

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on August 25, 2003, when it dismissed the Claimant, Mr. J. D. Theas, pursuant to the Letter of Understanding dated [July] 13, 1976, for allegedly being absent without permission for more than 5 consecutive days, in violating Maintenance of Way Operating Rule 1.6, and 1.15.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately reinstate the Claimant to service with benefits and seniority unimpaired and make him whole for all wages lost account of this violation. Additionally, the Carrier shall remove any mention of this incident from the Claimant's personal record. [Carrier File No. 14-03-0300. Organization File No. 40-13A1-0312.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Jimmy D. Theas, had been an employee of the Carrier since August 13, 1997. His occupation was Gang Trackman, and he had exercised his seniority and was intended to report for work at Waynoka, Oklahoma on July 28, 2003. He did not report on that date, however, and was allowed five days of vacation and four days of personal leave, which kept him on the Carrier's payroll until and including August 7, 2003. Still not having reported for duty after that date, he was sent a letter by the Carrier's Division Engineer on August 25, 2003, reading as follows, in pertinent part:

This is to advise you, effective this date your seniority and employment with the Burlington Northern Santa Fe Railway Company is hereby terminated pursuant to the provisions of Letter of Understanding dated July 13, 1976, for being absent

without proper authority for more than five (5) consecutive work days beginning August 8, 2003, and forward.

The Letter of Understanding dated July 13, 1976, referred to by the Division Engineer, reads as follows:

In connection with application of (Rule 13) [the Discipline Rule] of the current Agreement, this will confirm our understanding reached in conference today that, effective October 1, 1976, to terminate the employment of an employee who is absent from duty without authority, the Company shall address such employee in writing at his last known address, by Registered or Certified Mail, return receipt requested, with copy to the General Chairman, notifying him that his seniority and employment have been terminated due to his being absent without proper authority and that he may, within 20 days of the date of such notice, if he so desires, request that he be given an investigation under (Rule 13) of the current agreement.

NOTE: Effective January 1, 1984, the above understanding is to be applied only in cases where the employee is absent from duty without authority more than five (5) consecutive work days.

The Claimant submitted his request for an investigation within the prescribed time limit, and an investigation was scheduled for October 10, 2003, on the following charge:

[F]or the purpose of ascertaining the facts and determining your responsibility if any, in connection with your possible violation of Rules 1.6 and 1.15 of the Maintenance of Way Operating Rules, . . . in connection with your alleged absence without proper authority beginning August 8, August 11, August 12, August 13, August 14, August 15, August 18, August 19, August 20, August 21, August 22, 2003, while working as Trackman on Waynoka Section, Panhandle Subdivision, Kansas Division.

The cited Maintenance of Way Operating Rules (MWOR) read:

MWOR 1.6

Employees must not be

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest

5. Immoral
6. Quarrelsome
or
7. Discourteous.

MWOR 1.15

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.

By request of the Organization, the investigation was postponed until and held on October 23, 2003. The Claimant was present and he was ably represented by the Organization's Vice General Chairman. Roadmaster Darin E. Martin appeared as a witness for the Carrier. A transcript of testimony and evidence presented in the investigation is in the record before this Board.

The Claimant did not deny his absence from work after August 7, 2003. He had not worked since February, 2003, and he explained the background for his absence between February and July. He had been ticketed for an off-duty offense, driving under the influence of alcohol (DUI) in January, which resulted in suspension of his driver's licence. Additionally, he had tested positive for alcohol use in a Carrier-ordered test in February. As a consequence, being a first-time offender, he was subject to the Carrier's program for such cases, undergoing in-patient treatment for alcoholism. Following that, he had a court appearance on the DUI charge, after which he underwent a court-ordered evaluation and aftercare.

Finally, in July, he was released by the Carrier to resume work. At that time, the only position he could hold was in Waynoka, Oklahoma, some 235 miles from his place of residence in Americus, Kansas. Supposed to report in Waynoka on July 28, 2003, he was unable to obtain any form of public transportation between his residence and Waynoka. His driver's license was suspended, and there were no other employees regularly traveling between these points with whom he could arrange a car pool.

On July 30, he contacted Roadmaster Martin, and explained his dilemma. To allow him additional time to work out travel arrangements, Mr. Martin testified that he arranged to have the Claimant's five remaining days of vacation advanced from August 25 to begin on July 28, and following that, four personal days, which kept him on the payroll through August 7. Mr. Martin had no further contact with the Claimant after that.

The Claimant did not dispute any of the foregoing testimony by Mr. Martin. His own efforts to resolve his transportation problem can best be summarized in his own words, in the investigation transcript:

71. Q. You'd lost your driver's license. So, at that point, you started checking other avenues of travel?
A. Correct.
72. Q. And you checked with the bus routes; and, and as you stated, the closest bus you could get to this location was an hour and a half away?
A. Correct.
73. Q. And there's no Amtrak or any train service that you could take to get there?
A. Not that I was aware of.
74. Q. Right. At that point, you contacted Mr. Martin and expressed your concerns to him and see if you guys could work something out?
A. Correct.
75. Q. And one of the options that was available to you was to burn up some of your vacation time that you had?
A. Correct.
76. Q. And that's what you did?
A. Right.
77. Q. All the time that you were on vacation, you were working with manpower¹ in Kansas City?
A. Yes, I was.
78. Q. You were working with the division engineer's office out of Amarillo?
A. With Jinger, yes.
79. Q. And Jinger works in the division engineer's office?
A. Correct.
80. Q. And, you were also working with Mr. Hemphill of the union to get some kind of hardship or, or temporary leave of absence till you could figure out what to do or get another job?
A. Correct.
81. Q. And when I say another job, I meant another job with the Carrier?
A. Correct.

¹The Board believes "manpower" refers to the Carrier's Manpower Planning Office, which, according to Award No. 42 of Public Law Board No. 6102, "handles the bulletining, assignment, and displacement of employees in the Maintenance of Way Department."

82. Q. And there was another job available to you that you were working on getting on a gang, is that correct?
- A. Correct.
83. Q. And if you could have got to that job, you, there was a ride you could have carpooled [*sic*] with?
- A. Correct.
84. Q. And, but, before you could get that handled, you got the termination letter?
- A. Correct.
- ...
100. Q. Mr. Theas, I know you were set to report to Waynoka; but earlier we were talking about conversations with manpower and with the union and with the division engineer's office. And there was a gang job available to you is that we were working to get you on, is that correct?
- A. I was working to get myself there.
101. Q. Oh.
- A. And I found that there was a possible way for me to go.
102. Q. Right. And that would have been on a mobile gang and when you got to that mobile gang there was an employee there that you could carpool [*sic*] with, correct?
- A. Correct.
103. Q. And that was almost, or getting close to being completed when you got the termination letter?
- A. I got the termination letter on Friday, and I was going to go on Monday.
104. Q. Okay. So, you, you were going to the gang on Monday?
- A. Yeah.
105. Q. And, but, on Friday, you got the termination letter; and, therefore, you couldn't...
- A. I didn't proceed with the process.
106. Q. Okay. And if you would have got to report Monday, that would have enabled you to, to go to work because, at that time, you had made arrangements for a ride and all of that?
- A. I would have been to work on Monday if I would have received the paper on Monday, yes.

On November 20, 2003, the Carrier's officer who conducted the investigation advised the Claimant, "No evidence was offered during the hearing that would cause the Carrier to set aside this dismissal."

The Organization promptly appealed this disciplinary decision, requesting leniency, but also arguing that the Carrier's decision was "extreme, unwarranted and unjustified," and the discipline "excessive in proportion to the Carrier's allegations." It asks that the Claimant be reinstated with seniority and benefits unimpaired, that his record be cleared of this charge, and that he paid for all wages lost as the consequence.

The Carrier rejoins that substantial evidence was developed to prove the charges, that the Claimant abandoned his job, and the dismissal is neither harsh nor excessive. The Carrier further contends that no supporting evidence was supplied to substantiate the Claimant's assertion that he had worked out an arrangement to report to work on a system gang, as he asserted. The Carrier also points out that the Claimant never contacted Mr. Martin after the expiration of his vacation and personal days were taken, to keep him informed of what he was doing. It argues that the 1976 Letter of Understanding provides for automatic forfeiture of seniority by an employee with unexcused absence of five consecutive work days. It finds no compelling reason to set aside this dismissal. The Carrier denied the claim.

The Board has considered the testimony and evidence in the transcript, and the arguments of the Parties. The first issue which emerges is whether the Board is precluded from vacating or from modifying or reducing the disciplinary penalty in any way, in light of the Organization's request for leniency. Although the Organization did make such a request in its appeal letter, it also argued the case on the basis of fairness, sufficiency of evidence, and the degree of discipline assessed. In its response, the Carrier took no notice of the request for leniency, but proceeded to explain why the claim submitted by the Organization should be declined.

As a general principle, leniency is a power reserved to management. The National Railroad Adjustment Board's Third Division Award No. 20236 typifies such a holding:

[T]he General Chairman had abandoned the claim for time lost and was proceeding with the appeal on a "leniency" basis. . . . we can but conclude that the case before us involves a plea for reinstatement solely on a Leniency basis. . . . This Board has consistently held that the reinstatement of an employee on a leniency basis is solely within the discretion of Carrier. [Emphasis added]

Award No. 20236 dismissed the organization's claim. In the instant case, however, the Organization has scrambled the issues by presenting a two-barreled approach, requesting leniency and, at the same time, arguing fairness, sufficiency of evidence, and excessive discipline. One could wish for a clearer exposition of its best arguments. This Board will take refuge in Award No. 20236's employment of the adverb "solely," and the holding we find in Award No. 22, Public Law Board No. 6204, which involves this same Organization and Carrier. That Board held,

A Board such as this cannot issue a ruling on leniency basis. Decisions related to leniency are reserved for the employer. This Board can, however, review extenuating circumstances, as they exist, in order to ascertain whether the discipline assessed in any case may have been arbitrary or capricious.

First, it is clear that the Carrier acted within its rights, under the agreed-upon 1976 Letter of Understanding, when it terminated the Claimant for his unauthorized absence in excess of five days. The dismissed employee has the right, however, to request an investigation in accordance with the discipline rule in the Collective Bargaining Agreement. The only purpose which could be served by such an investigation is a disclosure of the facts surrounding the unauthorized absence. Was the employee truly absent? Did he have authority to be absent? Were there circumstances beyond his control which caused his absence? Was he sick or injured? Was he in jail? Was he working for another employer? Are there mitigating circumstances? Perhaps there are many other questions which might arise, but the provision for an investigation limits, to a degree, the irreversible closure of permanent discharge for the absence.

The Carrier's defense against the claim is comprehensive. Clearly, the employee failed to report in Waynoka after August 7, 2003. The Board is not persuaded, however, that the Claimant "abandoned" his job. He was faced with a dilemma of large proportions, i.e., the inability to obtain lawful transportation to his work site from his place of residence. The Board recognizes that the dilemma was of his own making, in that he would not have had his driver's license suspended had he not been apprehended DUI. Well, he's paid the consequences of that offense, but the Carrier itself believes in second chances, as demonstrated in its Employee Assistance Program for first-time drug or alcohol offenders.

Unable to arrange any kind of transportation to Waynoka, the Claimant testified that he undertook steps to obtain alternative employment with the Carrier. He said that he worked with "manpower," a Mr. (or Ms.?) Jinger in the Division Engineer's office in Amarillo, and the Organization's General Chairman to obtain a hardship leave of absence or another position. He asserts that another position was finally found, to which he could commute by a car pool arrangement. The Carrier argues that no supporting evidence of these efforts was supplied. While the Carrier is correct, the general arbitral principle holds that unrefuted assertions are accepted as factual, in the absence of countervailing evidence or testimony. The Carrier had the opportunity to call the Division Engineer's office and the Manpower Planning Office to rebut the Claimant's testimony, but chose not to do so. The Board finds no reason to disbelieve the Claimant's testimony in this regard.

The Claimant did not exercise good judgment when he failed to keep Mr. Martin apprised of his attempts to seek alternative employment with the Carrier. It appears that Mr. Martin was sympathetic to his quandary, and in any event, since the Claimant had displaced on a job under

Mr. Martin's direct supervision, he had an obligation to continue keeping him posted about what was going on.

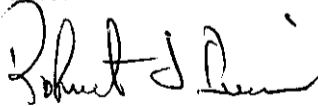
As stated above, the purpose of the investigation is to disclose facts surrounding the unauthorized absence. The investigation may build a record which will support the employee's dismissal but, on the other hand, it may disclose circumstances which will result in a decision not to dismiss him, for any number of reasons.

The Board is persuaded that the Claimant was unable to report to his job for reasons immediately beyond his control. (That his DUI conviction was the remote cause of his dilemma is beside the point, unless we're prepared to quit treating people for alcoholism or drug addiction because it's their own fault.) Mr. Martin went out of his way to assist the Claimant by keeping him on the payroll by advancing his vacation. The Claimant should have repaid that kindness by keeping Mr. Martin informed about his employment plans.

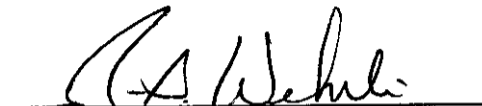
The Claimant asserts that if he had not been terminated, he could have gone back to work on a regional gang by September 1. These facts should have resulted in withdrawal of his dismissal. Until his positive alcohol test in February, 2003, his record had been clear since his employment. The Board determines he should be restored with seniority and other rights unimpaired, but without pay for time lost.

AWARD

The claim is sustained in accordance with the Opinion. The Carrier shall comply with this Award within thirty (30) days from its date.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

July 9 2004
Date