PUBLIC LAW BOARD NO. 5483

Award No. 25

Case No. 25

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION

and

PADUCAH & LOUISVILLE RAILWAY

Statement of Claim

Claim of conductor/brakeman B. J. Richardson, Louisville, KY, for reinstatement to the service and one (1) day's pay for all such days on which not allowed to exercise his Conductor-Brakeman seniority and work for the Carrier. Claims commencing May 24, 1994 and all subsequent dates until so allowed.

Findings

The Board, upon consideration of the entire record and all of the evidence, finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties to said dispute were given due and proper notice of hearing thereon.

Claimant has an initial seniority date with the carrier of March 15, 1971. This date reflects claimant's earliest date of conductor-trainman employment with the Illinois Central Gulf Railroad (IC), from whom the carrier was initially purchased in August, 1986. Claimant is a

Promoted Conductor and also a Promoted Engineer, with an engineer seniority date of April 8, 1987.

On May 17, 1994, claimant wrote United Transportation Union General Chairman John W. Hales regarding an earlier telephone conversation of May 12, 1994, requesting the General Committee to consider allowing him to return to work his conductor/brakeman seniority should he terminate his seniority as an engineer. Claimant stated that he was considering this action because of job stress while working as an Engineer and that he had been seeing an Employee Assistance Program Counselor. Along with this letter was another letter dated May 18, 1994, from Carol Stuecker, Stuecker and Associates, Inc., Louisville, KY, which attested to the fact that the claimant was seen on previous dates for evaluation and counseling and related a recommendation and professional opinion that the claimant's decision to request a transfer to another position and to give up his seniority (as an engineer) was in the best interest of the claimant and the public safety.

Upon receipt of this letter on May 24, 1994, General Chairman Hales telephoned Mr. G. I. James, Transportation Superintendent, Paducah & Louisville Railway and made a formal request that claimant be allowed to revert back to (exercise and utilize), his conductor/brakeman seniority.

Prior to the time of the Claimant's initial contact

and evaluation with Stuecker and Associates, Inc., he had been referred to Mr. William H. Draper, EAP Administrator for the P&L by Mr. D. E. Sill, Assistant Vice President & General Manager P&L Railway. On May 27, 1994, Mr. Draper wrote to Mr. Sills, confirming telephone conversations he had with the claimant and endorsing the professional opinion of Ms Stuecker; Mr. Draper also recommended that the claimant be allowed to transfer to another position instead of returning to his earlier role as engineer, as this would be in the best interest of both the P&L and of the employee.

On this same date of May 27, 1994, Brotherhood of Locomotive Engineers (BLE) General Chairman Jim McCoy addressed a communication to Mr. D. E. Sills, Assistant Vice President & General Manager, advising that he had been contacted by claimant, regarding his desire to give up his engineer's seniority standing on the Paducah & Louisville. Mr. McCoy stated that he had informed the claimant that he saw nothing contractually in the Engineer's Agreement which would prevent him from voluntarily relinquishing his P&L engineer's seniority status. Mr. McCoy also advised claimant that the request would be subject to the approval of the other involved parties; i.e. the United Transportation Union and the Paducah &

Louisville Railway.

While this matter was progressing, claimant was further evaluated by Mr. John C. Runyan, M.S. on June 9, 1994 and by Dr. David C. Waggoner, MD on June 24, 1994.

On June 27, 1994 claimant wrote Mr. G. I. James, P&L Transportation Superintendent, requesting various medical documents concerning his condition and voiced his feelings regarding the Carrier's handling of his situation.

On July 12, 1994, Mr. James, wrote claimant denying his request to relinquish his rights as an engineer and return to work as a conductor/brakeman. He further advised claimant that as the result of examinations by J. C. Runyan and Dr. David Waggoner the carrier was disqualifying him from the service of the P&L.

On this same date of July 12, 1994, Mr. James also wrote General Chairman Hales, concerning the organization's request that the claimant be allowed to revert back to his conductor/brakeman seniority, stating that the matter pertained to BLE matters therefore such would have to be handled between the carrier and the BLE.

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On July 26, 1994, General Chairman Hales replied to Mr. James' letter of July 12, 1994, stating that the UTU Agreement does not preclude the claimant from reverting to such service. Also on July 26, 1994, the organization presented its official appeal of the claim to Mr. D. E. Sill.

On September 15, 1994, Mr. Sill replied to the appeal of General Chairman Hales, declining same.

On September 27, 1994 General Chairman Hales advised Mr. Sill that his decision of denial was unacceptable to the Organization and requested an early conference on the matter. Conference was held on October 10, 1994, with the carrier's position of denial remaining unchanged.

In an attempt to clarify the question as to whether claimant should be allowed to return to and utilize his conductor-trainman seniority, on December 23, 1994, General Chairman Hales wrote to United Transportation Union Vice President W. E. Biedenharn, Jr., who, at the time of the establishment of the P&L Railway and Labor Agreement, was the General Chairman representing the P&L Employees, requesting his understanding of the intent of Rule 19 - Seniority Rights and Rule 20 - Exercise of Seniority. On

January 3, 1995, UTU Vice President Biedenharn wrote back to General Chairman Hales stating his position, that he concurred in that the claimant should be allowed to work as a conductor/brakeman while disqualified as an engineer.

On January 17, 1995, General Chairman Hales wrote Mr. Sill providing him with a copy of the correspondence to and from Vice President Biedenharn.

Mr. Sill responded to the matter on February 23, 1995, stating that the carrier considered the claimant to be disqualified from engine service and train service. The carrier further referenced Rule 45 - Medical Examinations of the Schedule Labor Agreement as providing a procedure to be followed when an employee felt that a disqualification is not warranted. The carrier also referred to the fact that claimant had chosen to file a complaint with the Equal Employment Opportunity Commission (EEOC), that the carrier's interpretation had not changed and that the claim was still denied.

On April 3, 1995, General Chairman Hales provided documentation under Rule 45 - Medical Examinations for the establishment of a Three Doctor Panel to determine whether claimant was qualified to

return to work and perform the work in train service, along with a letter dated March 30, 1995 from Dr. Mohammad A. Mian, attesting to the claimant's qualifications. On April 4, 1995, General Chairman Hales wrote Mr. Sill concerning the alleged finding and statements from Dr. Richard Rucker. The carrier responded to this communication on May 1, 1995, giving an explanation of the association of Dr. Rucker with Industrial Medicine, Inc., but further declined the claimant's return to service as a conductor/brakeman. In reply, on May 2, 1995, General Chairman Hales addressed a further communication to Mr. Sill again reminding him that Dr. Mian had stated that claimant was qualified to perform service as a conductor/brakeman.

On May 11, 1995, Dr. David L. Waggoner wrote Mr. Sill stating that he had re-evaluated claimant, and in his opinion (claimant) was able to function on the job as a conductor/brakeman, but that he was still not able to function in the role of an engineer.

On May 19, 1995, General Chairman Hales wrote Mr. Sill providing him a copy of a May 9, 1995 letter from the claimant. Also provided was a copy of a May 11, 1995 letter concerning evaluation of Dr. David

Waggoner on such date and a request of the Organization for a copy of pertinent documents of such evaluation.

On June 16, 1995, Mr. Sill advised General Chairman Hales that a Three-Doctor Panel was no longer required, as the carrier did not now consider claimant disqualified as a conductor/brakeman, but rather it was their position that the claimant was not permitted by the Labor Agreement to work as a conductor/brakeman.

It is the position of the organization that the only issue to be decided in this instant case is whether the claimant, who has previously made the progressive promotion from brakeman to conductor to engineer, having now been disqualified as an engineer, because of medical reasons, should be allowed to revert back to and utilize his conductor/brakeman seniority in order to work as such and maintain his livelihood. Accordingly, it is the position of the organization that claimant should be allowed to revert back to such conductor/brakeman seniority and that such actions are clearly allowable under Rule 19-Seniority Rights of the Schedule Labor Agreement, which states:

(a) The seniority of brakemen shall date from the time they begin their first tour of duty. Conductors shall retain the seniority date they established as brakemen.

(b) The right to work positions, assignments, promotion (except official positions) and vacations shall be governed by seniority.

(c) Seniority roster of brakemen showing date of employment, promotion and birthdate shall be posted on bulletin boards at all designated terminals in January of each year over the signature of the Designated Carrier Officer. The Local and General Chairman shall be furnished a copy.

NOTE: (A statute of limitations of six (6) months is hereby fixed to take up or appeal a case of seniority. If six (6) months has elapsed without any protest having been filed in such case, it cannot be taken up by the Committee or Carrier.)

(d) Employees leaving the service of Carrier shall, upon request, be given a service letter signed by the Designated Carrier Officer showing the time of service and the capacity in which employed.

(e) Employees shall be in line for promotion from brakeman to conductor to engineer in accordance with their relative seniority standing consistent with applicable provisions provided for herein, and shall be shown on seniority roster by appropriate symbols and dates.

(f) Employees shall not be permitted to waive their seniority standing and promotional responsibilities.

(g) The entire railroad system shall constitute a single seniority district over which employees may exercise their seniority to positions, subject to the provisions provided for herein,

The organization contends that there is no Schedule Agreement provision which would prevent claimant from reverting back to and using his conductor/brakeman seniority to work, considering that he has been medically disqualified from working as an engineer, but not disqualified as a conductor/brakeman.

The organization further contends that it was the clear intent of Rule 19 that if an employee could hold an assignment as engineer he could not exercise his seniority as a conductor/brakeman. It was also true that if he could hold an assignment/position as conductor he could not exercise his seniority as a brakeman. The organization states that this particular paragraph was not intended to deny an able bodied employee from holding a position as conductor/brakeman when such employee was not able to hold an assignment/position as an engineer, any more than it was intended to prevent a conductor who could no longer work a conductor position (for whatever reason; seniority, physical ailments or physical restrictions) from reverting back to the rank of brakeman and working as such.

Carrier's initial position was that representation of the claimant should be provided by the BLE; however, without prejudice to this position, carrier has continued to resolve the problem with the UTU, inasmuch as trainmen do get promoted to engine service and they do revert to train service as requirements of service change from time to time. The position of the carrier throughout the handling of this claim is that the Labor Agreements require forced promotion. No rule or practice requires the carrier to allow an engineer to be demoted to conductor/brakeman.

Carrier contends that claimant's request to transfer to a "Yard Position" could not be approved because no such position has ever existed. Although P&L employees commonly refer to trainmen positions as "over the road" or 'in the Yard', those jobs which primarily work in switching are subject to performing the same duties as those in "over the road" service. Carrier also notes that claimant desires a yard assignment in Louisville, Jefferson County, where most of Carrier's crossing accidents have occurred. There are approximately sixty (60) crossings located in that county.

Carrier also contends that claimant's disability

from Railroad Retirement Board is further proof that he is incapable of performing work in train service, as well as engine service. In order to be eligible for railroad disability benefits, he had to prove total disability either physically or occupationally. Claimant is receiving an occupational disability, which means that he is incapable of performing railroad work.

In summary, carrier contends that it acted properly when it refused to permit claimant (in effect) to demote himself.

During the Public Law Board hearing on May 23, 1996, the Neutral Chairman requested that the carrier: 1) determine if the ADA supersedes the Labor Agreement and 2) if not, would permitting claimant to give up his BLE seniority and return to work as a trainman constitute a reasonable accommodation under the ADA.

The Carrier wrote a letter indicating that it has been unable to find any authority which supports the position that ADA supersedes the Labor Agreement.

Carrier has maintained that the claimant requested a position (as an accommodation) which does not exist on Paducah & Louisville Railway, Inc. It states that there is no yard position, and those road switcher

positions which exist can and do go out and operate under the same conditions as do local/express assignments.

In summary, carrier requested that this claim be decided as a 'minor dispute' under the Railway Labor Act and that it be denied.

As was indicated at the hearing, this Board is aware that the claim in this case presents a novel question regarding claimant's rights under the agreements between the carrier and both the UTU and the BLE.

Claimant's last regular employment with the carrier was as an engineer. The agreement between the BLE and the carrier contains Rule 48, which states:

> (a) If employees move from train to engine service under the provisions of Rule 19 [Seniority Rights] herein, they shall retain their seniority in train service. Such employees shall be permitted to exercise their train service seniority only in the event they are unable to hold a regular position in engine service.
>
> (b) Employees holding engine service positions shall be subject to applicable agreement rules governing engine service employees.

Rule 53 of the UTU agreement with the carrier contains similar provisions, which read as follows:

> (a) Employees moving from train to engine service under the provisions of Rule 19(e)

herein, shall retain their seniority in train service. Such employees shall be permitted to exercise their train service seniority only in the event they are unable to hold a regular position in engine service.

(b) Employees moving to engine service positions shall be subject to applicable agreement rules governing engine service employees.

(c) The movement from train service to engine service or vice versa shall be under applicable agreement rules and shall not be considered to break the continuity of the employee's service, and all rights and benefits earned or granted to employees under combined service shall be maintained.

Rule 19(e) provides that employees shall be "in line for promotion from brakeman to conductor to engineer in accordance with their relative seniority standing... ."

The language in both of these agreements has generally been interpreted to mean that so long as a promoted engineer can hold a position working as an engineer, such individual does not have the right to return to the conductor/trainman ranks; however, if an engineer cannot hold either a regular position or one on an extra board, the individual would have the right to bid for a trainman's position. This right would only continue for the period that there was no work which the individual could perform as an engineer.

This is not a situation where claimant wishes to

return to train service. Rather, claimant cannot hold a job in engine service for medical reasons. The agreement between the parties does not particularize why an individual cannot hold a job in engine service. Rather, it requires an individual to stay in engine service if he can perform that work.

Claimant is medically unfit to hold a job in engine service. The carrier has effectively conceded that he could hold a job in train service, but refused to allow him to perform such work because he asked for a job which would be specially tailored to his desires.

There is nothing in the contract which requires the carrier to create a special job for claimant. Claimant, to date, has not indicated that he would be willing to take any train service job. However, were he to do so, there does not appear to be any language in the agreement which would preclude him from bidding for such a job, since he is unable medically to exercise his seniority in engine service.

Carrier has contended that claimant is drawing disability insurance from the Railroad Retirement Board and is so precluded from working. Disability even if believed to be permanent, may not always be

permanent. This may be such a situation; however, that decision is for the Railroad Retirement Board and not this Board.

Claimant has not shown that he can presently return to train service. He must do so in order to qualify for such service. If there are medical reasons he cannot qualify, that must be proven, otherwise, claimant shall be returned to train service and may bid for any available position in accordance with his seniority.

Award

The claim is sustained in part in accordance with the foregoing decision. Claimant has to show he is medical qualified to work in train service. At that time, carrier will either return him to service or be liable for a day's pay for each day claimant is denied work. The claim for back paid is denied. The Board will retain jurisdiction to effectuate this award.

Robert O. Harris
Chairman and Neutral Member

(DISSENT)
Jerry Shepherd
For the Carrier

B. R. Wigent
For the Organization

Louisville KY, 11/18, 1996