PUBLIC LAW BOARD NO. 4975

Award No. 17

Case No. 17

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION

and

CSX TRANSPORTATION, INC.

Statement of Claim

Claim of Conductor R. E. Jordan for clear record and pay for all time lost (15 days suspension) for alleged violation of Operating Rule "V", 104-A, 106, 130 and 571, April 12, 1992.

Findings

The Board, upon consideration of the entire record and all of the evidence, finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties to said dispute were given due and proper notice of hearing thereon.

The Notice of Investigation sent to claimant reads as follows:

Florence, SC, April 19, 1991

CERTIFIED MAIL RETURN RECEIPT REQUESTED:

You are instructed to report to the CSXT Assembly Room, 101 Hammond Street, Rocky Mount, North Carolina, Thursday, April 25, 1991 at 1000 hours for a Formal Investigation to develop the facts and to place responsibility, if any, concerning the manner in which you performed your respective duties as crew members of Train S47110 on April 12, 1991, specifically, between Elmore and Hamlet, North Carolina with report that the Laurel Hill and Hamlet DTC Blocks were released with the switch at the south end Elmore being lines for the siding.

You may arrange to have representation present in accordance with the agreement under which you are employed. You may arrange to have present any witnesses who have knowledge of this matter.

Waiver of Investigation will not be accepted from the locomotive engineer.

J. A. Drake
Division Manager

cc: Mr. B. F. Snuggs, Arrange to be present as witness.
Mr. R. E. Faircloth, Arrange to be present as witness.
Mr. R. G. Bucher, Arrange to be available as witness via conference call.

At the beginning of the hearing, the following exchange took place between the hearing officer, Mr. Anderson, and UTU Local Chairman Foster:

Anderson: Mr. Foster, are you ready to proceed on behalf of Mr. Jordan, Mr. Harper and Mr. Dickinson?

Foster: No, sir. At this time, I'd like to correct a few things. In your opening statement you said, you read off the list of witnesses present and you said that Mr. Bucher was present. I'd like to go on record as stating he is not present.

Anderson: O.K. We have got him on, will have him on hold to call him up as a witness when needed.

Foster: O.K. The Organization, United Transportation Union, makes formal objection to Mr. Bucher not being present. We contend that a witness has to be present, physically in the room, to be questioned by the Principal and/or its representatives. It is not a very equitable way to have someone available on the phone and not physically present. It goes against all procedures that are held in the courts of law which these investigations are patterned after and all other investigations, witnesses have been present and we object to him not being at this investigation.

Anderson: O.K. Mr. Foster, the current labor agreement between your Organization and CSXT states that the Principal will be permitted to attend investigation, hear all the evidence submitted, interrogate witnesses and be represented by his choice of a representative from train or engine service or employee of the UTU. The agreement does not require the witnesses presence, only that the Principals have the right to question all witnesses. It is, therefore, the Carrier's position that the requirements of the agreement are being complied with, whether or not the witness is present or the questioning is done via telephone. Your objection will be noted and entered into the transcript.

Subsequently, Mr. Bucher, the Dispatcher involved in the case, was called by Hearing Officer Anderson to testify by telephone.

Before this Board, the organization has again renewed its objection to the fairness of the hearing and focused specifically upon the refusal of the carrier to have a witness present in person at the hearing.

The carrier has not supplemented its justification of using a telephone conference call in place of having the presence of the individual at the hearing. It has not explained, as it did in Award No. 154 of PLB 3953, that the only purpose of the testimony was to authenticate a recording. Rather, it has stood on the statement of the hearing officer that it is "...the Carrier's position that the requirements of the agreement are being complied with, whether or not the witness is present or the questioning is done via telephone."

Article 31 of the agreement between the parties sets forth their agreement regarding the protections afforded an individual who is alleged to have possibly violated a rule imposed by the carrier. These protections include the right to due process in the investigative hearing and specifically give the accused the right to interrogate witnesses. Such interrogation includes the right to cross-examination as part of the adversarial system of obtaining the facts in any particular situation. Why this is important was stated by

Wigmore in his treatise on evidence:

> The vital aspect is that we are not to credit any man's assertion until we have tested it by bringing him into court (if we can get him) and cross-examining him. [1]/

Were this not the case, a carrier would never have to call any witnesses to be present at the hearing but could rely completely on telephone conference calls or other methods of obtaining statements. Clearly, this has never been the practice in the railroad industry. Without a strong showing of necessity on the part of the carrier or the agreement of the claimant, all essential testimony must be in the presence of the accused.

In this case, the presence of the dispatcher, who could explain certain of the essential facts in this case, was vital. The failure of the carrier to have him physically present at the hearing over the objection of claimant, effectively denied claimant the right to see the witness while cross-examining him. Such a denial deprived claimant of the safeguards which are essential and which were incorporated into the agreement between the parties. Claimant was, therefore, deprived of a fair hearing and any discipline assessed against him must be set aside.

While the organization has also raised a question regarding the merits of the claim, in view of this Board's

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[1]/ Wigmore, A Treatise on The Anglo-American System of Evidence at Trials at Common Law, 3d ed., Vol. I at 277 (Little Brown & Co., 1940).

finding regarding the procedural inadequacy of the hearing, it is unnecessary to discuss the merits of the claim.

Award

Claimant is to be paid for all time lost, including both the 15 days as the result of his suspension and on account of attending the hearing. All reference to discipline regarding this incident is to be removed from his record. Carrier is directed to implement this award within 30 days from the effective date hereof.

Robert O. Harris
Chairman and Neutral Member

R. P. Byers
For the Carrier
Dissent

R. D. Snyder
For the Organization

Jacksonville FL, Dec. 4, 1992

UNITED TRANSPORTATION UNION

vs

CSX TRANSPORTATION, INC.

PUBLIC LAW BOARD 4975

CASE NOS. 16 & 17

EMPLOYEES' DISSENTING OPINION
B1207280

Our dissent in this case is made mandatory by the Board's refusal to follow the precedent on the property regarding the tolling of the time limits in which the Carrier has to file disciplinary charges against an employee. In previous discipline cases, the precedent on the CSX (former SCL) has been to count the first day the Carrier learns of the incident in the ten-day time period in which charges may be filed. Referee Harris, however, insists upon following the "general practice" in the industry rather than the precedent on the CSX.

Obviously, if this case was one of "first impression", we could very well accept the decision. However, we think it is wrong to disregard the accepted precedent on the property and impose a new and completely foreign standard of conduct at this late date. Moreover, the problem with Referee Harris' determination is two-fold; first, failure to follow established president undermines the employees' confidence in the arbitration process. Second, because we now have Awards going both ways, neither the Carrier nor Employees actually know where they stand regarding this important issue.

The history behind this dispute is important.

In the late 1970's, the SCL and UTU Committees (C-T-E & Y) agreed to use the services of Referee David H. Brown to resolve all discipline cases. Between 1976 and 1990, Judge Brown handled in excess of 600 discipline cases. On countless occasions, Judge Brown had to determine whether or not a particular employee was accorded due process.

In the handling the discipline cases, along with the attendant procedural arguments, Judge Brown became exceptionally knowledgeable of the Carrier's Operating Rules and Articles 14 and 31 of the Schedule Agreement, the Discipline Rules. In addition, Judge Brown, unlike Referee Harris, had the opportunity to question the original negotiating parties concerning their real intent when they revised Articles 14 and 31.

In one instance, Judge Brown had to determine "when" the time limits would begin to toll for filing charges. In Award No. 250 of Public Law Board 2143, Judge Brown resolved that the day the Carrier had actual knowledge of an incident was "the day" that tolled the beginning of the ten-day period in which charges had to be filed. In an opinion adopted with unanimous consent, Judge Brown reasoned (in part):

> "We hold that the 10 days began to run on January 6 since such was the date on which a responsible Carrier officer had knowledge of the incident."
> (Underscoring added)

In (proposed) Award 152 of Public Law Board 3953, Referee Don B. Hays endorsed following the precedent as it existed between the parties.

Further, Judge Brown's interpretation was later applied in a case involving the assessment of discipline. In Award No. 64

of Public Law Board 4269, Referee Hays ruled that "the day" the investigation was held counted as the first day of the 30-day time period in which the Carrier had to assess discipline. In an opinion adopted with unanimous consent, the Board held (in part):

> "Following the close of the investigation (October 2, 1986) Division Manager H. J. Pigge took the matter under consideration and, in correspondence dated October 23, 1986, concluded that Claimant had violated Carrier's Safety Rules 173-A(f) and 174, assessing disciplinary suspension at five days. The Manager's correspondence included a directive to Mr. J. R. Odam to hand deliver the decision to the Claimant. However, the clear and convincing evidence in the record leads us to conclude that Claimant did not actually receive written notice until November 3, 1986, some 33 days following the hearing.
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> "...
>
> "...we must conclude that the language of the agreement is dispositive of the claim. Such provision contemplates only written notice, which was not shown to have been timely served nor effectively waived." (Emphasis added)
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> "AWARD: Claim sustained."

The mere fact that the "tolling" of the time limits on the CSX does not conform to the interpretation on other Carriers is not enough to warrant ignoring the established precedent. Every individual contract has its own idiosyncrasies.

The test for determining whether a particular decision should be overruled has been based on whether or not the original decision was "palpably erroneous" (1st Div. 22759).

In addition, please see Arbitration Award 34-11 (UTU vs AT&SF) wherein the Board held (in part):

> "This issue was once before arbitrated between these same parties. Amtrak Board No. 15, chaired by Referee Preston Moore, ruled that average monthly time paid is based on actual time worked, not hours

paid. The real question here is whether Referee Moore's decision should be overturned.

It is recognized that other Referees in Amtrak C-1 Boards subsequent to Mr. Moore's decision held in the opposite fashion. On this basis the Carrier submits that the Moore decision should be recognized as "palpable erroneous". "Palpable" is defined as obvious, evident or clear to the mind. While Mr. Moore's decision is "palpably" different than other awards, this doesn't mean it is "palpably erroneous". In a perfect world all referees would think alike, however, as reasonable people often do, even referees disagree. When there are disagreements, a minority view isn't erroneous, merely by the fact it is contrary to the mainstream. It is erroneous if it is without foundation in reason, is indefensible, shocks the reasonable conscience or simply doesn't fall within the range of legitimate differences of opinion.

"While consistency among all referees across all railroads is desirable, there are compelling reasons to be extremely reluctant to overturn prior awards of the same Parties. Obviously, great instability would result in the bargaining relationship if awards were overturned based merely on the fact that a referee sees a situation a little different than an earlier referee.

Weighing these considerations and evaluating the merit of Referee Moore's decision, this Referee cannot conclude it is "palpably erroneous". His decision is reasoned and is based on a defensible reading of C-1. The result in this case should be no different that it was originally resolved."

(Underscoring added)

Since the Board failed to follow the accepted interpretation of the time limit provisions of Articles 14 and 31, we must respectfully dissent.

Respectfully submitted,

R. D. Snyder
Vice President
United Transportation Union

Dated: December 7, 1992
Jacksonville, Florida