

RECEIVED DEC 01 1992

Award No. 2
Case No. 2
Org File: 1040-265-173
Carrier File: 430.30JBB0225G.DW4

PUBLIC LAW BOARD NO. 5311

Parties: United Transportation Union - Trainmen
and
Union Pacific Railroad

Statement of Claim: Request of R.R. Dixon for reinstatement
with pay for all time lost and all
contractual benefits restored.

Background: The Claimant had a seniority date of June 28, 1968 and had worked as a brakeman/yardman from that date until he sustained an injury on March 8, 1987. As a result of his injuries he effected a settlement for which he received \$250,000. As a part of this settlement, and due to his injuries, the Carrier agreed to employ him as a Supervisor of Yard Operations in Pocatello, Idaho, effective June 1, 1989. This position was denominated as a company or management job and therefore not covered by the UTU Agreement. The Union asserts that Claimant was a Yardmaster after June 1, 1989.

On April 19, 1991, the Claimant was arrested by law enforcement officers and charged with the delivery of a controlled substance, i.e., cocaine.

On July 18, 1991 at preliminary hearing before a Court Magistrate, the State's Attorney moved to amend the two felony counts from "delivery" of a controlled substance to "possession" of a controlled substance. The Magistrate granted

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the State's Attorney Motion and bound the Claimant over to the District Court.

On July 24, 1991 the Carrier's Superintendent of the Idaho Division tendered the Claimant a letter which stated he was resigning from his position with the Carrier, effective immediately. The Claimant refused to sign the letter and on July 29, 1991 the Superintendent wrote the Claimant that since he refused to sign the tendered letter of resignation, he was being dismissed from Carrier's service, effective July 24, 1991.

On September 23, 1991 the Claimant appeared in the State District Court with his counsel and the Court held that since the Claimant had pleaded guilty to 2 counts of possessing cocaine, the imposition of judgment be withheld, and the Claimant be placed on probation for two years and be fined \$1,500.00 and that he pay the sum of \$250.00 to Operation Crackdown and \$250.00 to the Idaho Department of Law Enforcement as well as certain Court costs. The Court also ordered the Claimant to perform 20 hours of community service and the remain alcohol and drug free during the term of his probation.

Shortly before the Claimant's dismissal, on July 28, 1991, the Claimant attempted to exercise his seniority as a Brakeman at the direction of the Terminal Superintendent. However, when the Claimant attempted to mark up, he was not permitted to do so and was informed that he was out of service pending investigation. No such investigation was held and the Claimant remained out of service to date.

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Between September 27, 1991 and January 27, 1992 the Claimant's attorney wrote several times to Carrier officials requesting that the Claimant be reinstated and that the Claimant was willing to waive any claim that he might have to back benefits. In February 1992 the Claimant's attorney also corresponded with a member of the Carrier's Law Department. In all these conversations, the Carrier informed the Claimant's counsel that it would not voluntarily reinstate the Claimant or would it permit the Claimant to return to train service because he had been charged with selling cocaine, and further, his personal injury claim had been settled on the basis that he was permanently disqualified medically from returning to train service.

On February 18, 1992 the Local Chairman wrote to the Superintendent requesting that the Claimant be reinstated. On February 25, 1992 the Superintendent denied the Local Chairman's request.

On May 4, 1992 the General Chairman appealed to the Director of Labor Relations stating that the Claimant had been withheld from service since July 28, 1991 without a contractual hearing having been held, and therefore the Claimant should be allowed to mark up as a trainman with all contractual benefits restored.

On June 25, 1992, the Director of Labor Relations replied denying the appeal, stating the Claimant's case was not governed by the UTU Agreement.

The parties thereafter agreed to submit the case to this Board.

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Carrier's Position

The Carrier asserts that it had just cause to dismiss the Claimant and it had not violated any of the Claimant's alleged procedural rights under the UTU Agreement.

The Carrier further asserts that in addition to the fact that it had just cause to dismiss the Claimant for conduct unbecoming to a Company officer, there were other ancillary reasons not to reinstate the Claimant.

The Carrier stresses that the Organization is in error when it states that the Carrier breached Rule 133 of the UTU Agreement by failing to afford the Claimant a contractual investigation prior to dismissing him. It adds that the Organization is equally in error in contending that the Carrier was compelled to allow the Claimant to exercise his seniority to a trainman's position after he had been terminated from his managerial position.

The Carrier maintains that since the Claimant was working as a company official at the time he was dismissed on July 24, 1991, he was not subject to the coverage of the UTU contract, especially Rule 133 pertaining to formal investigations covering trainmen dismissed from service. The Carrier asserts that since the Claimant was not working as a trainman, he was not covered by the UTU Agreement and could not properly invoke any provisions of that Agreement. He was not dismissed for any violation of the UTU Agreement but rather because he was found in a court of law, while working as a Company official, to have possessed cocaine which he attempted to sell to an undercover

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narcotics officer. While the Carrier admits it has a rehabilitation program for employees who admit using illegal drugs, it does not extend the same consideration to employees who are drug dealers. The Carrier stresses that the record clearly shows that the Claimant conducted himself in a manner that was incompatible with the conduct of a company officer and for such conduct it could justly dismiss him from its service.

The Carrier further contends that the Claimant has no valid right to invoke his seniority for a trainman's position. To permit the Claimant to pursue such a course of action would nullify all discipline against Carrier officers who hold trainman seniority. The Carrier asserts that the Claimant was not relieved or dismissed from his Carrier position for his failure to perform the duties of that position in a satisfactory manner. Nor did the Claimant voluntarily leave his company post because he wanted to be a trainman. The Carrier states that the Claimant was dismissed as a company officer because he was found to have conducted himself in a manner that was not in keeping with the standards of conduct that the Carrier has a right to insist be followed by all its officials.

While the Carrier states it is not necessary to discuss all the other defenses raised by the Organization, it maintains, *arguendo*, that if the Claimant asserts that the UTU Agreement is applicable to his case, then all its provisions equally must be applicable. In such a case, the claim must fail because the Claimant did not progress his claim within the prescribed time

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limits, or in accordance with the other provisions of the Railway Labor Act. The Carrier states that the Claimant received his letter of termination dated July 29, 1991. However, but the Claimant did not progress his claim under the UTU Agreement with his Union representative. Instead, he relied on his personal attorney to advance his case. This attorney contacted several Carrier officials in an effort to get the Claimant reinstated, all to no avail.

Finally, when the Local Chairman wrote the Superintendent on February 18, 1992, the time limits had long expired. In the period from July 29, 1991 to February 18, 1992 the claims became more than six months old before being filed.

The Carrier contends another defense to the claim for back pay is that when the Claimant settled his personal injury claim he executed a release wherein he averred that he had suffered personal injuries which were permanent in nature and therefore he was unfit for trainman service now and in the future. Accordingly, the Carrier asserts the Claimant is estopped from seeking to return to service as a result of his actions in his personal injury suit.

The Carrier reiterates that it was the nature and character of the Claimant's felonious conduct, selling rather than possessing illegal drugs that prevented the Claimant from being a suitable candidate for its rehabilitation program.

The Carrier states that while it has discussed other defenses of the Claimant, it insists that the Board has only one permissible course of action to pursue, i.e., deny the

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claim in its entirety because the Claimant as a non covered employee was not properly entitled to invoke the UTU Agreement as a basis for progressing his claim for reinstatement with all accrued benefits.

The Carrier cites several awards which it contends support its position, namely, that the Claimant was outside the coverage of the UTU Agreement and therefore could not utilize it.

Organization

The Claimant was dismissed from the Carrier's service in violation of his due process rights. The Organization states that the Claimant had been working as a yardmaster for about two years and prior to that he had been a brakeman/yardman since 1968, and the Organization stresses that it was a material and fatal error for the Carrier to dismiss the Claimant without granting him the fair and impartial investigation to which he was contractually entitled. The Organization asserts that the Claimant was dismissed without ever being charged or investigated.

The Organization maintains that the Carrier is in error when it insists that the Claimant cannot invoke the procedural provisions of the UTU Contract, particularly Rule 133 because he allegedly was not covered by the UTU Agreement.

In the first place the Claimant had seniority as a brakeman/yardman and therefore possessed existing procedural rights under the relevant labor agreements. These contractual rights prevented the Carrier from summarily dismissing the

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Claimant with the attendant loss of his seniority unless the Carrier complied fully with the procedural safeguards under the labor agreements. In the second instance, the record shows that the Claimant was told by Terminal Superintendent Gorman to mark up as a brakeman and it was Mr. Gorman put the Claimant in that status. The Company records show that the Claimant was in train service being withheld from service pending Investigation (Org. Ex. "C"). This Exhibit shows the Claimant's work history, his personal leave days as a brakeman, his paid holidays and the trainman jobs he was qualified to perform.

The Organization states that Exhibit "C" further shows that the Claimant was marked up as being in an "OK" status as a brakeman at 16:45 on July 29, 1991. The next entry shows that the Claimant was put in an I.P. (impending investigation) status to be investigated as a brakeman. The Organization asserts Exhibit "C" was prepared for Claimant's work history as a brakeman and does not mention his status as a Yardmaster. The Organization stresses that the minute the Claimant was put into service as a trainman, he became entitled to representation by the UTU as well as to a fair and impartial hearing before termination.

The Organization states awards which have accepted the principle that employees who accept non-agreement positions do not lose their craft seniority where that seniority is protected by a labor agreement and where there is a rule guaranteeing them continued seniority while they are working in an official capacity. The Organization notes that Rule 118(h)

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states that covered employees who accept official positions shall be considered on leave of absence and will retain and continue to accumulate seniority rights during such employment. The Organization reiterates that before the Claimant could lose his seniority as a brakeman/yardman, he would had to have a fair and impartial hearing and his guilt established, which was not done in this case.

The Organization further contends that the Claimant was not found guilty of possession of a controlled substance. He was given a withhold judgment and put on probation.

The Claimant has worked 24 years for the Carrier with an excellent record without having been previously dismissed or suspended. Fellow employees gave testimonials attesting to his work ethic while employed by the Carrier. The Claimant has earned the respect Of his follow employees and supervisor as a Carrier employee. In light of the entire record of this case, the Organization requests that the Board reinstate the Claimant to a brakeman/yard position and he be made whole for all wages and benefits lost.

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

The Board finds that while the parties have raised a number of issues in connection with this claim, the core issue is

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whether the Carrier could summarily dismiss the Claimant during the period he was employed in a company position or whether the Claimant was entitled to invoke his trainman's seniority and all its attendant benefits when he was terminated from his non covered position on July 29, 1991 for possession of illegal drugs.

Before reaching this dispositive issue, it is necessary to dispose of certain ancillary matters. First the Board finds that the Claimant was a non covered employee at the time of his dismissal regardless of whether his job was denominated as a "yardmaster" or "Supervisor of Yard Operations". There can be no dispute that he worked at a position that was outside the scope and coverage of the UTU Agreement. Secondly, the Board finds it to be a strained construction of the facts for the Organization to maintain that the Claimant was found not guilty at his Court trial. It is difficult to comprehend how an individual whom the Court fined \$1,500.00, placed on probation for two years and assessed court costs and ordered to make a substantial payment to designated specialized law enforcement agencies and required to give 20 hours community service, can meaningfully assert that he was found not guilty in the court proceedings, in which he appeared as a defendant. The Court record indicates that while the Court found the Claimant guilty of the charge, it extended him leniency by not sentencing him to a jail term. However, extending leniency is not the equivalent of the Claimant being found not guilty of the criminal charges levied against him.

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Turning to the central issue, the Board finds that the Carrier could properly terminate the Claimant from his non covered job without being guilty of violating the Claimants' procedural rights under the UTU Agreement; namely, Rule 118(h), The Leave of Absence Rule, or Rule 133, the Discipline Rule. The Board finds that Rule 118(h) is inapplicable because the Claimant was not on a leave of absence, but rather he was given a non covered position as a part of a personal injury settlement executed on February 22, 1990, because he allegedly was disabled from performing the duties of his former brakeman position. The Claimant was dismissed while he was working at a Company position and while occupying this position, he could not invoke the contractual benefits and protections that adhered to employees covered by the UTU Agreement.

Arguendo, if the Claimant had the right to leave his Company position, it would only be under those circumstances where the Claimant was not satisfactorily performing the duties of his non covered job or the Claimant found the duties of his Company position too onerous or too demanding. However, these conditions do not prevail when an employee is terminated from his non covered job because he has been found guilty of violating the criminal law of the State of Idaho.

The Carrier is at liberty to discharge an employee holding a company position, especially if the Carrier has cause and the employee has no valid basis to frustrate or militate against the Carrier's disciplinary actions, when the employee is working outside the scope and purview of a union contract.

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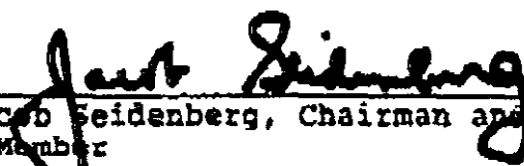
The Board finds not persuasive the Organization's contention that on the day the the Claimant was discharged, the Terminal Superintendent put the Claimant back into service when he instructed him to mark up on the Trainmen's Board but then took him out of service on the same day. The record shows the Superintendent told the Claimant to make up at 13:42 hours and took him out of service at 14:39 hours. The Board finds the Terminal Superintendent's error cannot prejudice or compromise the Carrier's basic managerial rights, especially in view of the short time that elapsed between the Superintendent's actions.

When the Board reviews the awards cited by the parties pertaining to this issue, it finds the Carrier's cases more persuasive because all its cases deal with operating employees discharged for felonious conduct while the Organizations cases pertain to non-operating employees, with one exception, and do not involve offenses as serious as that committed by the Claimant.

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In summary, the Board finds that in light of its finding that the dismissal of an employee holding a non covered position is appropriate, and as such the employee does not revert to his seniority and procedural rights under the UTU Agreement, it is not necessary to reach the other issues advanced by the parties in this case.

Award: Claim denied



Jacob Seidenberg, Chairman and Neutral
Member



L.A. Lambert, Carrier Member



R.E. Carter, Employee Member

November 29, 1992