PUBLIC LAW BOARD NO. 5133

AWARD NO. 7
CASE NO. 7

PARTIES : UNITED TRANSPORTATION UNION (C&T)
:
TO : and
:
DISPUTE : SOUTHERN PACIFIC TRANSPORTATION COMPANY (EASTERN LINES)

STATEMENT OF CLAIM:

Protest and claim of UTU Brakeman J.L. Gipson, Houston Division, against the unwarranted and unjust discipline assessed Brakemen J.L. Gipson on unproven and improper charges and claim all time lost, including date of investigation November 20, 1991, from that date that he was dismissed from service, November 26, 1991, forward until he is properly reinstated to service with all seniority rights, vacation rights, and Health and Welfare benefits restored. Also time held off prior to investigation.

FINDINGS AND OPINION

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are the Carrier and Employee, respectively, within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted under Public Law 89-456 and has jurisdiction over the parties and dispute involved herein; and, that the parties were given due notice of the hearing thereon.

Claimant attended the June 18, 1993 Board session without objection from the Carrier or Organization. Before the parties presented their respective positions in this case, the neutral member of the Board described to the Claimant the process by which his claim was timely progressed on the property by the Organization under the controlling Agreement which, sequentially, provides for adjudication where, as here, the dispute remains unresolved. In addition, the procedures governing this Board under the Railway Labor Act, as amended, and the parties' July 17, 1991 Memorandum of Agreement establishing this adjudicatory body, were similarly reviewed for the Claimant's benefit. Within this context, the neutral member informed him that he would be allowed to address the Board in his own defense upon the completion of the parties' oral presentations. Claimant acknowledged this arrangement and at the appropriate time addressed the Board.

Prior to his discharge, the Claimant was a brakeman with fourteen years of service with the Carrier. His regular assigned job was the Houston to Dallas run. On October 29, 1991, he was notified by the Carrier to attend a formal investigation concerning his purported indifference to duty and failure to protect his employment. In this connection, it was alleged that the grievant only worked a total of five round trips from August 12, 1991 through October 29, 1991, while work was available to him, but during this period of time he "marked off thirty-six (36) days, rejected one call for an emergency trip and failed to answer [his] telephone when called for emergency trips three (3) times." These charges were predicated upon the Carrier's Code of Operating Rules and Eastern Region Timetable No. 8, to wit:

> RULE 604. DUTY REPORTING OR ABSENCE: Employees must report for duty at the designated time and place. They must devote themselves exclusively on duty. They must not absent themselves from duty, exchange duties or substitute others in their place without proper authority.

Continued failure by employees to protect their employment shall be sufficient cause for dismissal.

RULE 607. CONDUCT:

* * *

Indifference to duty, or to the performance of duty, will not be condoned.

The investigation was held on November 20, 1991, at which the Organization objected to the charges lodged against the Claimant on grounds that he did not violate the rules cited by the Carrier in light of Articles 68 and 84 of the Trainmen's Agreement. The referenced articles, in pertinent part, state as follows:

ARTICLE 68
REGULAR TRAINMEN PERMITTED TO LAY OFF
WHEN EXTRA TRAINMEN AVAILABLE
TO PROTECT THE SERVICE

When there are extra men available to protect the service, regular men will be permitted to lay off.

Trainmen will lay off and thereafter report for duty to the individual for handling the trainmen's board at the source of supply on the district involved....

DOCTOR'S SLIP

A regular assigned employee who lays off for a short duration will not be required to furnish back-to-work doctor's slip. * * *

ARTICLE 84
LEAVE OF ABSENCE

* * * *

Trainmen will not be permitted to absent themselves from duty for a period of 45 days without written leave of absence....

The Organization's objection was made part of the investigation record. (Organization's Exhibit A) After the close of this investigatory proceeding, the Carrier, by letter dated November 26, 1991, found the Claimant guilty as charged and dismissed him from service. Consequently, the Organization filed a claim on behalf of the Claimant appealing his discharge. After the Carrier denied the claim at each step of the appeals process, the Organization submitted the unresolved dispute over the Claimant's discharge to this Board for a final determination.

It is the Carrier's position that the Claimant was justifiably discharged for failing to protect his assignment because of excessive absenteeism. According to the Carrier, the evidence adduced at the investigation points up that over a period of 48 days, which was calculated from August 12, 1991 through October 29, 1991, the

Claimant was off work for a total of 36 days (or 75 percent of the time) when work was available to him. In this regard, the Carrier submits that he missed calls on September 7, 9 and October 9, 20, 1991. The Carrier further notes that the Claimant marked off sick on 4 days, but maintains that his claim of illness was never substantiated at the investigation. While admitting that the charge against the claimant for rejecting a call was not verified, the Carrier nevertheless asserts that this overall absences during the period in question were in violation of Rules 604 and 607.

Although acknowledging that Articles 68 and 84 grant trainmen the right to lay off, the Carrier opines that neither article "was designed to allow the kind of unauthorized absences taken by Claimant, nor do they justify what has become habitual absenteeism on the part of the Claimant." (Carrier's Submission, p. 5) Insofar as the Carrier is concerned, the Organization failed to produce any rule which exonerates the Claimant simply because his excessive absences worked a "hardship" on the Carrier which cannot be excused.

For the foregoing reasons, the Carrier holds to the view that the Board should deny the instant claim in its entirety.

The Organization, arguing conversely, maintains that the charges against the Claimant had no basis in fact as evidenced by an investigation which was patently unfair and clouded with uncertainty. At the outset, the Organization takes issue with the Carrier's conjecturing that the Claimant's reputed absences from work disadvantaged the railroad because trains supposedly were delayed as a consequence thereof while supervision had to find other employees to protect the service. (Investigation Transcript, p. 7) The Organization contends that if such a situation existed, it was not the result of the Claimant's absences but traceable, instead, to the Carrier's failure to maintain a sufficient source of employees to perform service.

On the merits, the Organization argues that the Claimant was erroneously charged for marking off 36 days between the period of August 12, 1991 and October 29, 1991, which the Carrier indicated was a span of 48 days. The Organization avers that the Carrier miscalculated the actual number of days between the period in question and then compounded this error when observing incorrectly that the Claimant was off work approximately 75 percent of the time. (Investigation Transcript, p. 10) According to the Organization, the Carrier inexplicably dropped 31 days from its calculation thus implying, also incorrectly, they were the Claimant's "normal" days off. Based on the Organization's calculation, there were 79 and not 48 days between the August 12, 1991 and October 29, 1991, which reflects that the Claimant was not available for service approximately 45.5 percent of the time assuming he marked off 36 days as alleged by the Carrier. In the latter respect, the Organization submits that even if the Claimant marked off 36 days, his absences were still within the parameters of Article 84 of the Agreement which permits trainmen to be absent "from duty for a period of 45 days without written leave...." It is clear to the Organization that the Claimant violated neither rule upon which the charges against him were based since his purported absences never exceeded the prescribed limit of 45 days. In this context, too, the Organization also refers to Article 68 of the Agreement permitting regular assigned employees, like the Claimant, to lay off "[w]hen there are extra men available to protect the service...." From the Organization's perspective, the latter condition, as applied to the instant matter, was the Carrier's responsibility and not the Claimant's to fulfill.

Next, the Organization takes issue with the Carrier's allegation that the Claimant laid off sick several days during the period in question without substantiating his illness. The Organization asserts that the Claimant, as a regular assigned brakeman, was not required to contact and apprise the crew dispatcher of his illness when marking off sick. Nor, the Organization avers, was he required under Article 68 to furnish the Carrier a "back to work doctor's slip" since his illness was of short duration.

In the final analysis, the Organization denies that the Claimant rejected a call for an emergency trip or that he failed to protect emergency work during the days claimed by the Carrier since he was never personally contacted to perform such service. Overall, the Organization posits that the Claimant marked up and protected his regular assigned job from August 12, 1991 through October 29, 1991; and that he "checked regularly with the Carrier's site as to when his assigned job would work." (Organization's Submission, p. 11; Investigation Transcript, p. 10)

The Organization urges this Board to sustain the claim and to reinstate the Claimant to service with pay for time lost, including full restoration of his seniority rights and benefits.

After thoroughly scrutinizing the record in this case, the Board is unable to find any probative evidence supporting the charges that culminated in the Claimant's employment termination. Essentially, the Carrier relied on questionable inferential proof and supposition to substantiate his purported failure to perform work and excessive absenteeism as violative of Rules 604 and 607. The Carrier's probe of these alleged infractions was egregiously flawed, depriving the Claimant of his fundamental right to a fair and impartial investigation.

In the course of the investigation, it was revealed that the Claimant, from August 12, 1991 through October 29, 1991, worked five round trips on his regular assignment and marked off on numerous occasions during this period for various reasons, including illness. The Carrier's hearing officer observed that he was absent 36 days within a span of 48 days, or 75 percent of the time, (which he later revised to 72.5 percent after excluding some of the Claimant's absences as personal leave days). Here, the hearing officer erred when he miscalculated the number of days between August 12, 1991 and October 29, 1991 - the period specified in the notice of investigation during which the Claimant's absences from work occurred. Without disputing the number of days the Claimant marked off, the percentage of absences computed by the hearing officer would have been considerably lower had he taken into account that the period in question covered a span of 79 days rather than 48 days. His miscalculation, which the Carrier heedlessly accepted as correct (Carrier's Submission, p. 3), raised the adverse inference that the Claimant's absences from work were excessive and demonstrative of his indifference to duty. In light of the ultimate penalty imposed on the Claimant, it is obvious that the Carrier considered such an inference as an element of proof confirming the charges against him. The Carrier's reliance on a mistaken percentage of absences and the inference drawn therefrom, obfuscated the purpose of the investigation. It was incumbent upon the Carrier to prove the allegations at issue: (1) whether the Claimant missed calls to perform service for which he was available and failed to protect his assignments; and, (2) whether his absences from work were not only excessive but unauthorized. The Carrier did not meet its burden of proof with respect to his culpability in either instance.

Although the Claimant worked only five round trips on his regular assignment during the period in question, his occasional work does not prove, ipso facto, that he made himself unavailable for service or failed to protect his assignment. Claimant's unrebutted testimony revealed that he constantly checked the job site to determine when his regular assignment would work. There is not a scintilla of proof that he failed to protect his regular assignment. While the Claimant in the interim may have been available for other work, he cannot be held accountable for not performing "emergency" service simply because the Carrier was unable to contact him. Nor can it be found that he rejected work since the Carrier admitted that "no evidence was adduced to substantiate the charge that the Claimant had rejected a call ...." (Carrier's Submission, p. 4) Here, too, there can be no finding that he failed to protect the service notwithstanding the Carrier's half-hearted assertion that his alleged unavailability "sort of delay[ed] the trains" while supervision attempted to locate other employees to perform the assignment. (Id., p. 7)

Further, the record is devoid of any proof supporting the Carrier's contention that the Claimant's absences were unauthorized or that he improperly laid off sick without verifying his illness. As a regular assigned brakeman, the Claimant was permitted to lay off pursuant to Article 68 of the Agreement, provided there were "extra men available to protect the service." In this regard, the Carrier offered no evidence that he marked off on days where extra men were not available to perform service. Nor can it be found that the Claimant was absent from work without authorization on the days he laid off sick because he did not submit proof of his illness. Since these absences were of short duration he was not obligated to furnish such verification when he laid off sick or upon his return to work. The 36 days he was off work did not trigger Article 84 of the Agreement which requires a written leave of absence only if trainmen are absent for 45 days. Accordingly, the Claimant exercised his contractual rights to mark off, and did so without infringing Carrier Rules 604 and 607.

In characterizing the Claimant's layoffs as "habitual absenteeism", the Carrier discarded the rights he had under the Agreement in order to provide an integral component to the charges which ultimately resulted in his discharge. To link the Claimant's number of absences to his alleged failure to protect the service was improperly conceived by the Carrier. During the period in question, the Claimant was permitted to mark off without ever being instructed by supervision not to do so. Treating similarly with this particular point, Public Law Board No. 3080, in Award No. 13, held:

> It is incongruous that the Carrier would allow an employee to mark off and then discipline such employee, and it is not enough to advise employees that they are expected to be full-time ... and then discharge them because they mark off frequently with Carrier permission. If an employee is risking discharge or discipline by exercising a privilege freely granted by his employer such risk must be clearly made known to the employee. Excessive excused absenteeism is not the same as excessive unexcused absenteeism. Carrier has the right to refuse an employee's request to mark off and should do so or forfeit the right to discipline such employee for absenting himself with permission. (Emphasis added)

This cited authority is applicable in the instant case where the Carrier improperly used the Claimant's excused absenteeism as the foundation for his dismissal from service.

Based on the Board's findings, and for the reasons stated herein, the Claimant's discharge shall be set aside and any reference thereto shall be expunged from his employment record. He shall be reinstated to service and to his position of brakeman upon satisfying the Carrier's medical standards for fitness for duty, including a drug screen. Also, the Claimant shall be paid for all time lost together with full restoration of his seniority rights and benefits. In the latter respect, however, he is not entitled to compensatory reimbursement resulting from any loss of health and welfare benefits while he was in a dismissed status. Such reimbursement is not provided for in the parties' Agreement.

Lastly, the Board shall retain jurisdiction over this case for purposes of resolving any dispute which may possibly arise over the Claimant's return to service.

PLB No. 5133

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AWARD

Claim sustained.

ORDER

The Carrier shall comply with the terms of this Award immediately upon receipt of a fully executed copy thereof.

Charles P. Fischbach
Chairman and Neutral Member

A.M. Lankford, Employee Member

Stephanie Barrett, Carrier Member

Dated at Chicago, Illinois,

this 6th day of August, 1993