SPECIAL BOARD OF ADJUSTMENT NO. 1016

AWARD NOS. 125
CASE NO. 125

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employes

vs.

Consolidated Rail Corporation

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim denied

DATE: April 30, 2000

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier constructively dismissed Mr. K. R. Dusko from service on December 5, 1995 for alleged absence without permission (System Docket MW-4155).

2. The Agreement was violated when the Carrier improperly terminated the seniority of Mr. Dusko on December 5, 1995 for absence without permission in excess of fourteen (14) consecutive days.

3. As a consequence of the violations referred to in Parts (1) and/or (2), the Claimant's record shall be cleared of the incident involved here, he shall be compensated for all wage loss suffered."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

According to the parties' presentations at the hearing, the instant Claim has a considerable and unusual history. The following is but a capsule summary. In 1988 and 1989, Claimant alleged he suffered work-related injuries from exposure to paint and paint by-products such as

toluene. Claimant thereafter commenced a FELA suit alleging permanent inability to return to work. The jury found in favor of the Carrier. Within two months of that decision, Claimant's personal physician cleared him to return to work and he sought to do so. Simultaneously, Claimant appealed the adverse decision in his FELA lawsuit to the Pennsylvania Court of Common Pleas and the Pennsylvania Superior Court. Both Courts rejected his appeal. In practical effect, Claimant was alleging to the Carrier that he was fit to return to work while he was maintaining with the Courts that he was not.

Claimant's attempt to return to work under the Agreement eventually led to the filing of a claim, which was progressed to the National Railroad Adjustment Board ("NRAB"). The Third Division, in Award No. 31184, issued September 26, 1995, awarded Claimant the right to attempt to requalify for employment. The Board's rationale is expressed in the Award in detail.

While Award No. 31184 was pending at the NRAB, Carrier instituted a requirement that most B&B Mechanic position holders possess a Commercial Drivers License ("CDL"). The on-property record contains allegations that Carrier was "Dusko proofing" its B&B positions. Claimant had no such CDL and was not afforded the opportunity by the Carrier to acquire one before attempting to exercise his seniority. However, nothing in the on-property record purports to be a claim challenging the propriety of Carrier's action in establishing the CDL requirement or in not providing Claimant the opportunity to acquire a CDL.

Instead, Claimant sought out the few remaining B&B Mechanic positions that did not require a CDL. On November 17, 1995, after passing Carrier's required physical and mental examinations, Claimant sought to exercise his seniority by displacing a junior B&B Mechanic at Pitcairn, Pennsylvania. Although the record provides little in the way of an explanation, it appears that Claimant was not allowed to do so and was told to go home. Once again, nothing in the on-property record purports to be a claim challenging Carrier's action in this regard. This position was apparently within Claimant's work zone and was one that he was, presumably, required to bump if he could.

Discussions with his Organization representative located two more B&B Mechanic positions at Conway Yard/Diesel Terminal. Neither required a CDL. Apparently, however, they were outside of Claimant's work zone and, accordingly, he was not required to exercise his seniority. Nonetheless, on November 20, 1995, Claimant went to the Engine House at Conway

Yard intending to displace a junior B&B Mechanic. Upon arrival, the supervisor told him to await safety training and counseling in the lunch room. The accounts of the training and counselling differ sharply. However certain facts are essentially undisputed. The discussion took place after Claimant waited several hours. During a break in the discussion, at approximately 1:15 p.m., Claimant went to the restroom and never returned. He did not tell the supervisor that he was leaving the property or why. On this point, the Claim reads as follows:

> The claimant decided not to bump into the Engine House because he feared that bodily harm might come to him. He returned home and called his vice chairman. His vice chairman advised him to remain furloughed because he had no bumps in his work zone. He would investigate the situation.

When Carrier did not hear anything from Claimant by December 5, 1995, it issued him a letter informing him that he had been absent without permission in excess of fourteen consecutive days and that, pursuant to Rule 28 of the Agreement, Claimant had forfeited all seniority.

The Claim, dated December 11, 1995, challenges only the invocation of Rule 28. As noted just previously, it maintains that Claimant changed his mind and decided to remain in furlough status. Other than taking exception to the Carrier's notification of seniority forfeiture per Rule 28, the Claim does not allege any other improper action by Carrier nor does it seek any remedy by way of wage loss or other economic benefits.

The Board was informed at the hearing that the Claim had been advanced to the NRAB. It remained pending for some time. Eventually the parties agreed to withdraw the Claim from the NRAB and submit it to this Board.

The Organization has asserted a procedural objection arising out of the history of the Claim at the NRAB. Specifically, the Organization contends that this Board should not consider the Carrier's submission because the Carrier failed to timely file a submission with the NRAB when the Claim was docketed there. Accordingly, the Carrier was in default at the NRAB. As such, the Carrier should not be permitted to have its submission considered here. Carrier contended that its letter to the NRAB reflects that it did file a timely submission.

We reject the Organization's procedural objection for several reasons. First, there is no

confirmation from the NRAB to clarify the true status of the disputed filing. As such, we have nothing but competing assertions without proof. Second, there is nothing in the Organization's submission regarding this point. As such, it is new material being raised for the first time at this Board's hearing. Third, if the Organization had a valid objection to the status of the matter before the NRAB, there is no evidence that it did anything to preserve that objection before this since 1997. It is clear that the parties agreed to submit the Claim to this Board. There is no evidence they also agreed to allow any objections that might be valid before the NRAB to survive before this Board. Finally, there was no law, rule or precedent cited to support the Organization's contention that procedural objections before the NRAB apply with equal force when a dispute is withdrawn and resubmitted to a Public Law Board by agreement.

Turning to the merits of the instant Claim, we find the Organization advancing three theories. First, the Carrier failed to honor its obligation to return the Claimant to his former position pursuant to Third Division Award 31184. Second, the Claimant was improperly denied the right to exercise his seniority on November 17, 1995. And third, the Claimant was not required to and did not exercise his seniority on November 20, 1995 due to actions of a Carrier officer. In addition to the foregoing approaches, the Organization seeks reinstatement with seniority rights unimpaired and compensation for all wage loss suffered.

The Carrier, however, objects that the Organization is attempting to progress a different Claim to this Board. We concur. Neither of the Organization's first two theories were part of the original Claim dated December 11, 1995. The only exception taken to Carrier's action was the invocation of Rule 28 to effect a forfeiture of Claimant's seniority following his disappearance on November 20, 1995. Moreover, it is clear that the original Claim did not include any request for lost compensation. Therefore, to the extent that the Claim before this Board is different from the Claim that was progressed on the property, it must be dismissed. It is well settled that we have no authority to entertain a claim that is different than was progressed on the property.

The foregoing determinations leave us to consider the only surviving aspect of the Claim: Whether Claimant did or did not exercise his seniority on November 20, 1995. The Organization maintains that Claimant did not since he did not physically assume the duties of the position. It cites Rule 4, Section 2 (a) 2 in support. Carrier, on the other hand, maintains that Claimant did

accomplish the exercise of seniority and was under pay for the some six hours that day until he disappeared. Because of these competing positions, the question of whether Grievant was required to exercise or not is thus rendered immaterial. The only issue is whether he did or did not.

Here again the Board is confronted with another quirk in the record. The parties exchanged appeals and responses in what appears to be the customary manner up through a conference held April 23, 1996. Carrier issued its conference report and denial on June 14, 1996. Both submissions coincide with their documents up to this point. However, there is nothing thereafter to show when the on-property record was brought to closure. For example, neither submission contains a Notice of Intent to progress the matter to the NRAB, which is the document that normally signals closure of the record. The reason this becomes a problem is because the Organization's submission contains a statement from Claimant dated January 30, 1997. This date shows it to have been written more than seven months after the Carrier's final denial. Claimant's statement is not in the Carrier's submission because Carrier maintains the statement was not part of the claim handling on the property. Claimant's statement portrays his version of the safety training and counselling with Supervisor Fox on November 20, 1995. It also confirms that Claimant "... reported for work at 6:30."

Carrier's submission contains a statement from Supervisor Fox that provides a significantly different account of the November 20, 1995 discussions with Claimant. It also contains records showing Claimant received pay for 6 hours and 15 minutes for the day. Also attached was Claimant's bump slip showing the effective date of November 20, 1995. None of this is contained in the Organization's submission.

Since neither submission establishes when the on-property record was closed, the Board has no means of determining whether both statements should be considered or neither. Under the circumstances, it is not logical to consider one and not the other.

Whether we consider both or neither, one fact stands out undisputed: Claimant was under pay for November 20, 1995. If we consider neither, this fact was properly asserted in Carrier's June 14, 1996 conference report and denial. It is not refuted in the record -- not even in Claimant's statement. If we consider both, the unrefuted assertion and the payroll records prove Claimant was under pay on November 20, 1995.

On this record, therefore, we must find that Claimant did, in fact, exercise his seniority into a B&B Mechanic position at Conway Yard on November 20, 1995. The Organization's reliance on Rule 4, Section 2 (a) 2 is misplaced. That provisions tells when someone who is displaced may exercise seniority. That was not Claimant's situation. To the contrary, Claimant is more properly described by Rule 4, Section 2 (a) 6, which did not prevent him from exercising seniority on November 20, 1995.

When Claimant absented himself from the B&B Mechanic position at Conway Yard, Carrier properly invoked Rule 28 after more than 14 days had passed without explanation from Claimant. By its terms, Rule 28 is self-activating. Under the circumstances, we have no authority to stand in its way.

AWARD:

Claim denied.

Gerald E. Wallin, Chairman
and Neutral Member

Mark Schappaugh,
Organization Member
- I dissent -

Lawrence J. Finnegan,
Carrier Member
5/24/2000