Case No. 92-C-0825

IN THE MATTER OF ARBITRATION

Green Bay and Western Railroad Company

vs

Brotherhood Railway Carmen Division of the
Transportation Communications International Union

Out of Service Claim

Grievant: Ken Simons

Before

Arbitrator: Edward L. Suntrup

DECISION & AWARD

November 1, 1992

Issued at: Chicago, Illinois

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Green Bay and Western Railroad Company	)	
	)	
vs	)	Claim: Out of Service
	)	Grievant: Ken Simons
Brotherhood Railway Carmen Division, Transportation Communications International Union	)	
	)	

Before

Arbitrator: Edward L. Suntrup

Appearances

For the Company: John C. Switzer, Manager, Labor Rel. & Personnel
Stephen M. Olson, Counsel, Kirkpatrick & Lockport

For the Union : Richard A. Johnson, Assistant General President
Dennis Dilley, General Chairman
Ken Simons, Grievant

Introduction

The Carmen Division of the TCU, Milwaukee Joint Protective Board (hereafter the "union") is the exclusive collective bargaining agent for the thirteen (13) members of the carmen craft[1] working for the Green Bay & Western Railroad (hereafter the "company"). This company is in the process of transferring its operations to another company which is the Wisconsin Central Transportation Company and if the Interstate Commerce Commission approves the sale the final transfer will take place about the middle of December, 1992. The company fired the Local Chairman of

[1]Information taken from Court Decision & Order cited in Footnote 2. In its brief the company states that only eleven (11) of the Carmen were employed "at the time of the claim".

of the union for reasons which will be outlined later in this Award. That Local Chairman is the grievant to this case. Because this happened, the union's contention is that members of this union working for the company would not have proper representation when negotiating for benefits when the transfer of the company to the Wisconsin Central took place. The union grieved, therefore, to have the Grievant reinstated prior to the transfer of ownership of the company to Wisconsin Central or in the alternative, to be able to arbitrate the claim in his case prior to the transfer. The company denied the claim for reinstatement, and stated its intent to follow the procedure for handling claims as stipulated under the labor contract. The conclusion by the union was that if such happened, and the case was docketed before the National Railroad Adjustment Board, any final adjudication of the original claim would take place after the transfer of ownership and that the members of this craft would suffer "irreparable harm" without proper representation. The union, therefore, filed complaint with U.S. District Court of the Eastern District of Wisconsin wherein it requested a preliminary injunction reinstating the grievant to his former position with the company or, in the alternative, "an order compelling the defendant to submit to expedited arbitration."[2]

After the parties agreed to an expedited briefing schedule and

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[2]All cites in this section of this Award, except as indicated in Footnote 3, are taken directly from the Decision and Order of the U.S. District Court of the Eastern District of Wisconsin, Case No.: 92-C-0825, September 3, 1992 pp. 16. Robert W. Warren, Senior District Judge, Presiding.

after motions for and against the injunction were submitted, oral argument took place on August 18, 1992. On September 3, 1992 the Court ruled that it did not have jurisdiction to reinstate the Grievant but that it did have jurisdiction to "order an expedited arbitration" and therefore did so. On September 15, 1992 the Court then issued the following ORDER, which is cited here for the record.

> WHEREAS the parties in (this) matter participated in a conference call before the Court on September 15, 1992 and agreed to an expedited arbitration pursuant to the Court's Decision and Order issued on September 3, 1992, the following schedule is hereby set forth:
>
> 1. the parties shall exchange lists of acceptable arbitrators on or before September 21, 1992;
>
> 2. if there is no mutually agreeable arbitrator named in either party's list, an arbitrator shall be chosen in a "tie breaker" by the NMB on September 22, 1992;
>
> 3. the parties shall submit their briefs to the arbitrator on or before October 12, 1992;
>
> 4. the hearing shall be held no later than October 23, 1992; and
>
> 5. the arbitrator's decision shall be issued no later than November 1, 1992.[3]

Since a tie breaker situation resulted after the parties exchanged lists of arbitrators in accordance with provision (1.) in the foregoing, the NMB appointed this arbitrator to hear and rule on this claim. Hearing was held in Chicago on October 23, 1992.

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[3]See Order of the U.S. District Court of the Eastern District of Wisconsin, Case No.: 92-C-0825, September 15, 1992 pp 2. Robert W. Warren, Senior District Judge, Presiding.

The Grievance Before the Arbitrator

The Milwaukee Joint Protective Board of the union filed the following claim with the company, under signature by the General Chairman, on July 16, 1992.

> The Carrier violated the provisions of the current collective bargaining Agreement when it dismissed Ken Simons as a result of a formal investigation held on June 25, 1992.
>
> The Carrier shall now restore Ken Simons to service with all rights unimpaired, including a continuation of health and welfare coverage and shall compensate him for all wages and other benefits lost as a result of the unjust dismissal.[4]

The parties both agree that this is the proper issue before the arbitrator as witnessed by their versions of the language of the grievance in their respective written arguments before the arbitrator in this case. Nor was there disagreement on this statement of the grievance in the hearing.

The Rules and Contract Provisions at Bar

The parties argue variously that the following company Rules, and provisions of the collective bargaining agreement, apply to this case.

Company's Operating Rules

Rule 7

Employees are prohibited from being careless of the

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[4]See Company Exhibit D & TCU Exhibit D. Many of the same exhibits are found in both the company's and the union's briefs to the arbitrator. As only a convention, hereafter, when an exhibit is found in both briefs only the company's identification thereof will be cited.

> & 23 meetings. June 4, 5 & 6th for our Executive Board meeting to be held at Davenport, Iowa. If ok with you, may use some personal days.[5]

The Manager of Operations' West wrote by hand on this memo that it was received on "...5-20-92" and that there were no men to relieve the grievant on May 22 & 23 at Wisconsin Rapids since three men were already off on those dates. The grievant was apprised of denial of his request on May 21, 1992.

On May 26, 1992 the grievant received a "Notice of Investigation" from the company under signature of the Manager of the Car Department. It stated the following, in pertinent part.

> You will appear for a formal investigation to be held at the Green Bay and Western depot in Wisconsin Rapids on Monday, June 1, 1992 at 10:00 AM to develop the facts and determine your particular responsibility, if any, as to the reason you failed to report for duty on your regular assignment at 3:00 PM May 22, 1992 and 7:00 AM May 23, 1992.[6]

After postponement the investigation was held on June 25, 1992 and four days later, on June 29, 1992 the Manager of the company's Car Department informed the grievant that "...the investigation clearly shows that you were in violation of Rule(s) 14 and 7 of the General Regulations and Safety Rules of the Green Bay and Western Railroad." Therefore, the grievant was informed that:

> for your failure to comply with Rule 14 to attend to your duties during prescribed hours and your additional failure to comply with the instructions of your

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[5]See Company Exhibit V.

[6]See Company Exhibit B.

A second terminal, according to the company's brief, is located at Wisconsin Rapids, Wisconsin. At that point there is also another small car shop. Wisconsin Rapids is about a hundred miles west of Green Bay. The company has been in existence since the 1890s and currently employs, in all, about 140 employees. According to the Carrier, at the time of the claim, there were nine carmen working various positions at Green Bay, and two carmen working as inspectors at Wisconsin Rapids. The grievant to this case was one of the latter. He was working the 3:00 PM to midnight shift Tuesday through Friday, and 7:00 AM to 4:00 PM on Saturday. Sunday and Monday were his rest days. The other carman working as inspector at Wisconsin Rapids worked the 7:00 AM to 3:00 PM shift, Monday through Friday, with Saturday and Sunday as rest days.

The grievant started his employment with the company in 1974 and has alternately held various positions as a member of the carmen craft and had also been on furlough status in 1976-7 and again in 1978. In 1983 he exercised seniority and took the position of car inspector at Wisconsin Rapids. The grievant is also an elected union official and he held position as Local Chairman of the union's Local Lodge 6779 at the time of his discharge.

Under date of May 19, 1992 the grievant sent the following memo to the Manager of the company's Operations' West:

> This is to advise you that due to upcoming union events it is my intention to lay off the following days, May 22

safety of themselves and others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious or conducting themselves in such a manner that the railroad will be subjected to criticism and loss of good will, or not meeting their personal obligations.

Rule 14

Employees must report for duty at the designated time and place. They must be alert, attentive and devote themselves exclusively to the company's service while on duty. They must not absent themselves from duty, exchange duties with or substitute others in their place, without proper authority.

Collective Bargaining Provisions

Rule 23

The company will not discriminate against any committeemen, who from time to time represent other employees, and will grant them leave of absence and free transportation when delegated to represent other employees.

Rule 27(A)

All employees covered by this Agreement wishing to be absent shall first obtain permission from the proper authority. In the event an employee is unavoidably detained or absent from work on account of sickness or other good cause, he shall notify his supervisor as soon as possible in order that a relief man can be obtained to cover his assignment. An employee unavoidably detained from work will not be discriminated against.

Background

The company is a short line railroad which has about 250 miles of track in central Wisconsin which runs in an east-west direction. The company's terminal, maintenance shop for locomotives and trai' cars, and its general offices are located at Green Bay, Wisconsir

> supervisor in violation of Rule 7, you are hereby advised that you are dismissed from the services of the Green Bay and Western Railroad and all seniority rights and privileges are hereby terminated effective June 29, 1992."[7]

This disciplinary action by the Carrier was appealed by the union. That appeal was denied as outlined in the Introduction to this Award. Per procedures laid out in the Order by the U.S. District Court this arbitration Decision will dispose of the instant claim.

Threshold Issue

Discussion

It is the position of the union that the grievant was not afforded due process because of material deletions and omissions in the transcript of the investigation and that such deletions and omissions would influence the conclusions of an appellate forum when considering this case. This procedural objection by the union is laid out in the first level of appeal by the General Chairman of the Milwaukee Joint Protective Board. The content of the investigation was tape recorded when it was conducted on June 25, 1992. When the union received a written copy of the transcript it charged that the Carrier "...denied (the grievant his) fundamental right to due process by sanitizing the transcript of investigation and editing large portions of the testimony favorable to the accused, rendering the investigation **void ab initio.**" (Emphasis in

[7]See Company Exhibit C.

original).[8] According to the union this editing took place on pages 11, 13 and 19 of the transcript which represented "...key elements of the union's defense". The union goes on to observe that there is arbitral precedent dealing with the "doctor(ing)" of transcripts and that such precedent has held that this is a violation of due process rights of grievants.[9] In response the company Superintendent states that he is "dismayed" by such charges that the transcript was "sanitized", and in correspondence to the General Chairman under date of July 24, 1992 states the following:

> We know that you (also) recorded the proceedings and if you would provide us with a copy of your tape, or a complete transcript, we will review ours and make appropriate corrections.
>
> Let me assure you that the Carrier wants an accurate record of the testimony just as much as the organization does. Upon receipt of the above material we shall review for any corrections.[10]

Some two weeks later the Superintendent provided a second copy of the transcript with information that the company "...made the changes as...provided from (the union's) tape...".[11] The copy of

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[8]See Company Exhibit D.

[9] The union cites here National Railroad Adjustment Board Awards from the First Division (15508 & 15159) and the Third Division (18150). A review of these Awards shows that they address the general issue of a complete record of investigation and the importance of such as a matter of due process while at the same time not being exactly factually on point with what happened in the instant case.

[10]See Company Exhibit E.

[11]See Company Exhibit F.

the corrected transcript has been provided to this tribunal to use in framing its conclusions in this case.[12]

Ruling on Threshold Issue

A review of the full record shows that there was some information missing in the first written version of the transcript and that the substance of this omission was materially related to defense by the union in this case. On the other hand, there is no evidence that the company was not willing to correct the original version of the written transcript by checking their tape against that of the union. It is a matter of no small concern to the arbitrator, however, that the company would have equipment which would be of such poor quality in either its manufacture or its functioning, that it would not be able to record accurately the full rendition of testimony of a procedure as important as the one at bar. As a matter of due process, such could be construed as tantamount to, if not deliberate, at least unexcusable negligence. Nevertheless, the union did provide a back-up tape and the company was able to make corrections. Upon the record as a whole the arbitrator rules that the full evidence of testimony is now before him and that the more prudent route, in a case such as this, is to proceed in framing conclusions on merits. The objection raised by the union with respect to due process is, therefore, dismissed.

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[12]Full transcript based tapes of both parties in found in Company Exhibit A.

Merits of the Case: Discussion

Position of the Company

The company argues that the grievant was insubordinate when he "...willfully and deliberately absented himself from his assignment on May 22 and 23, 1992 in violation of Rules 7 and 14" of the company's Rules. According to the company, the grievant had "...requested permission to be off work and his request was denied because (the company) already had too many employees off work on those dates".[13]

The company dismisses the position of the union that the grievant has some special right to disobey the company's Rules because he was a union officer. In this respect the company states the following:

> The organization's contention that Rule 23 of the labor contract grants local union officers total exemption from the carrier's rules is patently absurd. If the organization's position were upheld, the carrier might receive only one minute's notice that a union official would not be at work. The detriment to the carrier's operations is obvious. If the organization's position were upheld, the organization could appoint each member "a committeeman" and effectively nullify the rules of the company that are required to provide transportation services to our customers.

According to the company, the grievant failed to follow basic procedures when requesting to be off. He did so by just putting his request on the supervisor's desk when the latter was absent; and he

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[13]These quotes and those following, unless indicated otherwise, are from the Carrier's most developed response, on property, to the original claim filed on property. See Company Exhibit I.

failed to advise either the agent at Wisconsin Rapids, or the lead man at Green Bay, that he wanted to be off. The latter did not know about the request until after it was denied. To honor the grievant's request for May 22 and 23, 1992 relief men would have had to be sent from Green Bay, and according to the company, "those people were already scheduled to fill vacancies at that time". Further, according to the company, if the grievant had been instrumental in setting up the May 22nd meeting as is claimed, why could he not have requested earlier to be off since a union official from another craft who went to the same meeting had advised the carrier of it as early as May 14th? When the grievant had made request in the past to do union business this had been granted. But the lead time he gave the company was always pretty long. In reviewing the grievant's file on this matter the company argues that in 1983 the lead time granted to the company for a union business convention was 29 days; in 1986 and 1990 the grievant had given the company 23 and 26 days' lead time, respectively, when requesting time off for union business. In 1987 he requested time off for union business and had given the company 7 days' lead time. Thus there was no precedent for providing time off for union business with only 1 or 2 days' lead time, depending on how one counts the days in this case. It is difficult for the company to replace an employee like the grievant when days off are requested because this craft does not have extra board employees who are available on stand-by basis such as is the case with the

company's engineers, and yard and road trainmen. In the case of carmen an employee must be reassigned to cover an absence. When a carman's vacancy occurs in Wisconsin Rapids the company must arrange for relief from Green Bay. There are only two designated relief positions and both are located at the latter location. When a vacancy occurs at Wisconsin Rapids, the company pulls one of the Green Bay relief personnel and sends them to Wisconsin Rapids. If the vacancy is for more than one day, the relief person is provided lodging and a per diem. It is quite common for members of this craft to submit requests to be off some 30 days in advance and only one employee of this craft is permitted to be on vacation at a time on this railroad. The company also argues that the meeting on May 22, 1992 did not take all day long, so why did the grievant not come to work part of that day?[14] The company argues that opposition to the sale of the company to Wisconsin Central was nothing new and that various unions at this company, including this

[14]There is an inconsistency here in the company's argument about this point. In the first level denial of the claim the company argues as follows: "(b)y his own account, (the grievant) would be finished with the May 22 meeting so that he could fill the last six hours of his shift; yet, he never came to work". See Company Exhibit G. In its brief the company argues as follows as noted below in this section of this Decision: "(the grievant) told Mr. Milquet he could come in on May 22 and be an hour late. Mr. Milquet denied that request because of (the grievant's) poor record of working his full schedule". See reference to Company Exhibit W. Thus the grievant did not come in for the last six hours of his work schedule because he was denied the request to work out this type of arrangement on May 22, 1992. There is also a third argument of sorts presented by the Carrier on this issue. In its brief it also argues that since the May 22, 1992 meeting was only for two hours the grievant could have missed a "mere hour" of the meeting and still "have been to work on time".

craft, had opposed such sale and in this respect there was "nothing extraordinary" about the May 22, 1992 meeting that the grievant claims he had to attend. The company finds the union work which the grievant allegedly did on May 23, 1992 even more difficult to understand. The grievant himself admitted that he just stayed home on that day and did "...union-related paperwork". The company asks: why could not such latter work have been done on the grievant's rest days?

The company had discussed the grievant's situation on May 22, 1992 with the General Chairman of the union and the company states that the latter explained that Rule 23 applied to the grievant's request to be off on May 22 and 23, 1992. The company's position at that time was that if the grievant was not representing an employee "...at a formal investigation" then he was expected to be at work. According to the company, it is its view that "...Rule 23 has application when a represented employee is charged and/or requested to attend a formal investigation". Had such been the case, according to the company, it would have rescheduled the investigation for some other day than May 22 or 23, 1992. The company argues here that:

> ...(t)he facts of this incident are very clear: (the grievant) was not representing a fellow employee at an investigation, which is what Rule 23 contemplates, and he was insubordinate. He willfully chose to ignore his supervisor's orders, and failed to show up for work on his regular assignment. He waited until the last instant to request the time off, and did not follow procedure that would have allowed the company to accommodate him, had his request been timely.

The company argues, in fact, that it has been the union's General Chairman, and not the grievant, who has been consistently acting as the "bargaining agent for the craft" at the company and that the grievant had not attended any meetings nor contract negotiations with the company for "...at least 5 and 1/2 years" nor has the grievant represented any carmen at an investigation during that time-frame. The company argues that the grievant holds merely a "...minor union title". Further, according to the company, testimony by the grievant at the investigation that he was absent from work at various times to attend union functions is "...obviously...exaggerated". The company cites arbitral precedent to the effect that Awards exist which deny claims when employees argue that carriers have no right to "interfere...with their right to represent employees under the agreement...".[15] In short, according to intimation by the company, the minimal duties of this employee as union representative did not "...insulate him from his responsibilities as an employee" and the axiom of "obey now and grieve later" was applicable.

The company argues that it would lead to "ridiculous results"

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[15]The Award cited here is Third Division 27494 which deals with the intent of the language found in the Signalmen's Agreement with the Eastern Lines of the Southern Pacific Transportation Company. The language of the Rule at bar in that Agreement is quite dissimilar to the Rule 23 under consideration here. The former addresses specifically "...necessary leave..for the purpose of handling grievances between employees and the railroad..." and the claimants to that case had asked for leave to attend some other kind of union business i.e. to specifically do the annual audit of the local lodge's financial books. Neither the circumstances nor the Rule in that case are on point with the instant one.

and is an "...extreme and unreasonable interpretation" of Rule 23 to believe that it means that a union official ought to "...receive time off whenever he request..." it without regard to the operations of the railroad. By analogy, the company notes that if a dispatcher would do that he or she could "...grind the railroad to a halt".

The company argues that the discipline assessed was proper in view of the grievant's past record which included two prior suspensions, two letters of reprimand, and one citation for failure to wear safety gear.[16] The company also provides information on the fact that the grievant had been counselled for leaving his tour of duty before he had finished an assignment. In fact, according to the company, the grievant had been counselled to this effect on May 20, 1992 and when the grievant had told the company's management that he could come in on May 22, 1992 but would be late since he had to attend to union business, this proposal was denied by management "...because of (the grievant's) poor record of working his full schedule". [17]

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[16]The company cites in its original letter of denial of the claim that the grievant was allegedly implicated in falsification of car inspection records on May 30, 1992. The union argues, in the record, that such is post facto and is improperly before this forum since the notice of investigation was sent to the grievant before May 30th. The arbitrator agrees with the reasoning of the union. Such evidence is improperly before this forum and will be treated accordingly. See Third Division Award 21709 for precedent.

[17]See Company Exhibit W. In that memo to the grievant the manager of the company's Operations' West states to him that it is improper to leave early even if one has not taken a lunch break. It is not denied in the record that the grievant rearranged his hours

In conclusion, the company argues as follows:

> This case is not about a proper or improper application of Rule 23; it is clearly also not about his right of a union representative to oppose the proposed sale of the GB&W assets to a new affiliate of Wisconsin Central. Clearly, the carrier recognizes that claimant and all other employees and union representatives have certain, clear protected rights under the Railway Labor Act and the Interstate Commerce Act, among others. This case is about a clear and blatant breach of the fundamental employee-employer principle of "obey now and grieve later".
>
> ...An Award in favor of the claimant would clearly place labor relations on this property, and possibly in the rail industry, in the hands of "justice of the jungle". Such a result would be beyond the authority of this Board and would virtually extinguish one of the fundamental purposes of the Act, to wit, to provide for the prompt and orderly settlement of grievances and to provide extremely narrow circumstances (in major disputes only) when employees can resort to self-help..."[18]

Position of the Union

In its claim and appeal of the disciplinary action taken by the company against the grievant the union argues that the company:

> proceeded in a willful manner to obstruct (the grievant) in the exercise of his lawful rights as a representative pursuant to the Railway Labor Act and denied him his contractual right to be off to represent other employees pursuant to Rule 23 of the current collective bargaining agreement.

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in this manner on May 7, 1992 which led to the meeting between he and this manager on May 20, 1992. See Footnote 14 above for curious inconsistencies on the part of the company on the role that this May 20, 1992 meeting had on its view of the grievant's absence on May 22, 1992.

[18]See Company brief @ p. 17.

> The dismissal of an elected union representative for performing his duties and responsibilities strikes at the very heart of the purpose of the Railway Labor Act. There can be no more egregious example of interfering with the designation of representatives...than for a carrier to attempt to dictate to the union when and where it is permitted to represent employees. This is precisely what the carrier has done in dismissing (the grievant).[19]

The union then cites arbitral precedent outlining what it calls the "...immunity of a union representative from disciplinary action by his employing carrier when he is engaged in representing other employees...". The union quotes from Award 80 of SBA 951 to the effect that to subject a representative to discipline while conducting union business "...would place a weapon in the hands of the carrier so powerful that sooner or later it would have a chilling effect upon an employee's function as a representative". The union also references Award 624 of SBA 912, as well as Third Division Award 21763 to this effect. The particular business which the grievant was to attend to on May 22, 1992 was to represent employees' interests at a meeting organized by "...himself and a state legislator" which dealt with the impending acquisition of the company by Wisconsin Central. That meeting was attended by union members, local and state elected officials, and a United States' congressman. According to the union:

> The purpose of the meeting was to allow an exchange of information and for (the grievant) to pay a key role in

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[19]This and following quotes, unless indicated otherwise, are taken from Carrier's Exhibit D.

> representing the interests of TCU employees in the proposed acquisition. Unequivocally, (the grievant) was actively engaged in representing other employees at the meeting and he was guaranteed time off to do so by Rule 23...(which states that)...the company will not discriminate against any committeeman...and will grant them leave of absence...(Emphasis in original).

According to argument by the union the language of Rule 23 is not permissive. It implies an obligation on the part of the company if there is union business which has to be done.

Further, according to arguments by the union, the right of elected union officials to represent their constituency is a more general union-management principle recognized not only under the Railway Labor Act, but also under protected union activity covered by the National Labor Relations' Act. The union references various arbitration Decisions issued in NLRA covered forums to that effect. To this effect, it cites inter alia an arbitrator who reasoned in a case dealing the protected activity, as follows:

> The law of labor relations is relatively clear that an employer has no right to interfere with an employee's performance of his valid union activities and his obligation to his union, the same as the union and employee have no right to interfere with the employer in the employer's right to manage and operate the plant.[20]

Argument by the union is that the "obey now and grieve later" principle, while applicable to the generality of employees who believe they may have been wronged, while under the protection of

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[20]See 67 LA 1001. Also the union cites 56 LA 1093 to the effect that: "(t)o place an employee in a position in which carrying out his legal responsibilities will serve as the guillotine which severs his job relationship is a very subtle, but very real, penalty".

a union contract, is not applicable to the instance when an elected union official is disciplined under circumstances comparable to those in this case.

The union rejects the argument by the company that if a committeeman automatically had rights to attend to union business then logically all unit members could be appointed committeemen and enjoy such rights. Such does not represent the real world, but the company's past action with respect to the grievant does show that he was granted time off to conduct union business, in accordance with Rule 23, which extended beyond just representing unit members in investigations. In fact, the company's argument that the grievant had not represented any members of the craft during the five or so preceding years in investigations is true: there had been no investigations. As a matter of fact, according to the union, the company was prepared to allow the grievant off on June 4, 5 and 6 for union business which was not representing employees in investigations anyway. The union argues that the grievant had been an outspoken representative of this craft's interests as they related to the sale of the company to another carrier and that the company was attempting to "chill his basic right to perform his job as a union representative" by discharging him.

Findings

When the grievant made request for leave to do union business in the note he presented to supervision on May 20, 1992, he clearly did so under protection provided to him as an elected union

representative under Rule 23. The issue in this case is whether it was reasonable for the company to deny such request under the discrimination language of that Rule. The language of Rule 23, as the union correctly argues, is not permissive. It does not say "may"; it says that the "...company will not discriminate against any committeemen, who from time to time represent other employees, and will grant them leave of absence..." (Emphasis added). As moving party to this case, it is incumbent upon the company to bear the burden of proof according to substantial evidence standards,[21] that it acted reasonably when it refused to allow the grievant to exercise his union representation rights under the language of Rule 23. That burden is particularly heavy in a case such as this since there is abundant precedent to support the conclusion that the exercise of these rights go to the heart of the union-management relationship as it is understood in this industry since 1926, and as it is understood in the wider industrial arena in the U.S. since 1935, when the National Labor Relations Act was passed. It is necessary, therefore, to examine the company's arguments relative to Rule 23.

First of all, the company argues at one point that the exercise of union representation rights by the grievant is limited to representing members of his craft in investigations. It is

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[21]Substantial evidence has been defined, for arbitral purposes, as such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229).

unclear why this argument is proposed since the company itself had granted the grievant leave to engage in other kinds of union business in the past. In fact, that was the only reason he was ever granted leave. There had been no investigations during the preceding five years or so and there is no documentation that the grievant ever did represent members of his craft in any investigation.[22] Further, there is nothing in the language of Rule 23 to support the narrow interpretation which the company is trying to impose on it in this case.

Secondly, the company appears to believe that it can support its actions by downgrading the importance of the grievant's elective position with the union by calling him a "minor" official. As a factual matter, the grievant is no more of a minor official than his counterpart on any Class I railroad. After many years of arbitrating in this industry for all Class I carriers, and most of the smaller ones, as well as for all of the unions, this arbitrator has never heard of local committeemen or chairmen being referred to as minor officials on the larger carriers. The title of local chairman is one which carries with it considerable responsibility as the first line of elected power on the local level in this and other railroad unions. On a Class I carrier, this is a position of extensive responsibility because of the number of employees in the craft's bargaining unit. On a railroad the size of GB&W, admittedly

[22]The arbitrator says this as an empirical conclusion based on evidence of record. If he had represented members of the unit he represented, the arbitrator was provided no information on this.

the quantity of responsibilities must be fewer: but the importance and status of the office remains. This argument by the company must be rejected as lacking legal substance. The importance of an elected position in a union under labor law, whether under the Railway Labor Act or the National Labor Relations Act, has never been measured by the size of a union as a whole and/or of any of its sub-units. If the arbitrator understands this argument by the company correctly, it is analogically the same as saying that a managerial official at a company the size of GB&W is less of an official (or merely a "minor" official) than the particular manager's counterpart at a larger transportation company since this company is smaller than Conrail, Burlington Northern or whatever. There is nothing in this argument which would permit conclusion that the grievant was less protected by the provisions of Rule 23 than any other union official and the arbitrator must rule accordingly.

Thirdly, the company states that it could not accommodate the grievant because he did not give the company enough time to make proper arrangements. There are a number of issues here which must be considered. It is true that the grievant had given the company fairly long lead-time notice in the past when requesting time off to conduct union business. This was, of course, always for the company's convenience and represented, on the face of it, a consideration extended to the company by the grievant. The circumstances of this case represent the first documented time, in

the record, that the grievant had ever requested time off to conduct union business on short lead-time. The company refused to accommodate the grievant. As a factual matter the company was hardly practicing a quid pro quo. The company argues that the grievant could have given it more lead-time, in this instance, because another union official who attended the same meeting on May 22, 1992 had given notice of the meeting about a week before the grievant. Such does not absolutely prove that the grievant knew about the meeting that long in advance although it would be reasonable perhaps to assume this. Even if he did, and neglected to inform the company more in advance than he did, such would not necessarily relieve the company of its obligation to grant him the leave he requested, under the language of Rule 23. A reading of this Rule shows that it does not operationalize lead-time needed in order that the company might avoid a discrimination charge. The company, in turn, has only pointed to courtesies which the grievant had extended to it in the past. Reasonable minds would conclude that it was now time for the company to extend a courtesy in kind. And this request by the grievant clearly represented an exception. He had never requested leave as a union official with such short lead-time before. Certainly the situation of the whole company, gearing itself for merger with another carrier, created conditions of uncertainties. The company intimates that the grievant engaged in polarizing behavior by attending to his union business, whatever it was, anyway on May 22 and 23, 1992 after being denied permission

to do so. The record before the arbitrator could be construed, however, to permit the opposite conclusion. In all documented instances of requests of leave for union business in the past the grievant had accommodated the company with a fairly large amount of lead time: In the one instance when the grievant effectively requested that the company return the favor, so to speak, it refused to do so. The obstinacy of the company's officers in this respect is further compounded when the grievant attempted to strike a deal and said he would come in and work on May 22, 1992 after his union business was finished. Company officials refused this offer. Then in arguments before this tribunal, which the arbitrator has characterized as puzzling, the company argues that the grievant did not come in to do partial tour of duty on May 22, 1992 when he could have. In fact, the grievant was informed that this was an unacceptable option. The argument related to lead time is insufficient to convince the arbitrator that the company was justified in denying the grievant his rights under Rule 23. As a practical matter, it is true that both of the relief carmen at Green Bay were committed on May 22 and 23, 1992. But does that mean it was impossible for the company to have covered the grievant's assignment on these two days as an exceptional circumstance? Clearly, by means of extra effort on the part of the company the grievant could have been accommodated. He himself stated that he would have covered most of May 22, 1992 after his union meeting. The company's management refused this proposal. Secondly, the

grievant states that another carman could have been assigned on overtime basis to cover his assignment. This has never been denied by the company, in the record. If the company had struck a deal with the grievant for May 22, 1992 such overtime arrangement would have been needed only for Wisconsin Rapids for one day, which was that of May 23, 1992. Thus it was not logistically impossible for the company to have accommodated the grievant's short-term request for leave, under Rule 23, as an exception this one time and it could have been done at relatively little cost to the company.

Fourthly, the company argues that the grievant, after being denied the option to come to work the partial day of May 22, 1992, should then have come to work on May 23, 1992. Why? Because, according to the company, the grievant could have done the union business he was attending to on May 23, 1992, on some other day or after hours. The problem with this type of argument, which is why legal and arbitral opinion has never let it get off the ground, is that no one can figure out where the corollaries of such line of reasoning ought to stop. Once employers begin to dictate when, and what, unions and union officials are to do, then the balance of the union-management relationship, as we currently understand it, and as it is practiced under protection of the Railway Labor Act and

the National Labor Relations Act,[23] is subject to being undermined. It is true that the grievant could have done the union work he said he did on May 23, 1992, on some other day. But it was not up to the company to dictate that. For the arbitrator to accept this argument would be to accept but one version of what is known as company unionism whereby union activities, in whatever form, are dictated by an employer.[24]

Nextly, relative to Rule 23, the company argues that if it automatically let the grievant off every time he asked, in order to do union business, then the union could appoint every member of the bargaining unit committeemen and operations of the railroad could break down, etc. The arbitrator can find nothing in the record to suggest that the local union had ever behaved in such a way in the past which, in turn, is reasonable gauge for its behavior in the future. Such argument is at such high level of abstraction that the conclusion is warranted that it is not related to any factual

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[23]These are the laws application to the private sector and to the U.S. Postal Service. Since the early 1960s almost all states have codified laws to cover employees in state and local jurisdictions and in 1979 the federal government enacted a statute for federal employees. The state of Wisconsin, in fact, where this case takes place, was the first state in the union to enact a labor law for public sector employees (local jurisdiction) who wishes to organize collectively. This happened in 1959.

[24]This is not the forum to develop the full legal history dealing with company unionism which is embodied in this argument by the company. It can but be noted that legal theory dealing with company unionism is more extensively developed, in the estimation of this arbitrator, in administrative and court decisions under the National Labor Relations Act than under the Railway Labor Act since the former, rather than the latter, has provisions dealing with unfair labor practices.

experience which the parties have ever had and the arbitrator must rule on it accordingly.

Lastly, a search for arbitral precedent for the denial by the company of the grievant's request points only to Third Division Award 27494 which the company references in its arguments. As noted when that Award is cited earlier in this Decision, it is not on point either with respect to facts nor contract language.

The arbitrator must conclude, therefore, that the company has not sufficiently met its burden of proof that it was not in violation of Rule 23 when it denied the grievant time off for union business as he had requested under date of May 20, 1992, and that it inappropriately disciplined that grievant when he, therefore, attended to union business anyway.

A second tact taken by the company, after presenting all of the arguments cited in the foregoing, is to simply conclude that this case is not about Rule 23 at all. It states: "(t)his case is not about a proper or improper application of Rule 23...". What is it about then? According to the company, it is about an employee who violated company Rules 7 and 14, and Rule 27(A) of the labor contract which deal with attendance at work. The letter of discharge explicitly states that the action was taken because of violation of company Rules by the grievant dealing with attendance.[25] Following this line of reasoning for assessing discipline, the company then develops its position on progressive

[25]See Company Exhibit C, cited earlier in Footnote 7.

discipline by outlining the grievant's past record and so on which leads it to conclude that discharge was the proper penalty.

While the company has the right to take this position if it wishes, the arbitrator must note that such logic simply misses the point of the instant case. The original request made by the grievant was made in his capacity as a union official, not in his capacity as an employee. By emphasizing Rules 7 and 14, [26] the company refuses to recognize the legitimacy of the grievant's status and position when the original request was made, nor the reasons that the request was made. It attempts to treat the grievant only as an employee. But the request to be off was not for some personal reason, nor reason of health, nor any other reason related to the grievant's position with the company as an employee. The request was only made, and this is not even an arguable point given the facts of this case, in the grievant's capacity as a union representative, to engage in union business. That the company dealt with the original request out of the context of Rule 23 is clear from the record: it put emphasis on the grievant's past record as an employee only, and it even refused to negotiate with him about his coming in on May 22, 1991 because of his behavior as an employee. The General Chairman of the union correctly informed the company on May 22, 1992 that the issue at bar was a Rule 23 one. The company refused to believe this because of its insistence that

[26]In fact, labor contract Rule 27(A) was not cited in the letter of discharge.

the original request to be off was made by the grievant as an employee, and not as a union official. In short, the company has spent a great deal of its time and effort in this case refusing to recognize the issue that is really at stake. No other conclusion is warranted except that such was a tactical error on the part of the company.

Finally, the company presents a number of final arguments, or more correctly statements, in its brief, only one of which will be addressed here because it appears to be contrary to the ORDER under which this tribunal is being conducted, and the abundant body of precedent dealing with labor arbitration which arguably serves as basis for that ORDER. The company appears to intimate that this tribunal does not have jurisdiction to issue a Decision and Award in this case if it is favorable to the grievant. Such is a misunderstanding of the process ordered by the Court to resolve the instant dispute. Not only does this tribunal have the jurisdiction to rule on this dispute, but its Decision and Award in this matter is final and binding.[27]

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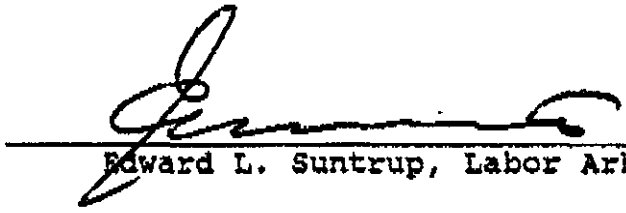
[27]The company also uses other florid language, in concluding its brief, which deals with "justice of the jungle", the "fundamental purposes of the Act", etc. The argumentative intent of this language is obscure. See p. 17 above for full cite.

Decision and Award

The company was in violation of Rule 23 of the Agreement when it discharged the grievant on June 29, 1992. The grievant shall be returned to service to his former position, with seniority unimpaired. He shall receive all compensation and other benefits which were lost as a result of his discharge, in accordance with the labor contract. The grievant shall be returned to service, and all compensation due to him shall be paid to him, within thirty (30) days of the date of this Decision and Award. All information relating to the June 29, 1992 discharge of the grievant by the company shall be removed from his personnel record.



Edward L. Suntrup, Labor Arbitrator

Chicago, Illinois

Date: November 1, 1992