member

R. S. Spenski, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Wilmington, Delaware, March 31, 1979.