

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

BNSF RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (COAST LINES)

NMB Case No. 108

Claim of J. T. Conner

Dismissal -

Insubordination and

Abandonment of Job

STATEMENT OF CLAIM: Request on behalf of Trainman J. T. Conner requesting reinstatement of the Claimant to service with pay for all time lost and restoration of seniority and all fringe benefits.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on August 19, 2010 in Washington, D.C. Claimant was present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement (the "Agreement") which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts including Claimant. The Board makes the following additional findings.

Claimant was employed as a Conductor. He had 12 years of service, during which time he had been disciplined five times prior to the discipline at issue.

On October 14, 2009, Claimant was called to perform service as a Conductor on a business car special from Fresno to Oakland on which the Carrier's Chief Executive Officer and other senior managers. The move was accompanied by Road Foreman of Engines Welch and Trainmaster Morris. Claimant and his Engineer held a job briefing with the TM and a second job briefing with the RFE. Claimant and his Engineer were familiar with the territory over which the Special was to operate, having handled trains over that territory on a daily basis. A third job briefing was conducted with the crew and Terminal Manager Kitchen. In each instance, applicable documentation was reviewed.

Claimant and his Engineer were then taken to the crew change location. The Special arrived at 6:31 a.m. The arriving crew remained on the train pending delivery of paperwork to the business car. The arriving RFE conducted another job briefing with Claimant and his Engineer. Claimant indicated that the arriving RFE was no longer in charge and that he (Claimant) would determine who would board the train and when. The Engineer and RFE Welch boarded the

train by 6:40 a.m. and the RFE asked if Claimant was ready to depart, but Claimant refused, indicating that he needed more time to review paperwork, notwithstanding the several job briefings that had been conducted. Claimant then asserted that the locomotive's refrigerator was not working and requested a bag of ice.

Notwithstanding requests by Carrier Officers for the train to depart, Claimant instructed his Engineer not to proceed and advised the Officers that the Engineer takes his instructions only from Claimant. He stated that if the Carrier officers did not like the way he was doing his job, they could get another Conductor, to which Terminal Manager Kitchen said that is what he would do. Claimant then departed the locomotive, went to the yard office, tied up and left, notwithstanding requests by Carrier Officers to have him work the train. Another Conductor was called and took the Special to Oakland, departing at approximately 7:30 a.m.

The Carrier notified Claimant to attend an investigation, which was held on the property November 4, 2009. Based on the investigation, the Carrier found Claimant to have abandoned his job and to have been insubordinate, in violation of General Code of Operating Rules, Fifth Edition, effective April 3, 2005 ("GCOR"), specifically Rules 1.4, 1.6 and Rule 1.29, and dismissed Claimant from service.

The Organization filed a claim protesting Claimant's dismissal and requested his reinstatement based on both procedural and substantive arguments. It asserted that the Hearing Officer had impermissibly strayed from his obligation to provide a fair and impartial hearing and that the Carrier had failed to meet its burden of proof on the merits.

The Carrier denied the claim. The Organization appealed the denial up to the Carrier's highest designated official, but without resolution. The Organization then invoked arbitration, and the dispute was referred to this Board.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burden to show, by substantial evidence on the record as a whole, that Claimant was guilty of the charges against him and that dismissal was an appropriate penalty. It asserts that the evidence establishes that Claimant delayed a train, failed to comply with instructions and then abandoned his job. BNSF contends that the Organization's position that Claimant was simply being extra safe is unsupported and that Claimant's conduct was pretextual, to make some unspecified point. It points out that Claimant was familiar with the territory and underwent three job briefings. The Carrier

argues that the circumstances of the Special's arrival and anticipated route made Claimant's delays unnecessary. It contends that the sequence of conversation between Claimant and Management officials makes clear that his failures to proceed were unnecessary and that his leaving the job was at his initiation. BNSF argues that Claimant's insubordination and job abandonment are well-established by the evidence.

The Carrier argues that the Organization's procedural arguments are without merit, as the Hearing Officer was simply doing his job and the Organization is not entitled to discovery. It asserts that UTU's position that Claimant was simply being ultra-safe and trying to do a good job is not supported by the record. BNSF contends that Claimant was non-compliant with Carrier instructions and then abandoned his job. It maintains that the consequence of Claimant's action was to delay the Special in Fresno for almost an hour.

The Carrier urges that the claim be denied.

The Organization argues, as an initial matter, that procedural defects denied Claimant the fair and impartial hearing to which he was entitled. It asserts that Hearing Officer Johnson was rude and badgering in his questioning of Claimant, abandoning his responsibility to conduct a fair and impartial investigation.

UTU also argues that the Carrier improperly withheld Claimant from service in advance of the hearing and determination of guilt, in violation of Article 13 (a) of the governing Agreement.

As to the merits of the claim, UTU argues that Claimant was simply acting in a safe and professional manner and that it was the Carrier officials who exacerbated the situation, working to save face at the price of safety, which Claimant was protecting. The Organization contends that Claimant was simply following the same checklist, proper and required, he had used throughout his career. UTU asserts that the Carrier acted improperly when it allowed the verbal abuse of Claimant by his superiors. It denies that Claimant's conduct amounted to insubordination.

As to whether Claimant abandoned his job or was relieved, the Organization asserts that TM Kitchen's testimony establishes that in response to Claimant telling him that if Kitchen did not like the job he was doing, he could get another Conductor and that Kitchen responded "if that's what I need to do then I will." UTU maintains that Kitchen thereby relieved Claimant and initiated the process to obtain his replacement. It maintains that, in any

event, there is insufficient evidence from which to conclude that Claimant abandoned his job.

The Organization argues that the Carrier denied the Claimant the fair and impartial hearing to which he was entitled, improperly withheld him from service prior to the investigation and findings, and that, with respect to the merits, failed to meet its burden, failed to prove all of its charges. The Organization urges that the Claim be sustained.

DISCUSSION AND ANALYSIS: A review of the transcript of hearing indicates that the Hearing Officer aggressively questioned Claimant concerning the facts of his conduct; however, the record is insufficient to establish that his method of proceeding interfered with the establishment of a full factual record or otherwise constituted harmful error.

As to the Organization's protest that the Carrier failed to provide documents it requested, the Board is pointed to no contractual provision entitling the Organization to discovery. More to the point, the Board is pointed to no prejudice to its rights or those of Claimant resulting from the failure of the Carrier to provide the documents requested.

As to the Organization's claim that Claimant was withheld from service, the evidence persuades the Board that Claimant walked off the job without permission. There is no evidence of record that Claimant sought to mark up following October 14, 2009 through the date he was dismissed and no evidence that he was denied the right to do so.

As to the merits of the claim, the Board has carefully reviewed the evidence with respect to the charges of insubordination and job abandonment and finds substantial evidence in support of both charges. The commitment of both the Carrier and employees to safety is not disputed. However, Claimant was an experienced Conductor who was familiar with the territory through which the Special would be passing. His extended explanations of why he needed the a longer period of time to review what he already knew and what he had been briefed on three times strains credulity. His further explanation that the repeated instructions from Management to move the train stressed him out are similarly unconvincing.

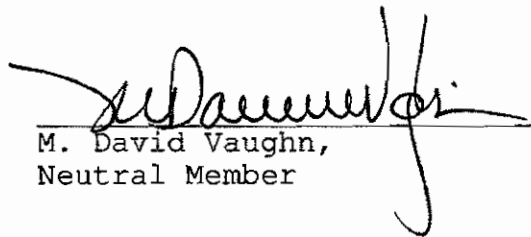
As to Claimant's assertion that he was relieved of duty, rather than abandoning his job, the evidence is that Claimant was delaying the departure of the train for other than legitimate

reasons and that he advised Managers that, if they did not like the way he was doing his job, they could get someone else. In response, TM Kitchen said that if that was what it took, he would. Instead of getting the train underway, Claimant left the job, tied up and left. That is job abandonment, not being relieved.

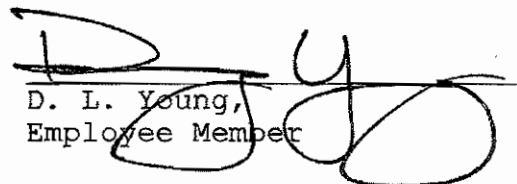
The clear conclusion to be drawn from the evidence is that Claimant was insubordinate and did abandon his job. His excuses of taking extra pains to ensure safety and of being stressed by Carrier officials repeatedly urging him to depart are unpersuasive. The Special was an important move. The passengers included the Carrier's CEO. Claimant's extended delay and job abandonment can only be viewed as a deliberate act to delay the departure of the Special and embarrass and frustrate Carrier officials. The deliberateness of Claimant's conduct converts an incident serious under any circumstance to a dismissible offense. The Award so reflects.

AWARD: The Carrier proved Claimant guilty of insubordination and job abandonment by substantial evidence and proved dismissal to be an appropriate penalty. The Claim is denied.

Dated this 4th day of November, 2010


M. David Vaughn,
Neutral Member


Gene L. Shire,
Carrier Member


D. L. Young,
Employee Member