

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13211
Docket No. 13016
98-2-95-2-40**

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(International Brotherhood of Electrical Workers
(System Council No. 9

PARTIES TO DISPUTE: (

(CSX Transportation, Inc. (former Seaboard Coast
(Line Railroad Company)

STATEMENT OF CLAIM:

- “1. That at Waycross, Georgia, on December 17, 1993, CSX Transportation violated the controlling agreement, particularly Rule 32, when electrician J.L. Harper, ID 174299 was directed to attend formal investigation commencing November 11, 1993 and concluded on December 7, 1993 in connection with reporting a personal injury which occurred (sic) while on duty at Waycross, Georgia, at about 10:45 pm, August 27, 1993. Mr. Henry (sic) was charged with falsely reporting that he was located inside the electrical locker compartment of Locomotive 5548 leaning over to check voltage on the check panel at the moment Locomotive 7827 coupled into Locomotive 5548 and with falsely reporting that the impact of the coupling threw him against the electrical relays in the electrical locker compartment. Mr. Harper was not afforded a fair and impartial hearing as Mr. Harper's representative was not allowed the right to cross examine witnesses during said formal investigation. Mr. Harper was found guilty as charged and was dismissed from service for (sic) CSX Transportation Inc. effective December 17, 1993, and;
2. That electrician J.L. Harper be compensated for eight (8) hours at the pro rata rate commencing December 17, 1993 by reason that CSX Transportation unjustly dismissed Mr. Harper from service

and compensation be paid for all lost wages until such time Mr. Harper is returned to service with seniority rights unimpaired, be made whole for all vacation rights, for all health and welfare and insurance, for pension benefits, including Railroad Retirement and Unemployment Insurance, and for any other benefits that he would have earned as said benefits are part of the wages lost while being unjustly dismissed from service and his personal record be cleared of all matters referred to herein."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was subject to an investigative Hearing on the following charge:

"Falsely reporting that you were located inside the electrical locker compartment of Locomotive 5548 leaning over to check voltage on the check panel at the moment Locomotive 7827 coupled into Locomotive 5548 and with falsely reporting that the impact of the coupling threw you against the electrical relays in the electrical locker compartment."

Following the Hearing, the Claimant was dismissed from service.

There is no dispute on the record that the Claimant, an Electrician, was on Locomotive 5548 on August 27, 1993 and that Locomotive 7827 failed to halt in time to avoid hitting and coupling into Locomotive 5548. As far as the Board can determine,

there is no challenge by the Carrier that on August 31, 1993 the Claimant completed a Report of Personal Injury concerning "sore neck and shoulders."

In that report, the Claimant stated that, at the time of Locomotive 5548 being hit, he was "in the electrical locker behind the cab" performing work as quoted in the charge against him. The sole concern of the Carrier, and the reason for the dismissal action, was the Carrier's contention that the Claimant was not in the electrical locker compartment, but further forward in the cab of Locomotive 5548. While not directly so stated, the Board concludes that the Carrier is alleging one of the following: (1) if the Claimant had been in the cab, an injury would not have resulted; (2) there was no injury; or (3) if the Claimant was injured, it did not occur as a result of Locomotive 7827 hitting Locomotive 5548.

By challenging the account in the Report of Personal Injury and the Claimant's corroborating written statement, the Carrier assumes an affirmative defense. As a result, it is not the Claimant's burden to prove he was not in the cab; rather, it is the Carrier's burden to prove that he was not in the electrical locker. The Board finds the Carrier failed to provide reasonable proof in support of its contention.

To attempt to prove that the Claimant was in the cab and not in the electrical locker, the Carrier relied on the testimony of two employees. The first was the Sheet Metal Worker operating Locomotive 7827. He testified that, as his engine approached, he applied emergency brakes, blew his horn, and saw a "man in the cab of the unit spotted Spot #7." The Sheet Metal Worker further testified that, after the incident, the Claimant came out of the Fireman's door of the locomotive cab and talked with him. The Carrier also alleges that a Carman on the scene "noticed [the Claimant] in the cab of Locomotive 5548."

A closer examination of the testimony shows these observations were not as clear cut as argued by the Carrier. The Sheet Metal Worker's testimony included the following:

Q Where was the, where was [the Claimant] located when you first saw him?

A When I seen him, he was in the cab.

Q Was this before or after the coupling?

A After; now I seen somebody in the cab. I seen a person in the cab just before we coupled. That's the reason I blew the horn at him but I couldn't tell you who it was.

Q Do you believe [the Claimant] had the time to get out of the electrical locker into the cab?

A He could have. Like I say it was dark and I couldn't tell you." (Emphasis added)

The above testimony informs that (a) the Sheet Metal Worker saw "somebody" in the cab; (b) before or after the impact; (c) it was dark; and (d) the Claimant "could have" moved from the electrical locker to the cab, as indeed he said he did.

As to the Carman's testimony, his observations of the Claimant were before or after the impact of the locomotives, as follows:

Q Would you please state what you saw.

A . . . I stood there and watched it and I looked up and I saw [the Sheet Metal Worker] on the engine on spot seven and I saw [the Claimant] in the cab in the engine on spot seven. . . . I tried to look to see if there was anybody between the engines because I didn't want to see nobody get killed you know but I didn't see anybody and when the engines hit, I saw [the Claimant] reach round and knock the throttle off because he had the engine revved up and he was standing there facing that little cabinet where you start the engine up and he knocked the throttle off and he went out the fireman's door. . . ."

To this must be added the testimony of the Laborer who was controlling the movement of Locomotive 7827 from the ground:

Q When was the first time you seen [the Claimant] after [the engines] coupled up?

A Approximately, I'd say, maybe three, four seconds after we coupled up, . . . I ran up to the locomotive to uncouple it and on my way going up to uncouple it, I seen [the Claimant] standing on the running board outside the electrical door looking at, looking towards me."

It was the Claimant's testimony that he moved from the electrical closet to the cab to "knock off" the throttle, apparently a proper safety measure. A review of the testimony of the three witnesses as related above can by no reasonable means serve to prove that the Claimant was not, at the moment of impact, doing what he said he was doing in the electrical locker.

Beyond this, it is difficult to understand the Carrier's belief that the Claimant's position on the locomotive was so fundamentally important that it warranted dismissal. Nowhere in the record before the Board does the Carrier challenge the Claimant's statement that the impact caused the injury. Further, the Carrier's Submission provides a deposition given by the Plant Manager on March 29, 1994 which includes the following:

"Q I'm trying to understand the basis of -- first I want to understand the reason that you have held an investigation and disciplined [the Claimant].

I thought that you said there was some dispute as to whether he was injured.

A [by Plant Manager] No, sir."

The same document indicates that the Claimant was assessed no discipline in the 20 years prior to the incident here under review.

On the narrow issue stated in the charge, the record is clearly unconvincing that the Claimant falsely stated he was in the electrical locker at the time of the impact. Because there are no other charges against the Claimant, the claim must be sustained. However, the claim is sustained in accordance with Rule 32, providing for reinstatement with seniority rights unimpaired and compensation limited to "wage[s] lost, if any."

Given this conclusion, there is no need for the Board to examine the procedural objections raised by the Organization.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 26th day of February 1998.