

PUBLIC LAW BOARD NO. 5918

AWARD NO. 18
NMB CASE NO. 18
UNION CASE NO.
COMPANY CASE NO. 500193

PARTIES TO THE DISPUTE:

UNION PACIFIC LINES (former SPCSL)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Claim of SPCSL Engineer T. A. Jacobson for the removal of thirty (30) days overhead suspension for the alleged violation of Rules 1.6, 1.13 and 1.15 of the Safety and General Rules for All Employees in connection with his allegedly being quarrelsome and alleged possible dishonesty when he tried to lay off for personal reasons at about 1:45 a.m. on December 28, 1996; (s/b December 29, 1996) and then after being denied to lay off for personal reasons, he allegedly attempted to lay off sick. NMB CODE 106

OPINION OF BOARD:

In December 1996, after transferring terminals from Fort Madison, IA to West Quincy, MO, Engineer T. A. Jacobson ("Claimant") took three (3) days off for the seniority move, a week of vacation and two personal days (December 27 & 28). Counting two (2) paid holidays during the period, he was off work from December 17-28, 1996. In accordance with the Personal Leave Day Agreement between Carrier and BLE, he was marked up "automatically" on the Quincy Extra Board at 8:00 am on December 29, 1996.

At 1:45 am on December 29, 1996, Claimant telephoned Crew Dispatcher Jo Lewis and asked for "some more time off on my personal leave day". When queried about the reason, Claimant demurred that it was "personal", but volunteered: "...actually, I have gotten lucky"--- a response which evoked amused laughter from Crew Dispatcher Lewis. After checking with Crew Manager Johnson, Ms. Lewis advised Mr. Jacobson that the Manager would not approve his request because "...we've been holding trains for the last two days in Quincy." Claimant responded "Well, show me off sick--Testestoronitis", Ms. Lewis demurred and transferred him to the Crew Manager's office, where Claimant left the following message on the answering machine:

"This is T. A. Jacobson. I'd like to lay off sick on account of testosteronitis, and I'll check with my doctor to see if that's a normal function. Thank you very much. I'll call you back later. Thank you."

A short time later, Claimant called back and spoke with Crew Manager Skaggs, who declined his request to be marked off "sick", pointing out that Mr. Jacobson Claimant had earlier tried unsuccessfully to extend personal leave. That sparked the following colloquy between Mr. Jacobson and Mr. Skaggs:

JACOBSON: Please show me laid off sick.

SKAGGS: Well, we can't do it because you tried personal earlier. And we need you to come back to work.

JACOBSON: Well, I'm sorry. I didn't understand that.

SKAGGS: You haven't worked since the 17th of the month you've been off. You've been off half the month. You know, right now we need you to come back to work -- to work for us.

JACOBSON: Well, I'm sorry. I can't. I don't understand.

SKAGGS: Well, what it is we need you to protect your job. You know, it isn't like you haven't had time off. They gave you time off, now. We need you to come back and go to work.

JACOBSON: No, I'm going to lay off sick

SKAGGS: No, no. We're not laying you off sick.

JACOBSON: Well, I'm sick

SKAGGS: No. Once you try a personal business, and personal leave is denied; we don't change it to sick.

JACOBSON: I didn't request to be laid off personal business

SKAGGS: You requested earlier during the day.

JACOBSON: Well, I did?

SKAGGS: Yeah.

JACOBSON: Well, let's go to an investigation.

SKAGGS: Well, that's what we're going to go.

JACOBSON: Okay. Lay me off sick.

SKAGGS: I'm not laying you off. I'm not changing your status.

JACOBSON: Well, you lay me off....

SKAGGS: I'm not

JACOBSON: -- pending investigation.

SKAGGS: Listen to me. I'm not laying you off.

JACOBSON: You're telling me that I am not sick.

SKAGGS: What I'm telling you is that we need you to protect your job.

JACOBSON: Well, I am telling you...

SKAGGS: Okay. And...

JACOBSON: -- that I need you to show me laid off sick.

SKAGGS: I'm not doing it.

JACOBSON: Okay.

SKAGGS: Okay.

JACOBSON: You prove that I am not sick.

SKAGGS: What I'm telling you is that we need you to protect your job.

JACOBSON: Well, I'm telling you that I am laying off sick.

SKAGGS: No. We're not changing your status.

JACOBSON: Okay.

SKAGGS: Have a good day, Mr. Jacobson.

JACOBSON: Thank you very much.

By letter from K.E. Hamilton, Assistant Superintendent, dated January 2, 1997, Claimant was summoned to an investigation on January 10, 1997, on charges reading in pertinent part as follows:

You are charged with responsibility which may involve violation of Rules 1.6, 1.13 and 1.15 of the safety and General Rules for all Employees, those parts reading:

Rule 1.6. Conduct

Employees must not be:

- 3 Insubordinate
- 4. Dishonest
- 6. Quarrelsome
- 7. Discourteous

Any act of hostility, misconduct or willful disregard or negligence affecting the interests of the Company or its employees is sufficient cause for dismissal and must be reported.

Indifference to duty or to the performance of duty will not be condoned. Boisterous, profane or vulgar language is forbidden.

Rule 1.13 - Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

Rule 1.15 - Duty, Reporting or Absence

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties or allow others to fill their assignment without proper authority. Continued failure by employees to protect their employment will be sufficient cause for dismissal.

An investigation was held on January 10, 1997 at which the only Carrier witness was Claimant's immediate supervisor, Trainmaster/Roadforeman J. S. Wren. Mr Wren authenticated the tape recording of Claimant's conversations on December 29, 1997 with the Crew Caller and the Crew Manager; but otherwise he had only hearsay knowledge of the alleged misconduct. Thereafter, by letter dated January 22, 1997, M. A. Paras, Superintendent notified Claimant as follows:

Refer to the Notice of formal investigation sent you under date of January 2, 1997.

After carefully considering the evidence adduced at the hearing held in Fort Madison, IA on January 10, 1997, I find that the following charges against you have been sustained.

"you were quarrelsome and that you may have been dishonest when you tried to lay off for personal reasons at about 1:45 a.m., December 28, 1996, then after being denied permission to lay off for personal reasons you attempted to lay off sick. It has further been alleged that you have displayed a willful disregard for the affairs of the Company and indifference to duty as evidenced by your continued failure to protect your employment as indicated by your personal record, which will be reviewed at this investigation."

Therefore, you are in violation of Rules 16, 1.13 and 1.15 of the Safety and General Rules of all employees.

You are hereby assessed the following discipline.

Thirty (30) days overhead suspension for a period of six (6) months abeyance beginning today. If, during the probationary period, you are found not to be in violation of any rule resulting in discipline, the suspension will be canceled. If, however during this period you are found to be in violation of any rule resulting in discipline, you will be required to serve the thirty (30) day suspension, in addition to any subsequent discipline.

Appeals of the assessed discipline remained unresolved at all levels of handling and the matter eventually was placed before this Board for final determination.

We have studied the record in this matter carefully, including listening to the content and tone of the taped conversations Claimant had with Ms. Lewis and Mr. Skaggs. An objective listener would conclude that Claimant's idea of humor with the Crew Caller was in poor taste and that he was a "wise-guy" in dealing with the Crew Manager. At worst, the record evidence supports a finding that Claimant violated Rule 1.6 by exercising poor judgement in speaking discourteously to the Crew Manager on December 29, 1996. But no reasonable person would hear in the tone and content of his exchanges with the Crew Caller or the Crew Manager "boisterous, profane or vulgar language". Significantly, Ms. Lewis was not called as a witness against Claimant and the tape plainly reveals that she giggled at Claimant's remarks and never expressed any offense either to

Claimant or to the Crew Managers with whom she spoke at the time of the calls.

As for Claimant's flippancy comments to Mr. Skaggs, the tape reveals that the Crew Manager bears some of the responsibility for provocation by his own confrontational approach to Claimant, including repeatedly chiding Mr. Jacobson for taking time off to which he was contractually entitled. Objective and disinterested assessment of the taped conversations and "Personal Memos" Carrier had placed in Claimant's personnel file shows complete failure to prove any violation of Rules 1.13 or 1.15. The attempt to back-door or bootstrap evidence of alleged prior violations of Rule 1.15 into an investigation of the incident of December 29, 1996, to justify imposition of a greater *quantum* of penalty for his inappropriate conduct that one day, must fail for lack of proof, double jeopardy and by operation of Rule 37 (a) of the SPCSL/BLE Agreement.

Claimant can be faulted for violation of Rule 1.6 in his conversation with Crew Manager for dissembling about his earlier request for extended personal time off and for escalating the confrontational tone of that conversation, but his culpability is mitigated by the provocative approach initiated by the Crew Manager. Based upon all of the foregoing, an overhead suspension of six-months is so disproportionate to the mitigated offense actually proven by Carrier (as compared to the unmitigated multiple charged offenses for which Carrier charged and found Claimant guilty yet failed to prove) that the penalty imposed is unreasonable and arbitrary. We hold that disciplinary letter of January 22, 1997, finding Claimant guilty as charged of violating Rules 1.6, 1.13 and 1.15 and imposing the six-month "overhead" suspension must be rescinded retroactively and replaced with a letter of reprimand for discourtesy in violation of Rule 1.6 on December 29, 1996. Jurisdiction is retained by this Board in the event that this retroactive remedy requires any related

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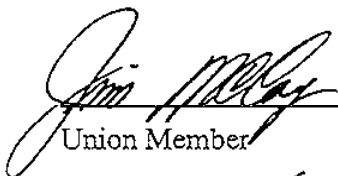
adjustments to Claimant's disciplinary record arising out of the six-month period of vulnerability under the penalty imposed by Carrier on January 22, 1997.

AWARD

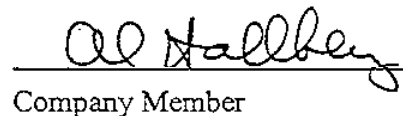
- 1) Claim sustained to the extent indicated in the Opinion.
- 2) Carrier shall implement this Award within thirty (30) days of its execution by a majority of the Board.



Dana Edward Eischen, Chairman
Dated at Spencer, New York on June 20, 1998


Union Member

Dated at Chester
on 6/29/98


Company Member

Dated at Chester
on 6/29/98