NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5298

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

ST. LAWRENCE & ATLANTIC RAILROAD COMPANY

Docket No. 1
Award No. 1

Date of Hearing - January 21, 1993

Date of Award - January 25, 1993

Statement of Claim:

1. The Carrier's decision to terminate Section Foreman N. Chagnon from his assigned section foreman's position effective January 11, 1992 and thereafter suspending him from service for thirty (30) days for allegedly operating a Company vehicle without a valid driver's license was arbitrary, capricious, without just cause and in violation of the Agreement.

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to his section foreman's position, his record cleared of the charges leveled against him and shall be compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 5298, upon the whole record and all of the evidence , finds and holds that the Employee and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

BACKGROUND

In mid December 1991, Carrier was contacted by its insurance broker and advised that its automobile insurance carrier, The Hartford Company, desired to drop Section Foreman Norman Chagnon from coverage because of his driving record. The insurance broker was asked to seek a delay in this action until after the coming holiday season, which was done. The broker was also requested to secure a transcript of Mr. Chagnon's driving record and transmit it to Carrier's headquarters in York, Pennsylvania.

The driving record transcript was faxed to Carrier on January 3, 1992. That same date a Carrier representative discussed the transcript with a representative of the Maine Motor Vehicle Department. On the basis of statements allegedly made by the MVD representative to Carrier's representative marginal notations were made on the transcript which would suggest that the transcript was incomplete or in error. Following this conversation, Carrier's Human Resource Administrator sent the following letter to Mr. Chagnon:

> We have been notified by our business automobile insurance carrier, The Hartford, that due to your driving record, you will be dropped from coverage effective January 11, 1992. They have indicated to us that the following violations have appeared on the Sated of Maine - Department of Motor Vehicles' Driver Record Information Report that was acquired during our 1991 renewal:
>
> 1. 3/19/89 - DWI
> 2. 9/22/89 - Speeding
> 3. 11/15/89 - DWI and Driving to Endanger
>
> Please be advised that the following charges did not appear on your driving record during our 1990 renewal.

> Consequently, since you will no longer be insured to operate any company vehicle, you will be terminated from your position as Section Foreman or any other position that requires you to operate a company vehicle effective January 11, 1992.

On February 1, 1992, the Organization challenged Mr. Chagnon's termination, claiming, *inter alia*, that the driving record on which the insurance carrier took action, which was furnished Carrier, was inaccurate, there is no rule or Company policy which requires anything more than a valid driver's license to operate a Company vehicle (insurability is not a requirement of employment) and that Grievant was terminated without any warning, the fair and impartial hearing contemplated by the Agreement and without an opportunity to defend himself.

This letter was answered on February 5, 1992. In that letter, Carrier's General Superintendent commented only upon the lack of a hearing, indicated that he had discussed the matter with the Assistant General Chairman stating that he would hold a hearing if one had been requested, however, he was not aware of such a request.

Even though Mr. Chagnon had been arbitrarily "terminated" by Carrier's January 3, 1992 letter, on February 25, 1992 he was cited to attend a fact finding session on an alleged incident occurring fourteen months earlier. The February 25, 1992 notice charged:

> You are hereby requested to be present at the General Superintendent's office, Berlin, New Hampshire, on Tuesday, March 3, 1992, at 1000 hours to attend a fact finding session in connection with your operating a company vehicle without a valid operators license on:

December 20, 1990
December 22, 1990
December 26, 1990
December 27, 1990
December 28, 1990
December 29, 1990

Rules that me be discussed are Rule A, Rule B, Rule H and Rule K of the St. Lawrence & Atlantic Railroad Company rules effective December 15, 1990.

The next day, on February 26, 1992, the Human Resource Administrator contacted Mr. Chagnon again. In that letter, she stated:

> The purpose of this letter is to revise my letter to you of January 3, 1992 regarding your employment status with the St. Lawrence & Atlantic Railroad Company. Please be advised that you are disqualified, effective January 11, 1992, from any position which would require you to operate a company vehicle or drive a motor vehicle while on duty because of your uninsurability by our insurance company, The Hartford.
>
> This letter supersedes the Company's notice to you dated January 3, 1992.

The ensuing fact finding session was postponed a number of times and eventually got underway on April 27, 1992. During the hearing the Union raised issues concerning Mr. Chagnon's termination without a hearing, the timeliness of the charges alleging that Claimant operated a Company vehicle without a valid driver's license, the merits of the charge and the triggering issue of insurability. Carrier introduced a transcript of Chagnon's driving record and accepted testimony on the conversation its representative had with an individual in the State Motor Vehicle Department. Following the close of the fact finding session Mr. Chagnon was notified, on May 13, 1992, that he was assessed discipline of a 30 day suspension.

On May 22, 1992, the Assistant General Chairman filed a lengthy appeal to the suspension. This appeal noted, *inter alia*, that January 3, 1992 notice of termination was flawed because of the failure to proceed with a fact finding inquiry as contemplated by Article 20 of the Agreement. It also, contended that the charge of operating a vehicle in December 1990, without a valid license was out of time in addition to not being established to be correct. On June 2, 1992 the Assistant General Chairman submitted a copy of a check Grievant issued to the Motor Vehicle Department, dated May 15, 1990, covering reinstatement fees connected with Claimant's license. That letter noted that the check verified Mr. Chagnon's statements that his license had been reinstated in 1990.

On June 15, 1992 Carrier denied the appeal. The denial letter reviewed the testimony developed at the fact finding session. It also discussed in detail the development of the case from the time Carrier became aware of a problem from its insurance broker. It concluded that it was proper to discipline Claimant for operating a Company vehicle without a valid driver's license and that it was not inappropriate to effect disqualification on the basis that its insurance carrier would no longer provide coverage because of Mr. Chagnon's driving record.

Both the thirty day suspension and the "termination" or disqualification have been addressed by both parties in their written and oral presentations before this Board. Accordingly, the Board's review and decision will address each.

DISCUSSION

Upon review of the entire record and hearing the oral presentations of the parties, the Board is persuaded that sufficient procedural flaws exist so as to negate any and all discipline which may have been assessed, specifically or constructively, in this matter. Additionally, with respect to two substantive issues:

> a), whether Mr. Chagnon could be terminated or disqualified from positions because Carrier's insurance provider no longer wished to underwrite his inclusion in its coverage; and,
>
> b), whether or not Mr. Chagnon was guilty of operating a Company vehicle while his license was suspended;

it is the Boards view that Carrier has not met elementary proof requirements necessary to its burden. In cases of this nature, the burden of proof is on Carrier. It simply has not been satisfied in this record.

Looking at the procedural defects first, there is no question that Carrier terminated Ms. Chagnon (effective January 11, 1992) outside the procedures provided in Article 20 of the Agreement. Carrier's January 3, 1992 letter can not be fairly read to mean anything but termination. Carrier may now seek refuge in self-serving characterizations subsequently proffered that wrong terminology was used, the termination was corrected by disqualification, etc., but this does not alter the fact that the language used in its January 3, 1992 letter, was termination and Claimant was treated as being terminated at the time. It was only after Mr. Chagnon's Union protested the act as being outside

the Agreement that steps were taken to change the termination to something different.

When the Organization protested the matter as discipline without investigation as provided in Article 20 the termination was changed to a disqualification and charges were advanced alleging that Claimant operated a Company vehicle when his license had been under suspension. These charges were dated February 25, 1992. Paragraph B of Article 20 requires that an employee charged with an offense shall be furnished with notice within seven days of the date the Company acquires information about the offense. Carrier received information concerning Claimant's driving record in mid December 1991. Its Human Resources Administrator discussed this information with the State Motor Vehicle Department on January 3, 1992. It was in that discussion that she claims she was advised that certain information on the drivers license transcript was incomplete and that Claimant's license was not reinstated as shown. It was this period which covered the December 1990 dates on which Claimant was alleged to have operated a Company vehicle without a valid license. It would seem that January 3, 1992 would have been the triggering date for time limits to start tolling under Article 20, paragraph B.

These two defects cause the entire process to be flawed and the ensuing discipline to be void *ab initio*. Normally discipline adjudged to be void *ab initio* because of procedural flaw is not thereafter reviewed on its merits and the employee involved is restored to the status which obtained immediately prior to the event triggering the action. However, because the record demonstrates

that Mr. Chagnon would also have prevailed on the uninsurability issue the merits of that matter will be dealt with also.

The Board finds no fault with the Awards submitted in support of Carrier's case, which hold that disqualification from an assignment requiring operation of motor vehicles is not inappropriate in situations where an employee does not possess a valid driver's license. In fact the Chairman and Neutral Member of this Board has authored Awards reaching this conclusion.

The Board has difficulty, though in embracing the notion that disqualification is appropriate merely because a particular insurance carrier seeks to remove certain risks (demonstrably insurable in other contexts) from its underwriting coverage. In this situation while The Hartford Company was seeking to exclude Mr. Chagnon he in fact was covered by a different insurer and this was noted on the license transcript reviewed at the time of his termination (changed to disqualification).

It is a well known fact that some insurance carriers seek limit coverage to only drivers possessing limited risks or exposure. Other companies will only underwrite non-smokers or non-drinkers, and still others concentrate on individuals residing in low crime areas, etc. A employer selecting one of these insurers as its provider could effectively disqualify large numbers of employees form positions they would be entitled to work under the terms of an agreement. The selection process could effectively alter fitness and ability provisions and/or practices embodied as actual and objective working

conditions within the collective bargaining agreement without required notice and negotiations contemplated by the Railway Labor Act.

Thus even though Carrier, since at least February 26, 1992, has maintained that Mr. Chagnon was disqualified because he was uninsurable, this is not fact. Mr. Chagnon was insurable and maintained a valid policy on his personal vehicle. Moreover, he possessed this policy at all times relevant herein. Carrier is not privileged to remove an employee from a position on the grounds that he is uninsurable unless he is truly uninsurable. Simply because one particular insurer may not wish to underwrite a particular driver, this is not proof that the driver is in fact uninsurable. Especially in a situation where the employee has filed proof of insurance with the State at the time his driver's license is being restored.

The immediate foregoing may seem at odds with the decision in Award No. 4, PLB 2752, Sickles, Arb., (1981), the only award referenced by Carrier on the issue of insurability. However, not enough is known about the facts present in Award 4 to accept it as an established and binding precedent. One comment from that ward is of interest though:

> Disputes such as this must, of necessity, be determined upon their own merits, and obviously it would be inappropriate to allow an insurance carrier to whimsically affect the labor relations between two parties.

Review of the entire record and consideration of all of the arguments dictates that Mr. Chagnon's claim be sustained. The remedy requested by the Union will be awarded.

REMEDY

As a remedy, the Board will require that Mr. Norman Chagnon be immediately restored to his Track Foreman position. He shall be made whole for all wage and benefit losses incurred subsequent to January 11, 1992. Carrier may make an appropriate deduction for any earnings made in other employment.

A W A R D

Claim Sustained as provided above. The remedy is that provide above.

O R D E R

Carrier is directed to comply with this Award within thirty days of January 25, 1993.

John C. Fletcher, Chairman & Neutral Member

Alfred P. Smith, Carrier Member
DISSENT ATTACHED

Bradley A. Winter, Organization Member

Signed at Mt. Prospect, IL, this 25th day of January, 1993.

CARRIER MEMBER'S DISSENT TO AWARD 1, PUBLIC LAW BOARD 5298

REFEREE JOHN C. FLETCHER

This company goes out of its way to demonstrate fairness in its dealings with its employees. Its action in the case of the claimant in this case was one such example.

The Majority of this Board has committed a serious error in first of all, finding that the Carrier violated the time limits of the agreement for holding a disciplinary hearing, and, then in imparting its own judgment of insurability of an employee by a nationally recognized insurance carrier.

First, with respect to the procedural flaws which the majority found, while the use of the word "terminate" may have been a misnomer in the eyes of a strict constructionist who has plied the field of railroad labor relations for decades and is a traditionalist, the construction of the letter in which this word was used made it clear that it was used to apply only to any position requiring the operation of a company motor vehicle. Secondly, the carrier changed the word to "disqualification" immediately upon being questioned by the claimant's labor representative, and, that is the way the Claimant's record stood - a point not disputed.

This leads us to the second part of the case - the timeliness of the charge. The record clearly shows that Carrier's Personnel Administrator acted carefully and thoroughly and only brought charges **AFTER** she had further investigated whether Claimant had driven a vehicle without a valid driver's license - a separate issue from whether the Claimant was insurable by Carrier's insurance carrier. In this respect, the Board erred in finding the January 3rd letter triggering the date the Carrier would have had knowledge under the provisions of the agreement to bring charges. The Carrier's Personnel Administrator acted prudently and carefully in furthering her investigation into this matter - and - when she definitively learned that Claimant had no driver's license for the period in question from the State of Maine Motor Vehicle Department (after numerous calls and obtaining copies of the Official State of Maine records), she then determined the Company had sufficient knowledge and brought the charges - which were timely under the agreement.

Next, in the face of the introduction of the Claimant's driving record from the State of Maine in the disciplinary hearing, the Claimant's only response was that he had a valid driver's license. Two months after the hearing, he produced, on appeal, a copy of a canceled check to the State of Maine which he claimed supported his position that he had a driver's license. **BUT - HE NEVER PRODUCED THE MOST IMPORTANT DOCUMENT AT ALL - A VALID DRIVER'S LICENSE.** He was given the opportunity at the hearing,

upon appeal, and, at the Public Law Board to produce any evidence - but - he did not produce it. Should there have been any questions, production of this license could have then permitted a retracement of the document with the State of Maine - including determining date of issue.[1] The Carrier met its burden of proof by not only producing the State of Maine's Official Record, but, also, discussing this with the State of Maine who further verified the Claimant had no license on the days in question.

Perhaps the most egregious error made by the Majority of the Board is, however, imparting their own "standards" for insurability. The facts were this employee had been twice arrested and/or convicted for driving under the influence and related other charges. The fact that Claimant may have had insurance to drive his personal vehicle **DID NOT** mean he was insurable to drive a company vehicle. Further, claimant produced no evidence or proof that this insurance would have covered him and the Company's liability when operating a company motor vehicle. While it is true that almost anyone can purchase auto insurance, the question of what coverages are available; the restrictions in such insurance policies, and, whether or not such policies provide commercial coverage and at what levels are

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1. Assuming that he had such a license (which again, was never produced), this would have raised other questions, such as "did the license have restrictions precluding him driving except to and from work?", preclude him from operating a vehicle commercially, or other such restrictions commonly placed on those who have such bad driving records.

separate matters. If Claimant wished to use such arguments in his defense, his was the burden to provide all such evidence - **HE DID NOT DO SO.**

The majority cites awards which the Carrier provided - and - hangs their hat on one sentence of the Referee Sickles' decision which speaks of an insurance carrier undermining the labor relations between employees and employers. This was certainly not the case here. Again, this employee was convicted and/or arrested of driving under the influence twice - and, of other related matters. His driving record was atrocious. It certainly was not an abuse of the insurance company's discretion to cancel this high risk person from their coverage. The analogy that some insurance carriers cover only non-smokers, non-drinkers, etc., is misplaced. First, these kinds of insurance policies generally relate to health insurance or, general liability or property insurance (i.e., residing in low crime areas).

The neutral then speculates that if an employer were to select one of these low risk carriers for insurance, it could alter fitness and ability provisions or other terms and working conditions. This analogy is misplaced.

This neutral is effectively sanctioning that any employee of any railroad can, during their personal life, become inebriated, have accidents, get convicted or arrested of driving under the

influence, and, not have it affect the workplace. Federal Railroad Administration rules with respect to drivers of locomotives now require that any employee who is arrested or convicted of driving under the influence - even on their personal time - be removed and disqualified from operating a locomotive. The first such incident is a nine month suspension - while the second one is removal from service for 5 years. The Claimant in this case operates a hi-rail motor vehicle on the tracks of the Carrier - over grade crossings, and, interfaces with train operations. While not technically a locomotive engineer, this person interfaces with them daily in operation of a hi-rail on company tracks, is subject to train orders, track warrants and operating rules.

This was clearly not a case of any arbitrary or capricious decision by the Carrier's insurance carrier - but an exercise of prudent judgment which is also found now in public policy governing railroad safety. There was not a shred of evidence of arbitrary or capriciousness by the insurance company.[2]

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2. Awards presented to the board included many which held that an employee must be qualified to operate a motor vehicle if such a requirement is part of a position. Claimant's driving record - which again, included **REPEATED** driving under the influence offenses occurring within a short time span, are generally as a matter of public policy, grounds for uninsurability and even incarceration in many states. The Hartford Insurance Company certainly did not act arbitrarily or capriciously in refusing to insure this person - many other insurance companies all over the country have and would do the very same thing.

The Majority of this Board has exceeded its jurisdiction, and, based its decision on speculation, personal conjecture and apparent prejudice of not only the record and claimant's driving record, but, in the fact of action taken by The Hartford, a reputable, long established insurance carrier totally free of bias, prejudice, or, "whimsicalness" as that term is used by Referee Sickles in Award 4, PLB 2752.

The Award if without foundation in reason or fact, the conclusion outside the jurisdiction of the Board, and, for these reasons, we register this vigorous dissent.[3]

By: Reynold P. Smith

3. One only need to consider the deaths, accidents and destruction which are caused by those driving under the influence and the strictness by which almost all states deal with such offenders to also conclude that the majority of this Board, by imparting a "laissez faire" attitude towards this claimant, has gone beyond its jurisdiction and substituted its judgment for that of those who are charged with the responsibility and liability for insuring that such kind of people are not operating motor vehicles or placing their lives or the lives of others in danger.

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBER'S DISSENT
TO
AWARD 1 OF PUBLIC LAW BOARD NO. 5298
(Referee Fletcher)

The Majority was correct in its ruling in Award 1 of Public Law Board No. 5298 and nothing present in the Carrier's dissent distracts from the correctness and precedential value of this award.

The dissent attempts to portray this claim as containing a unique set of circumstances. The only unique thing about this claim and the subsequent award is that the Board interpreted the language of the Agreement as written. In response to the Carrier's dissent, we are obligated to reply in order to finally put this matter to rest. First, the Carrier opens its dissent with the comment that "This company goes out of its way to demonstrate fairness in its dealings with its employees. ***" The record of the instant case is diametrically opposite of what the Carrier has alleged. If the Carrier considers unilateral "termination" of an employe, without a fair and impartial fact finding session as mandated by Article 20, as fair dealings with its employes then the Carrier's supervisory personnel is in dire need of an education in employe relations. The record is clear in that the Carrier "shot first and asked questions later". Only after protest from the Union did the Carrier attempt to extricate itself from its obvious error by amending its termination notice to indicate that the

Claimant had been disqualified from any position that required him to operate a Company vehicle. The problem here is that the Carrier was contractually barred from making any such move against the Claimant without first charging him with an alleged offense and thereafter holding a fair and impartial fact finding session within the time limits set forth within Article 20. The Carrier simply failed to abide with the terms of Article 20 and, in failing to take heed with the rule, violated the Claimant's right to due process. While the Carrier attempts to mask its blatant violation of the Agreement by referring to the word "terminate" as a misnomer in the eyes of a strict constructionist in the field of railroad labor relations, it must be noted that the word terminate means to:

> "1. to bring to an end in space or time; form the end or conclusion of; limit, bound, finish, or conclude. 2. to put an end to; stop; cease. *v.i.* 1. to come to an end in space or time; stop; end. ***" *(Webster's New World Dictionary, College Edition)*

There is no question but that the Carrier's intent within said letter was to end the employer\employe relationship between itself and the Claimant. Even a cursory comparison of the definitions between the word "terminate" and "disqualify" will reveal no correlation in meaning between the two words.

Second, the Carrier clearly violated Article 20 when it became aware of the Claimant's alleged lack of a valid drivers' license. Only after the Union objected to the unilateral termination of the

Claimant without a fair and impartial fact finding session did the Carrier set out to dredge up a case against him. The record is clear that the Carrier had knowledge of the alleged incident in mid-December, 1991 but delayed investigating the matter until mid-January, 1992. The majority was liberal by stating that January 3, 1992 was the triggering date to set the time limits in motion to hold a hearing. In any event, the Carrier violated the time limit requirements of Article 20. If the Carrier believes that the actions it took were examples of "fairness in its dealings with its employes", then God help us. Finally, the Carrier seems bent upon retrying the case in its dissent. Obviously, it was unable to make its case on the property and within its submission to this Board and is now attempting another bite of the apple. Moreover, the Carrier is attempting to add another charge against the Claimant within its dissent, i.e., driving under the influence. Inasmuch as that charge was **never** brought against the Claimant, the Carrier's reference thereto, within its dissent, belies its allegation that "This company goes out of its way to demonstrate fairness in its dealings with its employees. ***"

The Majority based its findings on the record of the instant case as it was handled on the property and we wholeheartedly concur with the decision. Hence, the Carrier's dissent represents nothing more than "sour grapes" and warrants no serious consideration whatsoever.

Respectfully submitted,

Bradley A Winter

Bradley A. Winter
Organization Member