

SPECIAL BOARD OF ADJUSTMENT NO. 100

Parties: United Transportation Union  
and  
St. Louis Southwestern Railway Company

Statement of Claim: "Request for reinstatement of Yardman B. L. Carr, Pine Bluff, to the service with full seniority and vacation rights, and pay him for all time lost, including all arbitraries and fringe benefits, from the time he was withheld from service September 21, 1978 until he is returned to service."

Background: The Claimant Yardman had six years seniority when the Carrier dismissed him from its service.

On or about 6:25 P.M., September 20, 1979, the Claimant who was then marked up on the Extra Board, requested, and received permission, from Assistant Trainmaster Faulkner to mark off because he had to leave town on personal business. Trainmaster Faulkner stated he gave permission upon receiving the assurance of the Claimant that he would mark back on the extra board when he returned to Pine Bluff. The Claimant testified that he informed the Trainmaster that he would possibly mark up when he got back to town and got through with his business. On September 21, 1979 About 4:30 P.M. Terminal Superintendent Medley, in the presence of Transportation Inspector Uhrhan, observed the Claimant get out of a vehicle belonging to the City of Pine Bluff. The Claimant admitted he was working for the City on a part time basis. Superintendent Medley then proceeded to take the Claimant out of service and gave him a written notice to that effect.

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An Investigation was convened on October 4, 1979, wherein the Claimant was charged with violating specified Operating Rules in that he had failed to comply with Mr. Medley's instructions contained in his May 28, 1979 letter to the Claimant.

On May 28, 1979, Superintendent Medley had reviewed the Claimant's attendance record and determined that he was excessively absent and that the Claimant was also working full time for the City of Fine Bluff. On that basis the Superintendent wrote the Claimant that he had been constantly in violation of the rules pertaining to excessive absenteeism. The Letter further stated that the Superintendent had discussed this problem with the Claimant, and that the Claimant was employed elsewhere. The Letter also stated it was Mr. Medley's understanding that the Claimant was to have resigned his full time position with the City of Fine Bluff in April, and dedicate himself to his position as Yardman with the Carrier. The Letter went on to say that the Claimant's attendance record for April and May 1979 was completely unacceptable, and the Claimant was hereby instructed to remain marked up on a permanent basis and he would not be allowed to mark off without the Superintendent's personal authorization.

Article 25-1 of the Yardmaster's Agreement, states:

"Yardmen will not be suspended or discharged without a fair and impartial trial; nor will they be suspended for minor offenses pending investigation or decision."

Rule "Q" of the Operating Rules state in part:

"They (Employees) must not engage in other business which interferes with their performance of service with the Company unless advance written permission is obtained from the proper officer."

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Carrier's Position

The Carrier stated the record contains sufficient evidence to support the dismissal of the Grievant. He was guilty of violating Rule "Q". The Carrier stated that Superintendent Medley wrote the Claimant on May 28, 1979 that he decide as to whom he wished to work, i.e., the City of Pine Bluff or the Carrier. If the Claimant decided that he wanted to work for the Carrier, then he was to resign from the City and he had to remain marked up and would not be marked off without Mr. Medley's authorization. Mr. Medley testified that the Claimant told him that he had resigned from the City's employment, but did not tell him that he was continuing to work on a part time basis.

Superintendent Medley testified that he removed the Claimant from service because he was guilty of insubordination by not complying with the instructions in his May 28, 1979 Letter. He added that he regarded the Claimant as being dishonest for not telling him that he was continuing to work for the City of Pine Bluff. The Superintendent added that the Claimant was also dishonest in telling Trainmaster Faulkner that he had to mark off in order to leave town on personal business. The Carrier stated that the Superintendent was convinced that the Claimant had violated Operating Rules O an N, particularly that part of Rule N regarding dishonesty and insubordination.

The Carrier noted that the Claimant's attendance record between April 1, 1979 and September 20, 1979 was not very good. In that period the Claimant worked, or was available for work, 84 days and laid off 72 days. This record denotes the Claimant's lack of responsibility toward protecting yard service. During this period, the

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Carrier contends that the Claimant was working for the City. It adds that it is a serious offense for the Claimant to be laying off while working for another company. The Carrier cited awards which it maintained support this principle. The Carrier states it is not obligated to provide a haven for employees who do not wish to protect their jobs.

The Carrier states that the evidence of record shows that the Claimant did not comply with the Superintendent's instructions in his letter of May 28, 1979 by not remaining marked up on the extra board as well as engaging in outside employment, and therefore the discipline assessed was fully warranted and should not be disturbed.

#### Organization's Position

The Organization states the Carrier's disciplinary action cannot be sustained because it is in clear violation of Article 25-1. The operative facts are that the Carrier granted the Claimant permission to mark off and then took him out of service, pending Investigation, for marking off without permission. These facts do not constitute a major violation. It is no violation at all. The Organization stated it interposed a timely objection at the start of the Investigation being conducted and requested the Hearing Officer to dismiss the proceedings because of the Carrier's breach of Article 25-1.

The Organization also cited a number of other procedural errors which it maintained the Carrier committed in its conduct of the Investigation. It stated the bias and prejudice of Superintendent Medley toward the Claimant were clearly evidenced throughout the hearing, thus denying the Claimant a fair and impartial hearing.

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On the merits of the charge, the Organization stated the evidence shows that there was no basis to terminate the Claimant. The Claimant had personal business in a town 140 miles away. He asked permission to mark off in order to take care of his personal matter. The Carrier officer in charge at the Terminal, when the Claimant made his request, was Mr. Faulkner, and the Claimant properly addressed his request to him and it was granted. The Claimant returned the next day to Pine Bluff, and knowing he was not needed because there were 38 employees on furlough, went to his temporary job with the City of Pine Bluff. The Claimant had told Mr. Faulkner that he would probably mark up upon his return to Pine Bluff and when he was finished with his business.

The Organization stated Mr. Medley knew the Claimant had part time employment with the City of Pine Bluff because the Claimant had so informed him. The Claimant testified that after he received Mr. Medley's May 28th letter, he informed the Superintendent that he had resigned his full time job with the City and remained as a part time worker, and the Superintendent did not object as long as the Claimant met his obligation to the Carrier.

The Organization states that the Carrier stressed that the Claimant only worked 18 days in July 1979, but it failed to mention that the Claimant was on the 5 day off board three days and off three days because he was in a car wreck. In July the Claimant was off for the preponderance of the month because he was on vacation. In August the Claimant was marked off sick for nine of the fourteen days he was off. In September the Claimant laid off for five days, but the Claimant

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had worked nine of the first twenty days. The record shows that the Carrier was not in desperate need of the Claimant's services on September 20, 1979.

The record further reveals that there were men on furlough during this period, and on September 20th, the extra board was not in a state of emergency. The most that Mr. Faulkner could testify to was that the extra board was subject to being in an emergency after the caller filled the midnight jobs that evening.

The Organization stressed that the Carrier overreacted when it removed the Claimant from service prior to convening an Investigation and it continued to overreact when it found the Claimant guilty of dishonesty and insubordination - because the record does not support such charges.

The Organization requests the Board to set aside the discipline and make the Claimant whole.

**Findings:** The Board, upon the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the Railway Labor Act; that the Board has jurisdiction over the dispute, and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds that the Carrier committed a material error when it removed the Claimant from service for his alleged offense, prior to convening an Investigation to determine the truth or falsity of the charges placed against him.

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Article 25-1 of the Yardmen's Agreement guarantees an employee a fair and impartial hearing of charges filed against him. The central purpose of having a hearing, with Union representation, is to ensure that the Claimant will not be subject to prejudgment of his alleged offenses and will be granted a fair and impartial hearing at which he may present his defense.

It is also recognized that there are certain types of alleged offenses which the Carrier is privileged to take summary action in order to protect the public, the Carrier, and even the affected employee. In situations where the employee reports for work, or goes to work under the influence of liquor, where the employee is apprehended in a theft of property, where the employee engages in reckless conduct such as running through a stop aspect of a signal, or any other conduct that represents a clear and present danger to life and property, or where the employee refuses wilfully to refuse to carry out a legitimate order or instruction which does not represent a threat to the well being or safety of the employee - there are situations which have been recognized as exceptions to the rule against prejudgment of an accused employee. Public interest and public safety permit the removal of an employee before Investigation. However, these exceptions have to be tightly rather than liberally construed, because a fair and impartial hearing is the core and heart of the discipline rule - the keystone of employee contractual protection.

In the case at hand, the evidence does not support the Carrier's removal of the Claimant from service prior to convening a

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duly noticed Investigation. There is no probative evidence to prove that the Claimant was insubordinate or dishonest as these concepts are commonly applied in discipline cases, permitting removal from service prior to Investigation.

The Board finds that the Claimant was not dishonest in the sense that he was not apprehended in any larcenous activity. A disagreement as to whether the Claimant agreed to separate himself completely or partially, is not dishonesty that permits summary removal from service. Nor does the Board find that the Claimant was insubordinate in marking off when Superintendent Medley stated it could not be done without his personal authorization. The Claimant applied to the Carrier official in charge that day for authorizing an employee to mark off. His actions were done under a color of right, and do not support any charge of insubordination on the part of the Claimant.

The appropriate way for the Carrier to handle these alleged offenses was to convene a hearing and seek to prove the charges rather than prejudging the case by removal from service prior to an Investigation.

In summary, the Board finds that the Carrier's actions constituted a material breach of Article 25-1 and the Carrier denied the Claimant his contractual due process by denying him a fair and impartial hearing that was not subject to prejudgment. The Board



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finds that the discipline must be vacated and the Claimant be made whole.

Award: Claim sustained.

Order: The Carrier is directed to comply with the Award on or before February 28, 1981.

Jacob Seidenberg  
Jacob Seidenberg, Chairman and Neutral Member

R. H. Arnett  
R. H. Arnett, Employee Member

C. R. Huntington  
C. R. Huntington, Carrier Member

January 27, 1981