

SPECIAL BOARD OF ADJUSTMENT NO. 1127

AWARD NO. 7
CASE NO. 7

PARTIES TO
THE DISPUTE: Brotherhood of Maintenance of Way Employees

vs.

Union Pacific Railroad Company
(Former Southern Pacific Transportation Company-Western Lines)

ARBITRATOR: Gerald E. Wallin

DECISION: Claim sustained in accordance with the Findings.

DATE: April 29, 2001

DESCRIPTION OF CLAIM:

Claimant and a co-worker, Ed Coil, bid on and were awarded two positions to provide flagging services for a contractor doing underground boring for fiber optic cable installation. The bid called for them to work 12 hours per day for 7 days per week for the duration of the project. The Carrier and the Organization developed a special written agreement to provide for the work schedule involved. Claimant was awarded the position to work **from 12:01 a.m.** until noon each day. Mr. Coil's position had work hours from noon to midnight each day.

The contractor decided not to work its employees on the Saturday and Sunday following Thanksgiving, November 25 and 26, 2000. Accordingly, Claimant and Mr. Coil were not required to flag those days. Nevertheless, both employees submitted time claims for 12 hours plus 2 hours for off-schedule meal periods for each of the two days.

Following investigation held December 19, 2000, Claimant was assessed Level 5 discipline consisting of permanent dismissal from all service.

The Claim in this dispute seeks to overturn the discipline and make Claimant whole for all losses.

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.

Before turning to the merits of the dispute, the Board must deal with the procedural objections advanced by the Organization to challenge the appearance of two Carrier witnesses by telephone.

The taking of testimony by telephone does not automatically create a due process violation or constitute a denial of a fair and impartial investigation. Whether such fatal flaws exist is a question of fact to be determined **after** consideration of all of the relevant circumstances. As such, the analysis must be done case-by-case. Normally, the taking of background information or non-controversial testimony by telephone will not be found to have unduly prejudiced the claimant.

However, when a carrier takes telephone testimony concerning key fact **questions** or credibility issues, it proceeds at its peril. In this regard, it is well to recall the basis of the deference doctrine that has developed in railroad arbitration. Review Boards customarily defer to the findings of the hearing **officer** and will normally not substitute their judgment for that of the hearing officer. The primary reason for this deference doctrine is the fact that the hearing officer could **observe the demeanor of the witnesses while** review Boards could not. However, where the witness is not physically present at the investigation, not only is the employee denied the opportunity to confront an accuser, there is no longer any basis for the Board to defer to the hearing officer's determinations about the credibility of that witness' testimony or the weight to be given it. Therefore, such testimony invites the Board to quite rightly reject the hearing **officer's** findings.

On this record, the Board does not **find** the telephone testimony to have unduly prejudiced the Claimant's interests. Indeed, the transcript shows the testimony of the two telephone witnesses to have, on balance, favored the Organization's position. Consequently, the Organization's procedural objection is rejected.

On the merits, the Board does not **find** the Carrier's disciplinary action to be supported by substantial evidence in the record. Instead, at most, the evidence shows Claimant's actions to have been prompted by misunderstanding and/or mistake, for which the Carrier must bear the primary responsibility. It is undisputed that the flagging assignment was a special project whereby the Carrier supplied two **flag** employees to a contractor for a fee. Claimant and Mr. Coil were committed to work each day the contractor chose to work. A special agreement with the Organization was necessary to permit the work schedule. Nonetheless, Claimant's supervisor did not tell Claimant about the existence of the agreement nor did he give Claimant any specific instruction about how his time was to be reported for the special project.

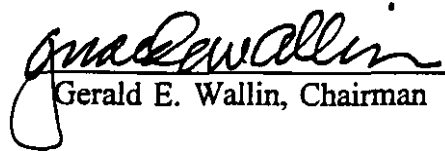
The record also shows that Claimant was provided essentially no supervision on the job by his supervisor. Although Claimant remained on his supervisor's budget for financial

accounting purposes, Claimant was effectively under the day to day operational control of the project construction coordinator, Mr. Collier. Mr. Collier, who was one of the telephone witnesses, confirmed that he understood Claimant's and Mr. Coil's positions were 7 days per week even if the contractor chose not to work. Collier related how those were the terms of employment for UTU represented employees on a similar but different project he also coordinated. Collier understood the same ~~terms~~ applied as well to Claimant and Mr. Coil. Collier also acknowledged that he may have conveyed his understanding to Mr. Coil, as Mr. Coil testified. Mr. Coil, in turn, said he relayed that understanding to Claimant.

The record also shows that Claimant's supervisor was aware of the manner in which Claimant reported his time. When asked by another employee, Claimant **freely** admitted he had not actually worked on the two days in question. Moreover, the record is clear that Claimant provided an explanatory statement immediately upon request. Nothing in Claimant's statement attempted to conceal the true facts. In addition, the effective Agreement contained Rule 40 which provided for disallowing portions of compensation claims upon notification to the employee. Claimant's supervisor was unaware of the rule, and the record provides no explanation for the supervisor's ignorance of the rule. Nonetheless, the supervisor directed a different subordinate to approve the time roll as Claimant had submitted it rather than investigate whether a misunderstanding existed. Finally, the record contains no evidence that Claimant was ever instructed not to submit his time claim for the special project as he did. The **only** contrary advice Claimant received was merely a suggestion from a lower ranking machine operator who was not part of the special project. And while the transcript references a safety meeting discussion held on November 21st, which Claimant and Coil attended, the topic was "padding the payroll." The transcript provides no specifics about the content of the discussion. Instead, the transcript suggests that it was only a general discussion for all employees and was not specific to the special project in question.

The Board's careful review of the transcript fails to disclose substantial evidence to support the Carrier's determination that Claimant was dishonest or failed to follow instructions as charged. The Claim, therefore, must be sustained and Claimant's dismissal must be overturned. Carrier is directed to offer Claimant reinstatement to his former employment with seniority and all other rights of employment unimpaired. In addition, Carrier is directed to make Claimant whole for all losses of compensation and other economic benefits resulting from his improper dismissal. The economic portion of this remedy is vested and is not conditioned upon Claimant successfully returning to service. If Claimant is no longer physically or mentally capable of returning to the Carrier's service, the make whole remedy shall cease to accrue as of the date such lack of capacity is established. Carrier is further directed to implement this award not later than June 1, 2001.

AWARD: The Claim is sustained in accordance with the Findings.



Gerald E. Wallin, Chairman