

Misc Awd:

AWARD NO. 7
CASE NO. 7

PUBLIC LAW BOARD NO. 5142

PARTIES) UNITED TRANSPORTATION UNION
TO)
DISPUTE) UNION PACIFIC RAILROAD
(FORMER MISSOURI PACIFIC UPPER LINES)

STATEMENT OF CLAIM

Claim of Switchman J. W. Dean for all time lost account being improperly disciplined. Claim includes payment for all wage equivalents to which entitled, including monetary equivalent of lost productivity shares, with all medical, surgical, life and dental benefits, and for monetary loss for such coverage while improperly disciplined. All notations of said discipline are to be removed from the Claimant's record.

Organization File: DF-221-972

Carrier File: 9003916

OPINION OF BOARD

As a result of a notice of investigation dated June 25, 1990, investigation ultimately held on July 18, 1990 and by notice dated July 25, 1990, Claimant, a Switchman with 12 years seniority, was dismissed from service for failure to comply with instructions to reduce excessive absenteeism and protect his assignment on a full time basis.

The record reveals that Claimant has had an absenteeism problem for some

time. By letter of June 19, 1989, the Carrier, by Superintendent S. L. Hefley, informed Claimant as follows:

It has been brought to my attention that in the past ten weeks beginning April 1, 1989, you have been working an average of four days or less per week and you are not alone in that respect. There are a total of twelve extra Switchmen averaging working four days or less per week.

The Union Pacific Railroad cannot afford part time employees working on the Railroad. Therefore, I am instructing you to properly protect your assignment as a Switchman on the Extra Board at North Little Rock, Arkansas.

If you have any questions concerning these instructions apply them to me now for explanation.

By letter of September 20, 1989, Hefley again wrote Claimant about his absenteeism:

This letter is in reference to your poor performance of protecting your job with the Union Pacific Railroad. From July 8, 1989, thru September 12, 1989, you have been unavailable a total of 30 days or 44% of the time. This is not acceptable to the Union Pacific Railroad. We will no longer tolerate any employees working part time when they are full time employees.

This letter will serve as instruction to you that I will no longer tolerate anyone

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abusing the system by only protecting their job part time. You must protect your assignment five days per week. I will be personally tracking your performance for the next 30 days and your failure to comply with my instructions will leave me with no alternative but to schedule a formal investigation and place responsibility where it lies.

If you have any questions or comments concerning this letter, please feel free to contact me and I will set up appointment to discuss any questions or comments you may have.

See no failure to comply with my instructions.

The record further reveals that Hefley again met with Claimant concerning his absence record wherein Claimant was again given specific instructions concerning the need to improve his absence record. Claimant testified that he had a conference in March or April 1990 with Superintendent Hefley (Tr. 4-5):

- Q. So Mr. Hefley, the Superintendent, conferenced you about your excessive absenteeism and that was back in March of this year?
- A. April, March, somewhere there. I don't know when exactly.
- Q. What did he tell you at that time?
- A. Told me to stay marked up more at least 80% of the time.
- Q. At least 80% of the time?
- A. Right.
- Q. Okay. Have you been marked up at least 80% of the time since then?
- A. No I haven't but I have excuses. I had those circumstances beyond my

control and that was the reason why I had to be off. ...

Q. But the instructions from the Superintendent was to work 80% of the time. Is that correct?

A. That's what he said, at least 80% of the time.

Even though Hefley gave specific instructions in March 1990 to Claimant to mark up and be available for work 80% of the time, during the period April 29, 1990 through June 28, 1990, Claimant was unavailable for work 27.47% of the time.

The record also reveals that Claimant has been disciplined in the past for absence related conduct. On January 9, 1989 Claimant agreed to take a 15 day deferred suspension for failing to be available when called. As shown by letter of January 27, 1989, Claimant was assessed a 30 day actual suspension for failing to comply with instructions issued to him on July 15, 1988 to make himself available to work as a Switchman. That letter further indicated that because Claimant's prior 15 day deferred suspension had not cleared, that Claimant was required to serve a 45 day actual suspension.

In this matter, Claimant was specifically charged in the notice of investigation and ultimately dismissed for "failure to comply with instructions to reduce your excessive absenteeism and protect your assignment as

Switchman on a full time basis" The threshold question is to determine what instructions were given to Claimant by Superintendent Hefley. While the notice of investigation speaks of an instruction to "reduce your excessive absenteeism", the evidence shows that instruction to be more specific. Claimant's unrefuted testimony clearly shows that Hefley specifically instructed Claimant that he had to be marked up 80% of the time. Again, according to Claimant (Tr. 4):

Q. What did he [Superintendent Hefley] tell you at that time?

A. Told me to stay marked up more at least 80% of the time.

Q. At least 80% of the time?

A. Right.

It is also clear from the record that the 80% cutoff was the standard utilized by the Carrier in determining whether Claimant should be charged. According to Manager Yard Industry Operations R. Pennington (Tr. 7):

Q. Mr. Pennington, Mr. Dean has stated in this investigation that he has had a conference with the Superintendent concerning his absenteeism and that he was instructed by the Superintendent to stay marked up 80% of the time. Mr. Dean has stated that this conference took place sometime in March of this year. Mr. Pennington has Mr. Dean been marked up and available for work 80% of the time since on or about March of 1990?

A. No, Sir.

Q. Do you have any documents to support that?

A. Yes.

* * *

Q. Mr. Pennington this Crew Dispatching Work Record shows total days unavailable 27.47%. Is that correct?

A. Yes.

That 80% standard is further evident from the fact that although the notices of investigation and dismissal speak of the failure of Claimant to reduce excessive absenteeism, the record shows that Claimant had reduced his absence record from past periods. The September 20, 1989 letter from Superintendent Hefley to Claimant states that "From July 8, 1989, thru September 12, 1989, you have been unavailable a total of 30 days or 44% of the time." During the period at issue in this matter, Claimant's record showed a 27.47% absence rate. Therefore, improvement from the past has been demonstrated - but that improvement did not meet the 80% standard set by Superintendent Hefley.¹

¹ The fact that an 80% standard was used in this case is not contested by the Carrier. See Car. Submission at 9, 11, 20 ("The Claimant had been instructed to improve his job protection performance to below 20% unavailability ... The Claimant per his own testimony indicates he understood he was to improve his work record to at least 80% availability. ... In the instant case the Claimant very clearly knew that he was required to improve his work record to below 20% unavailability for service."). That standard is further set forth in the Carrier's [footnote cont'd]

Thus, the record sufficiently shows that in this case the Carrier utilized a standard requiring Claimant to be available 80% of the time and dismissed Claimant for failing to meet that standard. The question now is whether the Carrier can utilize such a standard. The Organization argues that in light of the existing Agreements between the parties, the unilateral promulgation of an 80% standard is in conflict with those Agreements. We agree.

The relevant provisions state:

Article 12
Laying Off And Leave Of Absence

* * *

1. When employes in train service are permitted to lay off, they must not be absent in excess of 30 days, except in case of sickness or injury, without having formal leave, in writing, granted in accordance with the provisions of this Agreement.

* * *

Article 8
Laying Off

Yardmen will be permitted to lay off when extra men are available.

In PLB 4689, Award 25 between the parties, an employee was suspended for failing to comply with verbal and written instructions to mark up and protect his position on a consistent basis. That

letter of April 26, 1991 ("You were advised that Claimant had been instructed by the Superintendent to stay marked up at least 80% of the time.").

Board found that the Carrier was applying an 80% standard and sustained the claim. According to that Board:

Many Awards of the various Divisions of the National Railroad Adjustment Board have held that a Carrier may not make unilateral rules that conflict with the law on the provisions of the Collective Bargaining Agreement. See Second Division Award 1589, Fourth Division Award 780, and First Division Award 11287, and many more.

We find, and so hold, that the so-called 80 per cent policy as formulated by the Carrier in this case does conflict with the provisions of the Leave of Absence Agreement in that it attempts to apply restrictive provisions which were not negotiated into that Agreement by the authorized parties. The principle enunciated in the awards cited above is found to be applicable in the instant case.

Given that holding in PLB 4689, Award 25 between the parties, the narrow question before this Board is not whether we would decide that case in the same manner. Rather, the question is whether that award is palpably erroneous. We find it is not. It is not palpably erroneous to conclude that in light of the negotiated Agreement provisions set forth above that the unilateral promulgation and use of an 80% availability standard in this case is in conflict with those rules.²

² In its dissent to Award 25, the Carrier asserted that the Board therein, and not the Carrier, "created an '80 per cent policy'" and that the 80% availability standard was only the result of questioning at the hearing of the superintendent and his response concerning 80% "was an honest attempt to [footnote cont'd]

Therefore, because the record sufficiently reveals that the Carrier utilized an 80% availability standard in determining whether Claimant adhered to the instructions given to him to reduce his excessive absenteeism, we find that substantial evidence does not support the Carrier's decision to dismiss Claimant.³

The Carrier's arguments do not change the result.

The Carrier asserts that the Agreement does not give an employee an unfettered or unrestricted right to lay off. We do not hold that the Agreement gives employees such a right. All we

respond to the question and did not establish a Carrier Policy". However, in this matter the record clearly establishes the 80% level to be a policy (at least as applied in this case) in that Superintendent Hefley specifically told Claimant that he had to maintain an 80% availability level and the Carrier in its Submission repeatedly emphasized the failure of Claimant to maintain that level. See note 1, *supra*.

³ In this regard, because of the improper usage of an 80% standard, we cannot find that nevertheless Claimant's absence record for the period in question was excessive. The burden in a discipline case is upon the Carrier. Given our findings concerning the 80% standard, we cannot substitute our judgment for what the Carrier might otherwise have done had it not utilized that 80% standard. That would amount to speculation on our part. In any event, once the 80% standard falls, what we are left with is a record showing instructions given to Claimant to improve his absence record and a subsequent improvement from 44% unavailability to 27.47% unavailability. In other words, once the 80% standard falls, the record shows that Claimant complied with the given instructions and improved his absence record - a fact recognized by the Carrier. See Car. Submission at 9 ("The Claimant's job protection performance went from 44% unavailability to 27.47% unavailability.").

hold in this matter is that, consistent with the prior award between the parties, the Carrier improperly established and implemented an 80% standard of unavailability to determine if Claimant was excessively absent.

The awards cited by the Carrier are also not dispositive of the narrow issue before us. See PLB 5082, Awards 5 and 7; PLB 1324, Award 46; Second Division Award 12159. Those awards discuss the necessity for employees to avoid being excessively absent and the right of the Carrier to take disciplinary action for excessive absences. We have no quarrel with the logic of those awards and we agree with the conclusions of those awards that the Carrier can discipline employees who are excessively absent. Indeed, for those awards that are between the parties, those conclusions are entitled to the same due deference discussed earlier because they are not palpably erroneous. But those awards do not address the narrow issue that faces us - i.e., the unilateral establishment of an 80% standard to determine if the employee is excessively absent. The prior award between the parties (PLB 4689, Award 25) specifically address that question and, inasmuch as that determination is not palpably erroneous, that award governs this dispute.

Finally, we do not find that the


Carrier could have taken the disciplinary action against Claimant because he failed to call Superintendent Hefley personally when he was absent. No reference can be found in the dismissal notice to the fact that Claimant failed to personally call Hefley. The record sufficiently establishes that the overriding consideration in disciplining Claimant was because he did not meet the 80% availability standard - a standard that we find cannot be applied.

AWARD

Claim sustained.


Edwin H. Benn
Neutral Member


W. E. Naro
Carrier Member


M. B. Futhey, Jr.
Organization Member

Chicago, Illinois

Dated: June 4, 1992