

PUBLIC LAW BOARD NO. 6711

PARTIES TO THE DISPUTE:

United Transportation Union
And
Union Pacific Railroad Company
(Missouri Pacific Upper Lines)

STATEMENT OF CLAIM:

"Claim of Fireman in Training (FIT) C.J. Gober, PID# 0298017, for time lost on account of attending investigation on January 29, 2004 and removal of Level 4, with pay for all time lost. Claim includes payment for all wage equivalents to which entitled, with all medical, surgical, life and dental benefits, and for any monetary loss for such coverage while improperly disciplined."

OPINION OF BOARD:

A) Background

The Claimant has been employed by the Carrier for almost five years. On March 27, 2003, he was dismissed for a Level 5 violation based on his failure to protect his job assignment, when he was dishonest with the CMS crew dispatcher in violation of Rule 1.6. In October 2003, the Carrier and the Organization agreed that the Claimant would be reinstated without prejudice to his right to progress his claim for lost time. Included in the parties' written Agreement was the provision that "there must be a clear understanding of Mr. Gober's responsibilities with regard to job protection and absenteeism." On December 22, 2003, and January 4, 2004, the Claimant laid off without permission.

The Notice of Investigation provided to the Claimant stated as follows:

Report ... for an investigation and hearing to develop the facts and place your responsibility, if any, in connection with the charge that you allegedly failed to comply with instructions given to you by MOP Chad Billson on the requirements of the students [sic] engineers. You allegedly failed to obtain permission to lay off on December 22, 2003 and January 4, 2004 as discussed in return to work meeting held at the Superintendent's Office on December 8, 2003 at approximately 8:00 a.m.

* * *

Fireman in Training Gober, proposed disciplined for this alleged offense is Level 2 under the UPGRADE policy. As provided by the System BLE Disciplined Agreement, you and/or your representative may contact MOP Chad Billson ... to discuss alleged offense and proposed disciplined.

The hearing was postponed once at the request of the local chairman. The day before the date of the rescheduled hearing, the Claimant notified the Organization that due to his child's illness, he would be unable to attend the hearing. The local chairman contacted the Superintendent who requested that the local chairman provide documentation regarding the child's illness. The local chairman presented a memo at the hearing providing the child's name, the child's doctor, the name of the hospital and the time of the surgery. The memo was signed by the Claimant. The Carrier took the position that since there was no letterhead on the memo and no other documentation regarding the child's illness, that it would proceed with the hearing investigation. After the investigation and hearings were held, the Claimant was issued a Notice of Discipline on February 4, 2004, stating as follows:

I have reviewed the transcript and exhibits in connection with the investigation held on January 29, 2004 at Little Rock, AR., and have concluded that the charges were proven. Therefore, you are hereby advised that your record has this date been assessed with Discipline Level 4 (Thirty days off work without pay and must pass necessary annual operating rules exam or equivalent in order to return to work. A Corrective Action Plan must be developed upon return to work) for violation of Rule 1.13 (Reporting and Complying with instructions), and Rule 1.15 (Duty - Reporting or Absence) in connection with your failure to obtain permission to lay off on December 22, 2003 and January 4, 2004 as discussed in return to work meeting held at the Superintendent's Office on December 8, 2003 at approximately 8:00 a.m.

Your record now stands at Level 4 status.

The Organization appealed the Level 4 discipline and upon failing to resolve the matter the parties submitted the dispute to this Board.

B) Applicable Rules

General Code of Operating Rule (GCOR) 1.13, entitled "Reporting and Complying with Instructions" states as follows:

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions

issued by managers of various departments when the instructions apply to their duties.

GCOR 1.15, entitled "Duty – Reporting or Absence" provides that:

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be sufficient cause for dismissal.

C) Contentions of the Parties

The Carrier contends there is no basis for this Board to disturb the discipline assessed against the Claimant. Initially, it asserts that the Organization's claim is procedurally defective because it failed to hold a local level conference pursuant to UTU Article C-16. It notes that in the past, if a superintendent failed to hold a local level conference, the Organization took the position that the claim became valid and should be settled accordingly, pursuant to Article C-16. The Carrier argues that arbitral precedent supported the Organization's position in this regard. It asserts that the same principle should apply here, where the Organization failed to conference this claim at the local level.

Additionally, it contends the Organization has failed to establish the existence of any procedural errors in the Carrier's handling of this case that warrant overturning the discipline assessed. It argues that the Organization's allegation that the Notice of Investigation was procedurally defective because the Claimant was charged under the BLE Discipline Agreement is without merit, and in any event, "was a typographical error" that "in no way adversely impacted Claimant's ability to prepare and present a defense, nor did it violate Claimant's due process rights."

The Carrier also disputes the Organization's claim that the Carrier unreasonably refused to permit the Claimant to postpone the hearing due to his child's illness. Based on the Claimant's failure to provide sufficient documentation regarding his child's illness, Superintendent Crandall properly denied the request. Finally, the Carrier rejects the Organization's contention that Superintendent Crandall's failure to use the words "denied" or "declined" in response to the local level discipline appeal constituted "a fatal procedural defect." It is clear that the Organization understood the letter was a declination of the discipline appeal, based not only on the language of the letter itself but also upon the fact that the Organization appealed the Carrier's decision.

Additionally, the Carrier contends that it has provided substantial evidence that the Claimant violated GCOR 1.13 and 1.15. The testimony of MOP Billson clearly established the Claimant's failure to comply with Billson's introductions. The discipline herein was reasonable, because the Claimant was at a Level 3 and his misconduct constituted a Level 2 violation. Accordingly, this Level 2 violation warranted the assessment of a Level 4 discipline pursuant to the Carrier's UPGRADE Discipline Policy. Arbitration precedent has upheld progressive discipline for failure to comply with instructions. Additionally, the Carrier notes that "Claimant was given a second chance to comply with his supervisor's instructions to protect his student engineer assigned. He failed to do so." Thus, the Carrier requests that the claim be denied and that the discipline be upheld.

The Organization lodges a procedural argument over the Carrier's improper application of the progressive discipline rules. Specifically, it contends that the Carrier unilaterally determined that when the Claimant was reinstated in October 2003, that he should be returned to service at Level 3 status. The Organization argues that at no time did it agree that the Claimant be placed at Level 3, and that nowhere in the letter Agreement entered into by the parties does it indicate as much. Additionally, the Organization strenuously objects to the Carrier's citing to the BLE Discipline Agreement in the Notice of Charges. It asserts that the Fireman-in-Training agreements on the property have been continuously handled by the Organization, and that the Carrier has a statutory duty to bargain with the Organization - not the BLE - concerning the terms and conditions of the Firemen-in-Training, and that firemen do not fall under the BLE Agreement until after they establish engineer seniority.

The Organization also seriously disputes the Carrier's determination to proceed with the hearing in this matter without the Claimant being present. It argues that the Claimant clearly presented valid mitigating circumstances concerning his inability to appear at the hearing. The Organization also presented to the Carrier the information it requested be presented in order to support the request for a postponement. The Organization asserts that the Carrier's conducting the hearing *in absentia* deprived the Claimant of due process and is "most disturbing and not fully understood."

As a result of the Claimant being absent from the hearing, the Organization contends that "too many questions remain unresolved." In any event, the Organization asserts that the Claimant called CMS, which gave him permission to lay off. It argues further that if Billson did not want the Claimant to lay off, he could have informed CMS "and that would have ended it." Accordingly, the Organization concludes that the Carrier's position herein is "untenable" and that the claim must be sustained.

D) Discussion

At the outset, the Board must address the Organization's procedural contention that the Carrier improperly cited to the BLE Discipline Agreement when it issued its

Notice of Investigation to the Claimant. After carefully reviewing the record evidence and the contentions of the parties, the undersigned conclude that the Carrier's limited reference to the BLE Discipline Agreement in the Notice of Investigation constituted harmless error, and does not provide a basis for setting aside the discipline herein. It is clear from the actions of the parties that there was no misunderstanding or confusion as to which Organization was the certified representative representing the Claimant in this matter, nor any dispute as to which discipline rules were to be applied herein. However, the Board is sensitive to the historical tension and confusion that exists regarding the representation of trainmen in this industry. The Carrier can avoid this issue and controversy by simply ensuring that it refers to the appropriate Organization rules and agreements when citing employees for rule violations.

However, the Board cannot overlook the other procedural irregularity cited by the Organization. As set forth above, the instant hearing and investigation took place without the Claimant being present. The Organization asserts that valid mitigating circumstances were present that warranted a postponement of the January 29, 2003, hearing. The Carrier disagrees, contending that the Claimant's last-minute request for a postponement was unreasonable and that the documentation he presented was inadequate to justify the request.

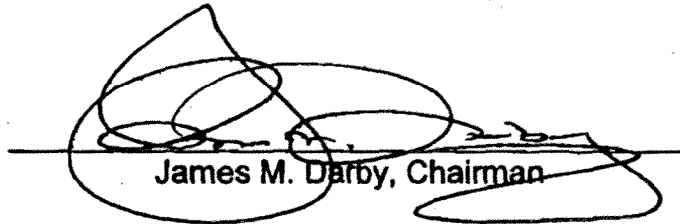
The undersigned cannot sustain the Carrier's position. Although there is evidence reflecting that the Claimant indicated that due to his child's surgery he would be unavailable on January 28, 2004, it is not unreasonable that this personal circumstance may have also required the Claimant's presence and attention on January 29, 2004. It is also reasonable to conclude, given the nature of the medical circumstances involved, that a last-minute request was unavoidable. Additionally, although the documentation provided by the Claimant was admittedly unofficial and lacking in detail, there is no evidence that it was not responsive to the Carrier's request.

It is well-established that a fundamental component of a claimant's due process guarantee is that he or she be provided a fair and impartial hearing. Although a Claimant can waive this right by engaging in certain dilatory and delaying tactics, there is no evidence that this occurred in the present case. The undersigned conclude that the Claimant provided sufficient mitigating reasons to support his request for a postponement, and that the Carrier's failure to grant the same was a violation of the Claimant's right to a fair and impartial investigation.

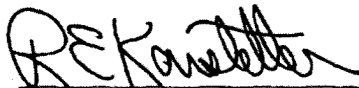
In light of the foregoing, the Board sustains the instant claim.

AWARD

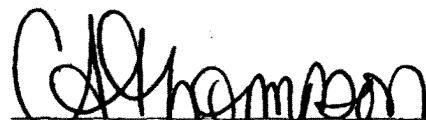
Claim sustained.



James M. Darby, Chairman



R.E. Karstetter, Union Member



C.A. Thompson, Carrier Member

Dated: 5/25/06