PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION – IBT RAIL CONFERENCE

And

CSX TRANSPORTATION, INC.

Case No. 43

* * * *

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The Carrier's decision to terminate the seniority of furloughed Machine Operator B.A. Johnson was without just and sufficient cause and in violation of the Agreement.

2. The Agreement was further violated when the Senior Director Employee Relations failed to timely respond to the April 16, 2004 claim letter.

3. As a consequence of the violations referred to in Parts (1) and (2) above, Machine Operator B.A. Johnson shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

Facts

Claimant B.A. Johnson, with seniority dating from June 5, 2000, placed a bid for a System Tie Unloader position on Gang 5XU6 on the Central East Service Lane while he was furloughed. He was the successful bidder for the position with the assignment effective March 16, 2004. Claimant did not report for duty, however, on March 16, 2004. Therefore, by letter April 8, 2004, he was notified that his seniority had been forfeited pursuant to Rule 26(b) of the Collective Bargaining Agreement, which provides:

Rule 26 – Absent Without Permission

(b) Except for sickness or disability, or under circumstances beyond his control, an employee who is absent in excess of fourteen (14) consecutive days without notifying his supervisor or proper carrier official will forfeit all seniority under this Agreement. The employee will be notified by certified mail, return receipt requested, with copy to the General Chairman advising them of such forfeiture of seniority. The employee or his representative may appeal from such action to the carrier's Highest Designated Labor Relations Officer within thirty (30) days under Rule 25, Section 3.

On April 16, 2004, Vice Chairman D. R. Albers filed a claim with Director – Labor Relations J. H. Wilson seeking Claimant's reinstatement with a restoration of wages and seniority. On October 4, 2004, Vice Chairman Albers wrote to Mr. Wilson, asserting that the "claim was discussed in conference on June 29, 2004...[and] the Carrier has failed to reply in accordance with Rule 24(b) of the current Agreement...." (Carrier Exh. F). By letter dated October 12, 2005, Wilson replied that during the June 29, 2004 conference, "[t]he Organization and Carrier agreed to re-list this claim for further discussion at a later conference (Carrier Exh. G), and consequently, CSXT was not required to respond to the claim within sixty days of June 29, 2004.

A conference was held on November 17, 2004, after which Mr. Wilson issued his appellate declination dated December 16, 2004. In a letter dated March 7, 2005, Wilson reaffirmed the basis for the Carrier's declination of the claim. The matter remained unresolved, and it was ultimately submitted to this Board for adjudication.

Contentions of the Organization

The Organization relies on Rule 24(b), which reads as follows:

(b) A claim or grievance denied in accordance with paragraph (a) shall be considered closed unless it is listed for discussion with the Carrier's Highest Designated Labor Relations Officer by the employee or his union representative within sixty (60) days after

> the date it was denied. A claim or grievance meeting with the local committee will be placed on the docket for discussion at such meeting. When a claim or grievance is not allowed, the carrier's Highest Designated Labor Relations Officer will so notify, in writing, whoever listed the claim or grievance (employee or his union representative) within sixty (60) days after the date the claim or grievance was discussed of the reason therefor. When not so notified, the claim will be allowed.

The Organization emphasizes that in this case, the Vice Chairman presented the claim to the Carrier's Highest Designated Officer on April 16, 2004, and a conference was held on June 29, 2004. The Highest Designated Officer did not deny the claim in sixty days as provided in Rule 24(b). Therefore, the Organization contends that the Carrier violated Rule 24(b), and the claim should be allowed.

Given the Carrier's procedural violation of Rule 24(b) of the Agreement, the Organization further argues that this Board should not reach the merits of the claim. But if it does address the merits, the Organization asserts that Claimant was not physically qualified to work on March 16, 2004 and therefore repeatedly attempted to schedule a physical examination. He asserts that he contacted "Jeannie" at the Huntington Office and made an appointment for a physical on April 8, 2004. He received Mr. Wilson's letter on April 8, 2004, however, and as a result, did not undergo the return to work physical examination.

Contentions of the Carrier

The Carrier denies that there has been any procedural violation. The conference was initially scheduled for June 29, 2004, but the Carrier contends that the parties agreed to re-list the claim for discussion in conference, which was eventually conducted on November 17, 2004.

While the Organization relies on Rule 24(b) to support its procedural argument, the Carrier submits that Rule 26(b), rather than Rule 24(b) applies to this case. The relevant contractual language states: "The employee or his representative may appeal from such action to the carrier's Highest Designated Labor Relations Officer within thirty (30) days under Rule 25, Section 3, which reads as follows:

> After the appeal has been acted upon, the employee or his Union representative shall be advised not later than thirty (30) days after the hearing, in writing, of his decision.

According to the Carrier, the appeal was never "acted upon" until the conclusion of the November 17, 2004 conference. Thus, CSXT's December 16, 2004 response was timely.

With respect to the merits of the case, the Carrier asserts that Claimed failed to protect his assignment as a System Tie Unloader from March 16, 2004 through April 8, 2004. Citing Rule 26 (b), the Carrier contends that there is no evidence in the Record indicating that Claimant was absent from work because of "sickness or disability, or under circumstances beyond his control." Moreover, there is no record of Claimant contacting any employee to arrange for a return to work physical. While he stated that he did not appear for his medical appointment on April 8, 2004 because on that same day he received Mr. Wilson's letter advising that he had forfeited his seniority, the evidence reveals that he did not receive Mr. Wilson's letter until April 13, 2004. Additionally, Claimant noted on his bid form that he was "medically qualified," which contradicts his alleged attempt to schedule a return to work physical examination.

Findings

The Organization has not met its burden of proof in regard to its claim that the Carrier committed a procedural violation. Undisputedly, the claim was initially

scheduled for conference on June 29, 2004. The unrebutted evidence in the Record, however, is that following discussion of the claim on June 29, the parties agreed to re-list the claim for "further discussion" (Carrier Exh. G). Eventually, the claim was discussed again at conference on November 17, 2004. Given that the Organization never refuted CSXT's contention that there was an agreement to re-list the claim for conference, which was in fact held on November 17, 2004, CSXT was not obligated to respond to the claim prior to that time.

Furthermore, the Organization has erred in relying on Rule 24(b) to support its procedural argument. CSXT argues correctly that the applicable provision is Rule 26(b), which deals with employees who are absent from work without permission and fail to notify the Carrier. The relevant procedural language from Rule 26(b) states: "The employee or his representative may appeal from such action to the carrier's Highest Designated Labor Relations Officer within thirty (30) days under Rule 25, Section 3." Rule 25, Section 3 states: "*After the appeal has been acted upon,*" the employee or his union representative will receive written notice of the decision not later than thirty days after the hearing (emphasis added). In this case, the appeal was not "acted upon" until the conclusion of the November 17, 2004 conference. Consequently, the Carrier's December 16, 2004 response was timely.

With respect to the merits of the claim, the evidence supports the finding that Claimant failed to protect his assignment as a System Tie Unloader between March 16, 2004 and April 8, 2004, when he was notified that he had forfeited his seniority. Under Rule 26(b), an employee who is absent more than fourteen consecutive days without notifying his supervisor or proper Carrier official forfeits his seniority "except for

sickness or disability, or under circumstances beyond his control...." This Record is lacking any evidence that Claimant was absent from work without permission due to "sickness, disability, or under circumstances beyond his control."

Claimant asserted that on March 16, 2004, and again on March 26, 2004, he contacted the Carrier to arrange for a return to work physical. The Carrier had no record of such contacts, however. But even if it were true that during the March 26 call, he spoke to an employee named "Jeannie" at the Huntington office, she would have had no way of knowing whether Claimant was improperly absent from his work assignment. It was Claimant's responsibility, not the function of the office clerk, to advise his supervisor within fourteen days as to why he was absent from work.

Claimant also stated that he made an appointment for a return to work physical on April 8, 2004, but did not keep the appointment because he received Mr. Wilson's letter on the same day, advising him that he had forfeited his seniority. The Carrier, however, had no record of this medical appointment. Moreover, postal records confirmed that Wilson's letter was not delivered to Claimant until April 13, 2004. Also troubling was the following statement in Vice Chairman Albers' April 16, 2004 appeal letter: "According to Mr. Johnson, his status as physical (sic) qualified to return to work was expired" (Carrier Exh. E). This statement was inconsistent with Claimant's bid form on which he had checked that he was "medically qualified" (Carrier Exh. B).

This evidence seriously undermined Claimant's credibility and buttresses the conclusion that Claimant concocted a story to disguise the fact that he, in fact, failed both to protect his assignment and to give timely notice to his supervisor as to the reasons for his absence from work. The Collective Bargaining Agreement recognizes that illness,

disability, or extenuating circumstances may prevent an employee from coming to work and/or notifying his supervisor in a timely fashion. There is no evidence, however, that such circumstances existed in this case.

There is ample arbitral precedent holding that Rule 26(b) is a self-executing provision, which mandates forfeiture of seniority when an employee fails to protect his assignment and cannot point to illness, disability, or circumstances beyond his control. (See, for example, *Public Law Board 6564,* Case 43 (Parker) and *NRAB, Third Division,* Award 35724 (Douglas)). The facts in this case fall squarely under Rule 26(b) and require that the claim be denied.

Award

The claim is denied.

Joan Parker, Neutral Member

James T. Klintzak
Carrier Member

Dated: 01-23-06

Organization Member

Dated: 1-23-06