

In the Matter of the Arbitration Between:

**BNSF RAILWAY COMPANY**

and

**UNITED TRANSPORTATION UNION (COAST LINES)**

NMB Case No. 109

**Claim of J. T. Conner**

Dismissal for Dishonesty:

Claim for Time and

Miles Not Worked

**STATEMENT OF CLAIM:** Request on behalf of Trainman J. T. Conner requesting reinstatement of the Claimant to service and 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 details of Claimant's service on that date and the disciplinary consequences thereof are the subject of Case No. 108 before this Board, issued at the same time as the instant Award. The terms of the Award in Case No. 108 are incorporated herein and made a part hereof, so they will not be repeated in detail.

After discussions with Carrier officials in which they repeatedly requested Claimant to depart Fresno, but without success, 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. When Claimant tied up, he did not print and sign the time claim and place it in the designated area prior to departing, notwithstanding the requirement of General Notice 696 that he do so. He did file a claim for time and milage, accurately

representing that he had been called to duty at 0500, tied up at 0651. However, he also claimed pay for 194 miles, which he did not actually work. Claimant's submission was based on his belief that he had been improperly relieved of duty and was entitled to be paid for the milage he would have worked, but for the Carrier's improper action.

The Carrier notified Claimant to attend an investigation, which was convened on the property November 4, 2009 and continued and concluded on December 17, 2009. A hearing was also scheduled for December 1, 2009. When the Carrier did not appear, the Organization conducted a "rump" hearing, replete with a transcript, and issued a letter finding Claimant not guilty of the charges. Based on the investigation the Carrier conducted on November 4 and December 17, it found Claimant to have engaged in "inappropriate conduct, failure to properly and accurately tie up and failing to complete and submit a signed tie up report before departing company property . . ." in violation of General Code of Operating Rules, Fifth Edition, effective April 3, 2005 ("GCOR"), specifically Rules 1.3.1, 1.3.3, 1.6, 1.13 and 1.17, as well as General Notice 696, and dismissed Claimant from service.

The Organization protested Claimant's dismissal and requested his reinstatement, based on both procedural and substantive arguments. 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 the record contains substantial evidence establishing Claimant's guilt of the charges against him. It asserts that dismissal was an appropriate penalty. BNSF points out that Claimant did not properly tie up, in that he failed to print and sign his tie-up form and place it in the designated area before leaving, in violation of General Notice 696. It maintains that Claimant's excuse - that the printer was not working - is a fabrication, in that there is no proof, and points out that there were at least three Carrier Officers in the area who could have helped him.

The Carrier also argues that Claimant was dishonest in claiming the full trip miles on the trip from Fresno to Richmond, which he did not work after improperly abandoning his job. It maintains that Claimant was insubordinate in not complying with General Notice 696. BNSF asserts that dismissal was an appropriate penalty for Claimant's violations; it urges that the claim be denied.

**The Organization** argues initially that the investigation which it held on December 1, 2009 after the Carrier did not appear as scheduled, is the proper and complete investigation and that the determination it reached as a result thereof, finding Claimant not guilty of the charges and ordering his reinstatement, is the proper and complete. It maintains that the postponement of that hearing was never served on the Organization and was not agreed to it, rendering the postponement improper.

As to the December 17<sup>th</sup> investigation conducted by the Carrier, it maintains that the penalty imposed in consequence thereof constituted double jeopardy, as the Carrier had previously disciplined Claimant for the same incident.

As to the merits of the dispute, UTU argues that the Carrier failed to prove that Claimant failed to do anything other than to tie up. It asserts that Claimant put in for miles to which he believed he was entitled as a result of having been improperly removed from service by the Carrier and that, if the Carrier believed the mileage claim was improper, the appropriate conduct was to decline the claim. It denies that Claimant's conduct amounted to either insubordination or dishonesty. Dismissal is not an appropriate or justified response, UTU maintains. The Organization urges that the Claim be sustained.

**DISCUSSION AND ANALYSIS:** The Carrier acted improperly in unilaterally postponing the investigation scheduled for December 1, 2009 without timely notice to or receipt by the Organization. However, that failure did not make the "investigation" conducted by the Organization or the "decision" based thereon proper. Under law and contract, it is the Carrier which has authority to conduct investigations and issue discipline; the Organization's *ex parte* proceeding and decision was invalid and carries no weight.

As to the Organization's claim that the penalty of dismissal imposed based on the December 17<sup>th</sup> investigation was improper because it constituted double jeopardy - a concept borrowed from criminal law - because the penalty is based on the same incident as the Carrier's previous action. The Board is not persuaded. The dismissal addressed in Case No. 108 before this Board was in consequence of Claimant's insubordination and job abandonment, based on his refusal to move the train and his walking off the job. The dismissal here is based on Claimant's improper tie-up, which the Carrier characterizes as "insubordinate" and submission of a claim which the Carrier characterizes as "dishonest". The dismissal penalties are not for the same conduct and do not constitute double jeopardy.

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The evidence persuades the Board that Claimant did not tie up in the manner required by General Order 696 and that discipline would be appropriate in consequence of that failure. However, the Board is not convinced that his conduct in that regard is insubordinate. Moreover, Claimant's failure to comply with the administrative requirement does not, itself, rise to the level of a dismissible offense. Clearly, Claimant did submit a claim, which was received and considered by the Carrier. There is no showing that the timing or manner in which he submitted the claim delayed the Carrier's review of the claim or otherwise prejudiced the Carrier. Claimant's administrative failure would warrant minor discipline.

As to the Carrier's claim that Claimant's request to be paid mileage which he did not actually work constitutes dishonesty, the Board is similarly unconvinced. The Carrier knew all too well that Claimant had not worked the miles, and Claimant knew that the Carrier knew. There is no evidence that Claimant was fraudulently concealing from the Carrier the fact that he had not worked the miles he was claiming.

It was Claimant's position and apparent belief that he had been improperly removed from his assignment and that he was entitled to be paid as if he had been allowed to continue in service, including pay for the miles he would have worked. In Case No. 108, this Board found that Claimant had abandoned his job, rather than having been withheld from service. However, Claimant's assertion of entitlement to pay for mileage in his tie-up form based on his position that he had been improperly removed from his assignment does not make him "dishonest" and does not warrant discipline based on such a conclusion.

For purposes of this analysis, the Board assumes that, if an employee were to be improperly removed from an assignment, the employee would be entitled to be paid as if he had completed the assignment, including any pay due for miles which would have been worked, but for the improper removal. The Board notes the Organization's representation that Claimant was not paid the proper amount for the day and that it has filed a pay claim; the determination as to the amount(s) due Claimant as a matter of application of the pay rules will presumably be made in connection with that claim.


The Board concludes that the Carrier could not dismiss Claimant based on the charges at issue herein. However, Claimant's conduct was a continuation of the conduct for which the Board upheld his dismissal in Case No. 108. Based on that Award upholding Claimant's dismissal, the claim at issue in this

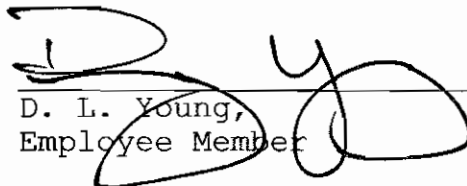
proceeding is moot and the case must be dismissed. The Award so reflects.

**AWARD:** The Carrier proved Claimant guilty of failure to comply with General Order 696, but failed to prove him guilty of dishonesty or insubordination. His proven conduct would not support dismissal. However, based on the Award in this Board's Case No. 108, upholding Claimant's dismissal based on other conduct, the determination in this case is moot, and the instant claim is dismissed for that reason.

Dated this 4<sup>th</sup> day of November, 2010

  
M. David Vaughn,  
Neutral Member

  
Gene L. Shire,  
Carrier Member

  
D. L. Young,  
Employee Member