

Public Law Board No. 5110

Case No. 1
KLR-43-97

UNITED TRANSPORTATION UNION

and

ELGIN JOLIET AND EASTERN Rwy CO.

Statement of Claim

The organization requests that the discipline assessed Mr. Cooper's record be expunged, and that he be compensated for all time lost since being improperly dismissed on March 17, 1997

Procedural Question

Is the Organization's Appeal of Mr. Cooper's dismissal barred under the time limit on claims rule?

Facts: Procedural Issue

The claimant was dismissed on March 17, 1997 after being assessed demerits which brought him beyond the 100 demerit total. The organization alleges that it faxed its appeal of the discipline on April 22, 1997 and therefore within sixty days from occurrence. The record contains an appeal letter of that date which has the transmission verification for that date, for "04:34". On July 7 1997 the Organization sent the Superintendent a copy of the fax transmission of April 22 1997 and explained further that

After speaking with N.C. Miller of your office, it is apparent that the carrier will claim that the appeal was not received. With that in mind, and without prejudice to the organizations' position contained therein, be advised that this copy which is being sent by FAX transmission is to be considered as the organization's formal appeal in behalf of Mr. Cooper.

It should be noted that the July 7th facsimile transmission verification report marks 07/07/1997 05:09 as the date and time of transmission and that the Carrier acknowledged receipt of that July 7th fax. The Carrier thus received a facsimile apparently sent in (or made to state) the same early morning time frame ("05:09" or 5:09 AM) as the disputed April 22nd appeal letter which, according to its transmission verification form, was sent at 04:34 (ie AM).

The Carrier contends that the July 7th facsimile is the first communication it received, and that the appeal is therefore time barred. The Organization asserts that it has been utilizing facsimile to send its appeals since 1995. The Carrier does not dispute this but argues that when a document is so transmitted, further steps must be taken to assure delivery, such as a follow up call, or a mailed copy. The Carrier argues that its fax machine is in a public part of the Superintendent's office, serves several persons and that "providing a computer generated receipt, which may or may not be accurate, fails to satisfy the sender's burden to prove receipt....the fact that the time, date and identification code on a fax machine are controllable by the operator of the machine also invites fraud." Neither party adduced evidence concerning whether their facsimile systems have delayed transmission for backed up messages.

Certain awards submitted indicate that these parties have used facsimile at least as far back as 1991. The carrier has itself relied on the date notation stamped at the top of a document on an unrelated matter where its own timeliness was at issue. (PL Board 4996 award No.5) Despite the many years of widespread facsimile use, the parties had not, as of the date of this hearing, created language to address this matter. The precedent on the question of burden of proof is clear (albeit generally discussed in the context of use of the mails). The presumption that a properly addressed, stamped, and deposited letter has been received is a rebuttable presumption and if the addressee denies receipt the burden is on the addressor to prove that the letter was in fact received. This proof rule logically applies to other means of transmission selected by the sender.

I conclude that the sender's burden has been met here. There is no evidence that facsimile machine date recording mechanisms are not quite generally reliable. The carrier suggests potential manipulation but it bases this argument as to the April 22nd document transmission receipt on the fact that another document sent in an unrelated matter by facsimile many months later was erroneously dated as to both year and month. That admittedly bizarre but remote in time event does not overcome the persuasive evidence here, specifically the fact that the April 22nd 1997 document appeal letter contains both sender information and the verification of transmission report and was sent (transmitted) in an early morning time frame identical to the later July 7th facsimile which was received.

The fact that the receiving machine is used by several persons in the Superintendent's office does not overcome the objective evidence of transmission and receipt provided here. I conclude that the Organization has met its burden of proof that the facsimile of April 22nd was sent and received by the office of the Superintendent. Therefore this appeal is not time barred.

Facts on the Merits

On February 8, 1997 at 4 AM the crew caller called Claimant\ Brakeman L.C. Cooper to have him report for a 6 AM switching assignment. He was listed in mark-up status as first out, available on the Joliet Brakeman extra board. Claimant Cooper told the crew caller that "I need to talk to a supervisor because I got a car problem. I won't be able to make it. " Systems supervisor Keith Griffin picked up the phone and Mr. Cooper described his brake problem, that "it just happened....my car just went sour on me again..I got to try to get something done to it. Okay?" Mr. Griffin replied that he was not going to mark him off, and alluded to an earlier matter where the Claimant had "not brought anything in". Mr. Cooper said that he "had something for that. " Mr. Griffin replied again "I'm not going to mark you off. I'll leave it at that. Alright?" The Claimant responded "okay." However, he then told the crew caller to mark him off. There is no indication that the claimant was warned that he would receive the maximum possible demerits or that there was any warning whatsoever. During the investigation Mr. Cooper indicated that he knew about his car problems at about 3 AM that morning but had not himself tried to call off in advance.

Mr. Cooper was assessed the maximum sixty demerits for this event of "failure to protect assignment consistent with seniority, marked off on call." He had previously been at 68 demerits. The new total now being 128 demerits, well beyond the 100 demerit dismissal level, he was dismissed. Not long prior to this event he had received 30 demerits (November 1996: "failure to properly protect assignment.")¹ Prior to that, still in 1996 he had received ten demerits each in May and June for "failure to protect assignment... ..unavailable." In 1995 he had received a 3 demerit and 5 demerit penalty for being "unavailable for service" or "when called." In 1991 the claimant had been reinstated from a previous dismissal.

The Carrier cites two rules violations from this mark-off: General Instruction #6 and Rule 1.6.2.-Marking Off.² That latter

¹ The claimant's receipt of 30 demerits for not being available for call had been sustained by PL Board Chairman Harris in October 1997 and the Chairman had noted that the assessment was "appropriate in view of the claimant's record of missing calls."

² General Instruction #6: "Each trainman and Engineer, regardless of assignment, is required to avail himself for service upon call and the practice of being unavailable and/or missing a call is strictly prohibited." Rule 1.6.2.-Marking off: "When an

rule was first posted in November 1996. The Organization argues that 60 demerits for the February 8th mark off on call was "excessive in the extreme" and "clearly did not fall within the carrier's progressive discipline policy for missing calls." The Organization contends that previous to this incident the most discipline assessed for "the only similar case" of marking off on a call was three demerits "(Robinson case). While the Robinson discipline states that it was for a rule 6 violation it does appear to have been for a failure to accept a call. The Robinson event occurred in September 1996 or two months before rule 1.6.2 was published. There is no explanation for how the three demerits were selected for him on a progression scheme except for the comment in the letter to Mr. Robinson that they were "determined upon consideration of your prior record." The Robinson record at that time was 50 demerits, compared to 68 demerits for this claimant. There is indeed a vast difference between 3 demerits to Mr. Robinson and the 60 demerits to the claimant and the Carrier has not explained this except of course that this claimant had just received 30 points and the next (possible) step is 60 points. However, language in the various memos (all of them very old) also state that there is some flexibility.

The Organization argues that

it is anticipated that the carrier will take the position that claimant's prior history of missing calls justified the discipline assessed in the instant case. However, while there exists a progressive discipline procedure for missing calls, this offense was the first of this nature for the claimant. In the interest of fair play, increased penalties should not be loaded on an employee for offenses which are unrelated.

While there is some evidence of disparate response by the Carrier, I cannot agree with the Organization argument of "unrelated offenses." Whether or not this was, as claimed the first specific "mark off on call" violation in the claimant's spotty absence history, there is very little distinction between absences via not being available for calls and via marking off on

employee wishes to be absent or is unable to perform service, employee must notify the proper authority promptly and must not wait until a call for duty is received to request permission to mark off."

call.³ At the same time, there had not previously existed a "mark off on call" separate rule and the record is devoid of other instances of how demerits were assessed. I find no fundamental unfairness in the treatment of a mark off on call as a step within the employee's existing progressive record of "being unavailable when called." That is certainly what it is. However, I do note the lack of any claim that employees were notified of how this new rule would be treated. Would they have a basis to know that there would be an "automatic" move to the next higher progression? Notice of where a new rule fits into an existing scheme did not occur here. The Carrier did claim that "marking off on call" has not ever been treated as a separate category from that described commonly as "unavailable for call." However, it also did not submit records of other demerits issued for this new rule specifically.

The Progressive Discipline Policy as issued in 1980 states that employees "habitually absent from service without good and sufficient reason over an extended period of time" will be subject to a series of progressions starting with personal contact with the supervisor, and then five, ten, thirty and sixty demerits. A memo promulgated in 1981 states that "assessment of demerits...will be based solely on the gravity of the offense and the employee's prior record....(and that) "all other aspects of the carrier's discipline policy remain unchanged." The prior record of Mr. Robinson is not known to me, but his 50 demerits are not that much lower than claimant Cooper's 68 merits when he marked off on call.

Claimant Cooper appears not to have gotten the message about his responsibilities in this regard and he has had some breaks on prior points. He had already moved through all listed progressive steps and just four months prior to his mark off on call here a Public Law Board had denied his appeal of 30 demerits. Nonetheless, the imposition of 60 demerits appears to have been selected as the "next step" automatically, without the claimant being on prior notice of where this new rule would fit. Allowing for the proper consideration of many factors, and noting this is not an isolated event for this employee, I nonetheless conclude that there was an element of arbitrariness in the selection of 60 demerits for this claimant versus the 3 demerits for Mr. Robinson.

On the unique facts here, and due to my concern with the consistency\disparity of discipline, and with the adequacy of direction to employees about the placement of the new rule in existing progression, the claim is allowed to the extent that the

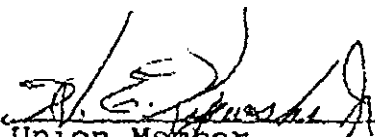
³ The discipline policy for excessive absenteeism lists on the same line "absence, missed or marked off on call." and lists as the "suggested action steps" "personal contact by supervisor, 3,5,10,30,60 (demerits.)


penalty to be imposed is reduced to 30 demerits, placing claimant at 98 demerits. The reinstatement is without back pay and is subject to his successfully passing a reemployment physical. All other claims are denied.

Award

The claim is allowed in part, as stated.


Eliehn J. Alexander, Chairman


Union Member
dated at JULIET, IL
on 2-23-99

 DISSENT
Company Member
dated at JULIET, IL
on FEB 23, 1999