

Award No. 27
Case No. 27
Org's File: D-92-38
Carrier's File: 9300761

PUBLIC LAW BOARD NO. 4561

Parties: United Transportation Union
and
Union Pacific Railroad Company

Statement of Claim:

Claim of Trainman, F.N. Hayden, Jr., for reinstatement to service with the Carrier for all rights and seniority restored unimpaired, including pay for al time lost.

Background: This case devolves upon the dismissal of the Claimant on the charge that he received and kept \$4,000.00 in rental payments for rented Carrier property in Milpitas, California, during November and December 1991.

The Claimant started his service with Carrier in 1973 as a student Brakeman in Spokane, Washington. Over the years, he rose through various positions, and at the time of the incident that led to his dismissal, he was Manager of Yard and Industrial Operations at Milpitas, a non-bargaining position.

During the latter part of 1990 the Claimant got involved in a pool game in which he lost \$6,500.00. He paid \$2,500.00 on this debt, which he borrowed from an individual and which he repaid. However, he still owned \$4,000.00 and had no other sources from which to obtain this money. The Claimant stated he was desperate because the gamblers to whom he owed the money threatened to harm his family.

The Claimant stated a Mr. Reyes wanted to rent a certain Carrier property in Milpitas and wanted the Claimant's assistance in obtaining the lease. The Claimant entered in a

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leasing arrangement, on behalf of the Carrier with Mr. Reyes. However, he pocketed \$4,000.00 which Reyes paid as part of the monthly rent. This fact was discovered as a result of an internal audit made in 1992 by the Carrier. The Carrier dismissed the Claimant as an officer of the Company for his missappropriation of Carrier funds.

After his dismissal, the Claimant attempted to exercise his seniority as a trainman in the Spokane, Washington yard. He was not allowed to do so.

On October 5, 1992 Superintendent Riney served him a notice to attend an Investigation to develop the facts and place the responsibility, if any, in connection with the rental agreement he had made with Mr. Reyes whereby the Claimant had personally received \$4,000.00 in rental payments. The Notice of Investigation stated that the hearing would be conducted in conformity with Rule 74 of the UTU Agreement. The notice further stated that the Claimant would be withheld from service pending the results of the Investigation.

At the Investigation held on October 9, 1992, the Claimant admitted his guilt and reiterated he took the \$4,000.00 to protect his family from the gamblers. At the Investigation he tendered a check for \$4,000.00 to reimburse the Carrier. He also introduced into the record evidence of the several commendations he had received for rendering meritorious service to the Carrier and its customers.

On October 19, 1992 the Carrier notified the Claimant that he was being dismissed from the service of the Company as a

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result of the evidence adduced at the Investigation sustaining the charges filed against him.

On November 15, the Local Chairman appealed the Claimant's discharge. After processing his appeal through the appropriate channels and unable to resolve the matter, the parties placed it before this Board.

Carrier's Position

The Carrier stated it had a valid reason to dismiss the Claimant because he admitted at the Investigation that he missappropriated \$4,000.00 rental money that belonged to the Carrier, to pay off a personal gambling debt. The Carrier properly dismissed the Claimant as a Company official. As a Company official he had no contractual right to a hearing because he was not covered by any collective bargaining agreement, and the Carrier was under no obligation to hold an investigation for a non-bargaining unit employee. He was a management officer and not covered by any agreement rules. Whatever rights the Claimant possessed, in this case, he possessed as a Company officer and not as a trainman.

The Carrier states that numerous awards have held that dismissal is a proper sanction to invoke against an employee who perpetrates theft against it. It adds that Company officials are not exempt from dismissal just because they are Company officials. Theft is an overt form of disloyalty to the

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Company and the Company is fully justified in terminating an employee who is an admitted thief.

The Carrier states that since it had just and sufficient cause to dismiss the Claimant for his disloyal act of misappropriating Carrier funds, such a dismissal was not subject to the provision of Rule 74 of the UTU Agreement. At the time of his dismissal he was a company official and not a trainman and therefore he had no right to invoke his Rule 74 rights.

The Carrier cites Award No. 1 of P.L. 4023 on another Division of this property which award held that a management official who had been disqualified as a company official had no right to mark up under the Trainmen's Agreement vis a vis discipline hearings. The Award held that the employee had been dismissed as an official for theft he was not covered by the Agreement. It added that whatever rights the employee had was as a company official and not as a trainman. The Award further held the Carrier should not have convened an Investigation, but the fact that an Investigation was held did not give the employee any procedural or substantive right to a contractual investigation to which he was not entitled.

The Carrier asserts there is no valid basis for the claim and the Board should deny or dismiss it.

Organization's Position

The Organization states that the Carrier has misused or

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misapplied Agreement Rule 74 because the Carrier did not convene the Investigation to determine whether to discipline the Claimant because it had already permanently dismissed him from service with no intention to reconsider its actions. The Organization states that, although it stated in its Notice of Investigation it intended to hold the Investigation in conformity with Rule 74, it was impossible for the Carrier to comply with the Rule. This is so because Rule 74 states that a trainman will not be dismissed without a thorough investigation and a fair and impartial hearing. However, the facts are that even before the Notice of the Investigation was issued to the Claimant, the Carrier had determined to dismiss the Claimant permanently. The Organization asserts that such Carrier action makes a mockery and sham of the Agreement Rule and of its investigation process.

The Organization maintains that the Carrier has not produced any evidence to show that the Claimant was delinquent as a trainman. The Carrier has not shown that he violated any trainman rules and he was not dismissed for breaking any trainman's rules. He was dismissed for failure to comply with the Company's Policy Concerning Business Conduct. This Policy is a management matter and has nothing to do with the UTU Agreement.

The Organization notes that it never requested the Investigation. After the Carrier refused to permit the Claimant to mark up in the Spokane Yard, the Carrier then hand

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delivered the Notice of Investigation to the Claimant, and subsequently held the Investigation pursuant to Rule 74. The Organization states there was no purpose to or meaning for, holding a UTU Agreement Hearing, and therefore, the Carrier could not in good faith dismiss him for violating any trainman's rules. The Claimant committed no such violations.

The Organization requests the Board to recognize that the Carrier failed to meet its obligations under the UTU Agreement, and therefore direct the Carrier to return the Claimant to service with full back pay and all seniority rights and benefits restored, as a Trainman/Yardman.

Findings: The Board, upon the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the Railway Labor Act, that the Board has jurisdiction over the disputes and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds on the basis of the testimony and the other evidence of record that it has no recourse but to deny the claim and sustain the Carrier's discharge of the Claimant. The record reveals that the Claimant has voluntarily admitted that he misappropriated funds belonging to the Carrier in order to pay a gambling debt. This is felonious conduct and the Carrier could permanently discharge an employee for such a criminal act because the employee's wrongful conduct severed the employment relationship.

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The Board concludes that if the Carrier has terminated a non-covered employee for cause, and did this unilaterally, this employee, even if he possesses seniority in a contractually covered craft, may not then seek to invoke the contractual protection that inheres to members of his craft. This is so because when the Carrier permanently terminated the non-bargaining unit employee from service for cause, the Carrier severed the employment relationship permanently, albeit unilaterally, and this employee although he retained seniority in a covered craft, cannot invoke the contractual protection of that craft, because at this time he was no longer an employee. The employment relationship having been irrevocably ended for cause, there is no longer any valid basis upon which the employee's seniority can operate. The Board is led to this conclusion for otherwise an employer could not discharge a non-covered employee for cause no matter how egregious and reprehensible his offense, because this employee continued to hold seniority in a covered craft.

The Board finds that it was error for the Carrier to issue a Notice of Investigation and to convene a hearing to the Claimant, because at the time the Carrier issued the Notice of Investigation, the Claimant was no longer an employee as the employee-employer relationship had ceased to exist and the Claimant's seniority could not revive this relationship.

However, even if the Carrier convened a Rule 74 Investigation, it could still dismiss a covered employee who

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admitted he had improperly converted to his use money that belonged to the Carrier. An employee be he a covered or non-covered employee had no license to commit theft. Neither a company official nor a Trainman are exculpated for the consequences of their felonious acts.

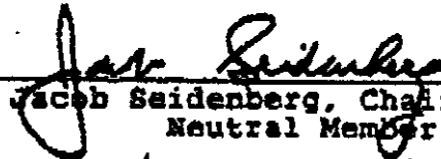
The Board of course is aware that there are situations where a covered employee may chose to leave his covered position for a non-covered position, and if dissatisfied with his non-covered position, voluntarily elect to return to his covered position with all the attendant contractual protections. However, such an election does not exist for a non-covered employee who has been discharged for perpetrating a criminal act and now seeks to return it to his covered position.

The Board is not unaware of the hardship and even pathos that is attendant on the discharge of an employee with many years of meritorious service. However, the Board must clearly delineate the limitations under which it operates. With respect to discipline imposed by the Carrier, the Board's authority is limited to review whether the penalty assessed is commensurate with the offense. It has no authority to grant leniency. That is the sole prerogative of the Carrier. When the Board reviews this entire case, it cannot hold, in good conscience, that the penalty of dismissal was not commensurate with the offense of missappropriating funds belonging to the

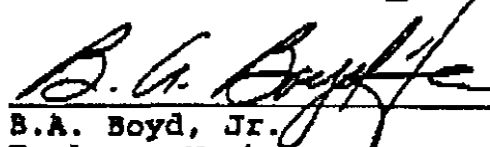
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Carrier. Admittedly a severe but not an unjust penalty.


Award: Claim denied.



Jacob Seidenberg, Chairman and
Neutral Member



B.A. Boyd, Jr.
Employee Member



L.A. Lambert
Carrier Member



May 13, 1993