

AWARD NO. 34
CASE NO. 34

PUBLIC LAW BOARD NO. 6192

PARTIES) UNITED TRANSPORTATION UNION
TO)
DISPUTE) THE KANSAS CITY SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM:

Appeal in favor of MidSouth employee Larry D. Cowan, Sr., for reinstatement to service of the Kansas City Southern Railway Company, with pay for all time lost, including all fringe benefits, with seniority unimpaired and all notations removed from his personal record relating to this incident account wrongfully removed from service on June 28, 1999. (UTU File: GC-731-99; Carrier File: MO19991157)

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

The dispute at issue arises as a result of the Carrier dismissal of the Claimant from service because he twice failed promotional examination for locomotive engineer after entering the Carrier's engineer training program January 18, 1999.

An employee of the Carrier for five years, and a promoted conductor for the past four years, the Claimant's dismissal from service followed a formal company hearing into a charge that reads as follows:

[Your] responsibility, if any, in connection with your failure of the Kansas City Southern Railway Company 1999 Engineer Training Program final examination. The second attempted resulted in failure on June 28th, 1999.

Following the company hearing, the Claimant was notified by letter of July 20, 1999 that he was determined to have been in violation of Rule 1.3.1 (Classes) of the General Code of Operating Rules, and that he was therefore dismissed from service effective that same date.

Rule 1.3.1 of the General Code of Operating Rules reads:

Employees must be familiar with and obey all rules, regulations, and instructions and must attend regular classes. They must pass the required examinations.

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At the company hearing the Manager System Training Center testified that the Claimant was told at the beginning of the training class that it was necessary to attain a passing grade of 85% on a written examination for promotion to engineer. Further, he said that the Claimant was told that if there was a failure to attain a passing grade on a first attempt, that he would be afforded a second attempt, at which time, if he failed both attempts he would be "removed" from the training program. The Manager System Training Center also testified that when the Claimant failed in a second attempt to pass the written examination that he was informed, on June 28, 1999, that "he was being removed from the training program and he must report to his local supervision."

The Manager System Training Center also introduced into the hearing record copy of a Carrier Notice to Locomotive Student Engineers. In part here pertinent, the Notice, copy of which the Claimant acknowledged as having received on June 7, 1999, reads:

At the conclusion of the classroom portion of the program you will be required to take a written Knowledge Skills Examination. You must obtain a minimum score of 85% to satisfactorily pass this examination... Failure on the second attempt of any of the examinations will result in removal from the training program and you will then be governed by your respective agreement. (Emphasis by the Board.)

On cross examination, the Manager System Training Center was not able to cite any rule of the aforementioned "respective agreement," of the Controlling Agreement in the case here at issue, wherein it is provided that a failure to successfully pass examination for promotion to engineer will subject an employee to a formal investigation and dismissal from service. The Carrier witness said that the Claimant "was simply removed from the training program, and because of company policy, if they fail required examination, they cannot revert back to their prior craft."

When asked if he had a copy of the company policy that he was referring to, the Manager System Training Center said that he did not have a copy of such policy, but that it was his "understanding of the company policy that has been given to me to enforce." Next asked if he had ever seen a written copy of the policy, the witness said: "No sir. But I am basing it on past precedence that I have observed."

The Superintendent, Transcontinental Division, who was identified as the Claimant's immediate supervisor, testified as follows concerning the Claimant having reported to him as directed by the Manager System Training Center:

I told Mr. Cowan to, uh, I asked him why was he reporting to me? He explained to me the reason why. I told Mr. Cowan to, uh, where was he at? He said he was at home and I told him give me an hour or so and I'll call you back about two o'clock to find out what the allegations were.

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In response to questioning concerning the Claimant being removed from service, the Superintendent first said that the Claimant "was not removed from service," and then said that he meant to say that the Claimant was "dismissed from the engineer certification training program pending an investigation." Subsequently, when asked who had made the decision to remove the Claimant from service, the Superintendent said that it was on the advisement of the Manager of Training Operations, albeit he then offered that final responsibility for such action rested with his office as the Superintendent of the Division.

Rule 35, Investigations and Discipline, reads in part here pertinent as follows:

An employee shall not be discharged, suspended or otherwise disciplined without just cause and without a fair and impartial hearing except that an employee may waive a hearing in accordance with Section "B", Paragraph 2 of this rule.

An employee shall not be withheld from service pending hearing except in cases management determines to be serious, such as but not limited to, theft, altercation, Rule G violations, insubordination, major accident, serious misconduct or major offenses whereby the employee's retention in service could be hazardous.

When questioned as to what portion of Rule 35 was applicable to the removal of the Claimant from service pending a hearing, the Superintendent responded as follows:

Just cause, endangerment, and what that would be, uh, pending the investigation would be the seriousness of an inability to pass the rule examination would lead to his exception or whether or not he could perform his duties? An example would be taking your regular driving test. To operate a motor vehicle, if you don't pass the test you can't operate a motor vehicle until you pass the test and in this case I use that as an example.

Asked if he gave consideration to the Claimant returning to the train service craft after he failed to pass promotional examination for engineer, the Superintendent said:

No. Being that the agreement on force for a promotion, under the terms of the contract, I would have no reason to consider that.

Thereafter, when asked to identify the agreement in which such a rule would be found, the Superintendent said that he did not know the rule "off hand."

In further examination, the Superintendent agreed that there is no engineer training agreement in effect on the Carrier property here at issue, the MidSouth Rail, either in the

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form of a local or national agreement. In this same connection, the Carrier has stated to the Board that the MidSouth is a "new" railroad in that it was formed in the middle 1980's out of portions of the merged Illinois Central and the Gulf, Mobile & Ohio Railroad, and thus became a small regional railroad and "negotiated local labor contracts, eschewing the standard national rules." In this regard, it is especially noted that the Carrier did not adopt the July 19, 1972 National Training Agreement or the October 31, 1985 UTU National Agreement, or, principally, national agreements which include certain provisions related to engineer training and promotion to engine service.

The Superintendent also testified that he had no knowledge of a Carrier written policy that prescribes that if an employee twice fails to pass promotion for engineer that they will be removed from the training program and dismissed from service.

To some extent, it seems to the Board that in seeking support for its actions in dismissing the Claimant from service that the Carrier witnesses, in making reference to what the Carrier calls its written Federal Railway Administration (FRA) Certification Policy for locomotive engineers, confuse FRA regulations and guidelines that mandate a locomotive engineer pass periodic recertification tests to continue working as an engineer, with the removal and dismissal of an employee who has entered a training program and then fails to pass examination for promotion or entrance into the craft of engineer. Moreover, even if the FRA recertification regulations and guidelines were to be considered applicable to the case here at issue, which we find no reason to so find from the record before us, it would have to be considered that under the FRA recertification regulations and guidelines that an engineer is not, in fact, formally removed from service, but rather not permitted to work as an engineer for certain stated periods of time, or until such individual passes recertification examination.

Further, in study of an exhibit that the Carrier has included with its ex parte submission pertaining to its Locomotive Engineer Training Program (LETP) as filed with the FRA, we find references are made to an employee being "removed" from the training program for a failure to pass certain examinations. However, we find nothing in the LETP, as the Carrier would suggest, that says an employee will be dismissed from service as a result of not passing an examination.

The Carrier also argues that it has the right to establish reasonable standards of employee performance, which, it says, includes the standard of termination for failure to pass promotional examinations. In this same respect, the Carrier contends that in the absence of an agreement provision limiting its rights, that it has the unrestricted right to establish standards of qualifications of employees and to establish a discipline policy to enforce those standards.

As concerns both the Carrier reference to its LETP and its claim of a right to set policy, it has long been recognized in decisions of boards such as this that while a carrier has a right to set policy on various matters, that it may do so only to extent that the policy does

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not conflict with existing rules of a collective bargaining agreement. Thus, in the instant case it would have to be recognized that even if the training program which the Carrier provided to the FRA was to be viewed as a policy, that any provision in that training program found to conflict with existing contractually negotiated rules with the Organization would have to be viewed as being of no force and effect.

Although the Carrier maintains that the Claimant was in violation of Rule 1.3.1 of the General Code of Operating Rules in a failure to pass what it calls a required examination, the Board does not find that it may be properly held that this particular rule has application to the case at issue since the Carrier has not shown any rule of the Controlling Agreement that makes it mandatory that a train service employee be required to pass a promotional examination for service as an engineer. That there apparently is no rule covering such a matter is evidenced by the testimony of the Carrier witnesses that the Claimant had only been told that a failure on a second attempt to attain a passing grade would result in his being removed from the engineer training program. Nothing of record shows that the Claimant had, in fact, been notified that a failure to pass examination would result in his dismissal from service.

In support of its position that the Claimant was wrongfully dismissed from service, and should instead have been permitted to exercise his retained seniority to train service, the Organization directs attention to Rule 54 of the Controlling Agreement, which reads:

- (a) Employees moving from train to engine service under the provisions of Rule 19(e) herein shall retain their seniority in train service. Such employees shall be permitted to exercise their train seniority only in the event they are unable to hold a regular position in engine service.
- (b) Employees moving to engine service positions shall be subject to applicable agreement rules covering engine service employees.
- (c) The movement from train service to engine service or vice versa shall be under applicable agreement rules and shall not be considered to break the continuity of the employee's service, and all rights and benefits earned or granted to employees under combined service shall be maintained.

Aforementioned Rule 19(e) in paragraph (a) of Rule 54, the only provision in the Controlling Agreement that is said to mention the word or term, promotion, reads:

Employees shall be in line for promotion from brakeman to conductor to engineer in accordance with their relative seniority standing consistent

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with applicable provisions provided for herein, and shall be shown on seniority roster by appropriate symbols and dates.

Clearly, it is evident, as the Organization argues, that neither the language of Rule 54 nor that of Rule 19(e) may be properly read as requiring a train service employee to enter into an engineer training program, much less that if they do so, and fail to pass promotional examinations, that they will forfeit their retained seniority in train service.

The Board does not have the authority to go beyond the clear and unambiguous language of an agreement that has been duly executed by the parties. Nor may the Board construe agreement language to cover matters that were not mentioned or covered simply because the intent of the original language is found wanting of new or additional application at a later date by an interested party because of certain changing conditions in the work place. We are obliged to apply and interpret agreement language in terms of what was said and meant by the parties at the time it was negotiated.

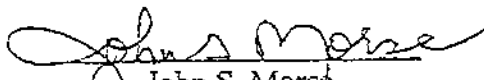
In the light of the above considerations and overall study of the extensive written and oral arguments of the parties, the Board finds that the Carrier has failed to meet a necessary burden of proof to hold that it had the right to remove and terminate the Claimant from service because he twice failed to pass written examination for promotion to a position of locomotive engineer. Under the circumstances, the claim will be sustained.

As to that portion of the claim which requests "pay for all time lost," the Board holds with decisions of prior boards that have adopted and followed the common law rule of damages to permit an offset of outside earnings and compensation, with the calculation of time lost being based upon the Claimant's attendance record by going back one year from the date of his removal from service.

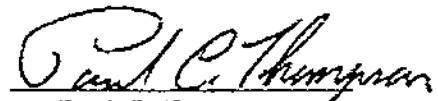
AWARD: Claim sustained to the extent set forth in the above Findings.



Robert E. Peterson
Chair & Neutral Member



John S. Morst
Carrier Member



Paul C. Thompson
Organization Member

Kansas City, MO
March 30, 2001