File: 900900

Public Law Board No. 3994

Parties to Dispute

United Transportation Union (Y))
) Case No. 6
vs) Award No. 6
)
Union Pacific Railroad)

STATEMENT OF CLAIM

Claim and request by the Organization tha former Yardmaster W. A. Ellis be reinstated as Yardmaster, that his record be cleared, and that he be paid for each and every day he would have worked beginning August 18, 1990 because of being dismissed from Carrier's service as the result of the investigation held on August 22, 1990.

Background

On August 20, 1990 the Claimant was advised to attend an investigation to determine facts and place responsibility, if any, in connection with alleged insubordination while working as a Yardmaster at the Carrier's East Bowl Yard in Kansas City, Missouri on August 18, 1990. After the investigation was held on August 22, 1990 the Claimant was advised, on August 29, 1990 that he had been found guilty as charged and he was dismissed from service of the Carrier. The discipline was appealed by the Organization up to and including the highest Carrier officer designated to hear such before this claim was docketed before this Public Law Board for final adjudication.

In his letter of discharge to the Claimant under date of August 29, 1990 the Superintendent at Kansas City, Missouri cited various Rules of the Carrier which the Claimant allegedly violated. The following are quoted, in pertinent part, for the record.

General Rule B

.....

Employees must be familiar with and obey all rules and instructions....

Rule 600

.....

Employees whose duties are prescribed by these rules will report to and comply with instructions from the superintendent, and such others as may have the proper jurisdiction. They will comply with instructions issued by officers of the various branches of service when applicable to their duties.

Rule 607

.....

Employees must not be:

.....

(3) Insubordinate;

.....

(6) Quarrelsome.

On August 18, 1990 the Claimant was working the 3:00 PM to 11:00 PM shift as Yardmaster at the Carrier's East Bowl Yard in Kansas City, Missouri. At approximately 3:15 PM and again at approximately 3:30 PM he received calls from the Supervisor of Yard Operations about the Kansas City to Chicago train (KCCH). According to the record of transcript, which both the Carrier and the Organization interpret differently, a communication was made between the Supervisor and the Claimant about offering this particular train for call. The Claimant did not offer the train for call and the sum total of this case, and the discipline the Claimant received, centers on this point.

At the investigation the Supervisor testified that he "instructed" the Claimant to "offer the train for call" and that without reserve he refused to do so. After this first alleged refusal

by the Claimant the Supervisor then testified that he again made this request and the Claimant then stated to him, on the phone, that he would only "offer" this particular train "...if Mr. Malone personally instructed him to do so". The latter is Superintendent at this location.

At the investigation the Claimant testified, on the other hand, that he did not offer the train, after it was suggested to him by the Supervisor that he do so, because of instructions to him and to other Yardmasters working this location that trains are not to be offered until they are set. Since KCCH had not yet been set for air it was, therefore, according to the Claimant, contrary to instructions by the Superintendent to offer the train. According to the Claimant all the Supervisor had to do was to have indicated that his own instructions, on that day, "superceded the superintendent, and (he) would (have) call(ed) the train".

The Manager of Terminal Operations testified at the investigation: he did not have direct access, however, to both sides of the conversation on the afternoon of August 18, 1990 and that must be taken into consideration by this Board in adjudicating this matter before it. This Manager did testify, however, that he was present when the Superintendent had a meeting, about a year prior to the incident here at bar, with the Yardmasters and that the "...Supervisor's abilities and tendencies as a supervisor were brought up." This witness of the Carrier further testified that the Superintendent emphasized that this Supervisor had not been "hand picked" by him, and that Yardmasters were not to "jeopardize the operation of this terminal".

Discussion & Findings

A complete review of the record before the Board can permit no other conclusion than that the Supervisor issued an instructi to the Claimant, as Yardmaster, to offer a train which was not yet

set. Although the Claimant searches for words to attempt to veil this instruction in the wrappings of a suggestion, that does not really work. By his own testimony, on p. 81 of the transcript, for example, he does not disagree with the query that an instruction had been given. He does offer reasons why, however, he had qualms about obeying it. As the Claimant explicitly states, he follows instructions "...as long as they don't intervene with the instructions (he) has from the Superintendent".

This highly idiosyncratic case before this Board, therefore, does not only center on the issue of whether this Claimant did or did not obey an explicit instruction, but it also centers on alleged information given to him and other Yardmasters about the true chain of command at this location.

There is evidence of record which the Board finds credible both because it is corraborative and also because it is not factually disputed, that the Superintendent established clear policy that trains are to be offered when set (contrary to instructions given by the Supervisor on the day in question), that he did not have complete faith in the Supervisor in question because the latter had not been hand picked by him, and that Yardmasters continued to have responsibility for the trains. None of this is denied by the Manager of Terminal Operations at the investigation. In fact, statements to the effect of the above, made by the Claimant's fellow Yardmasters, is corraborated by the Manager's testimony. Did the Superintendent himself deny any of this? The only evidence of his position on this matter is a document submitted to the Labor Relations' Department in Omaha on November 20, 1990. The Board has closely studied this important document. Although the Superintendent states that some who claim to have been present at the meeting wherein he set forth his thoughts about the Supervisor may not have been there, he never denies that there was "quite a bit of <u>trainmaster bashing</u> going on"

nor that he was part of this as alleged by corraborated statements by other Yardmasters at this location. That statement also says, however, that he "never told the Yardmasters not to comply with the instructions of company officials". The Superintendent cannot have it both ways, however, without expecting problems. He cannot theoretically hold that the chain of command must remain intact, and at the same time undermine it by explicitly stating his lack of faith in the Yardmasters' superior who reports to him, and who effectively ends up giving an order contrary to policy established by this same Superintendent as this relates to setting and offering trains. The Superintendent created a "Catch 22" and the Claimant got caught in it. In fact a charge of insubordination against any Yardmaster working under the Supervisor was a trap waiting to be sprung at East Bowl Yard given the variability of communications conveyed to them by the Superintendent. The Board can only draw conclusions from evidence provided to it. The Carrier had two major witnesses in this case against the Claimant: the Supervisor who gave the instructions, and the Superintendent who established policy about the relationship between that Supervisor and Yardmasters as this relates to specifics. The Carrier did not call the Superintendent as witness to clarify the latter. As moving party to this case, on whom rests the burden of proof, it chose not to do so at its own risk. Particularly so, since the Supervisor did testify that this was not the first time one of his instructio was countermanded at this Yard. In fact, he testified that: "Sure, it it happens quite ofen, well, not quite often, but it happens on occasion

Was the Claimant guilty of violation of Rules B and 600 by his actions? Was he insubordinate as stated in Rule 607? Certainly to test the "authority" of the Supervisor against the "policy" of the Superintendent,a possible path would have been for the Claimant to have obeyed the instruction and then to have grieved his order as arbitral

precedent in this industry and others tell us is one modus operandi (See Third Division 8712, 15828, 16286; Public Law Board No. 3443, Award 17; Public Law Board No. 4157, Award 11). That precedent, however, stresses that such orders must be "reasonable" (See Third Division 20030). Given the policy clearly established by the Superintendent with respect to setting and offering trains, and exceptions to the Supervisor's orders which had been taken in the past, it is far from clear that this Board can conclude, on basis of evidence, that the order in question was reasonable. This case clearly provides an exception to application of this valid principle of obeying now, and grieving later. Can the Board, as a final matter, conclude that the Claimant, irrespective of the confusion existing between authority and policy, was simply "quarrelsome" on the day in question and is thereby guilty of violation of Rule 607 on those grounds? The record provides no reasonable basis for such conclusions. Does any past record suggest that the Claimant had a propensity for quarrelsomeness? The record shows not only that the Claimant has a long tenure with the Carrier, but also that he has a totally clean record. The latter must always be taken into consideration, if provided to a Board such as this, in arbitral conclusions (Second Division 5790, 6632; Third Division 21043, 23508).

The burden of proof in discipline cases rests with supervision issuing the discipline (Second Division 5526, 6054; Third Division 22292, 22180, 11760; Public Law Board No. 3696, Award 1). That burden has not been sufficiently met in this instance. The claim must be sustained in full. Because of the idiosyncratic facts in the instant record before this Board, the Award issued herein sets no arbitral precedent.

Award

The Claimant shall be reinstated to his position as Yardmaster with the Carrier, his record shall be cleared, and he shall be paid for all time lost since August 18, 1990. Full application of this Award shall be made within thirty (30) days of its date.

Public Law Board No. 3994, Award 6

For the Board

Edward L. Suntrup, Neutral Member

D. D. Matter, Carrier Member

J. D. Martin, Employee Member

Date: January 11, 1991

Omaha, Nebraska