

PUBLIC LAW BOARD NO. 5959

Case No. 61
Award No. 61

Brotherhood of Locomotive Engineers)
vs) PARTIES TO
) DISPUTE
CSX Transportation, Inc.)

STATEMENT OF CLAIM

Request of the Committee that Engineer J.D. Shumaker (010525) be restored to service and paid for all time lost in connection with the investigation held on September 16, 1997 and continued and completed on September 24, 1997 and the removal of the unfavorable discipline entry from his service record; (Date of incident: August 31, 1997)

FINDINGS

This Board finds the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the dispute involved herein. The parties to said dispute were given due and proper notice of hearing thereon.

Claimant was dismissed from the service of the Carrier on October 23, 1997 as a result of an investigation held on September 16, 17 and 24, 1997. The Carrier found that the Claimant as well as the conductor and pilot conductor violated Operating Rules 234 and 234A, when on August 31, 1997 the Claimant operated train L-276-28 through an Absolute Stop Signal.

The Organization argues that the Carrier failed to produce at the investigation all the witnesses that had knowledge of the incident. All three crew members testified that they had seen a positive signal on signals #38 and #10 while departing the yard at Cumberland, Maryland. However, after passing signal #10 the crew discovered the main line switch was lined against them. The Claimant was able to stop the train before the switch. The crew was given permission to back up in order to clear train Q286. The Carrier failed to call the Terminal Manager on duty at the time of the incident, nor the carmen who lined the air and did the break test on the train.

On January 28, 1998 Carrier told the Organization it was going to reinstate the Claimant with the understanding the claim for time lost could still be progressed. The letter read in part, as follows:

This confirms discussions with you concerning Engineer J.D. Shumaker, ID 010525, who was dismissed for passing a red signal. The Baltimore Service Lane has been given approval to reinstate Mr. Shumaker to service with the right to progress his claim for pay for time lost.

On advice of his attorney the Claimant refused to return to work. Claimant's counsel was informed by the Carrier on February 5, 1998 of the action taken with the Organization. The letter reads in part, as follows:

As we discussed last week, on January 28, 1998, CSXT agreed to reinstate Mr. Shumaker to service with seniority unimpaired and with the right to pursue his claim for time lost under the labor agreement. As I explained, this differs from a "leniency reinstatement" in which an employee typically is required to waive all claims under the labor agreement in exchange for being returned to service. Mr. Shumaker, in contrast, can return to work while at the same time pursuing all claims he may have against the Company under the labor agreement. Based on your letter, however, I am assuming that Mr. Shumaker does not intend to protect his job in accordance with the requirements of his seniority.

The Organization also informed the Claimant's counsel about the offer of reinstatement.

The train crew members accepted the Carrier's offer and returned to work shortly after January 28, 1998. The United Transportation Union progressed their claim to Public Law Board 6059. In Award No. 11, the neutral found as follows:

The Board is concerned with the Carrier's failure to call certain requested witnesses. We have reviewed the transcript and it is our opinion that requested witnesses Terminal Officer Dave Bittner and Carman Jim Bierman could well have possessed vital and pertinent information, therefore, Carrier's refusal to call such witnesses was a fatal flaw in the proceedings. Such flaw, in and of itself would be sufficient to hold claimants were denied a fair hearing. Once the accused presented a valid reason for requesting these two witnesses, Carrier was not within its rights to deny claimants the right to question such witnesses.

Based on what this Board perceives to be a fatal flaw, the Board must find in favor of the claimants.

The Board would also like to state here that had we ruled on merits alone, our decision would have been that Carrier failed in its burden to prove with substantial evidence that claimants were at fault. There was no evidence produced to offset the clear and concise testimony of the Crew involved that the signal involved did not display a stop aspect when their train passed such signal.

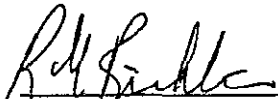
The neutral in this case does not find fault with the above Award. Accordingly the claim in this case will be sustained, in that the Claimant will be reinstated with seniority unimpaired, and with pay for time lost from the date removed from service until January 28, 1998.

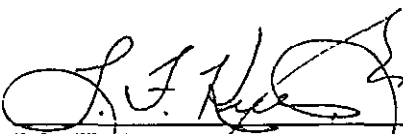
The Carrier offer of January 28, 1998 which was refused by the Claimant is a procedure frequently used in the Railroad Industry and legal under the Railway Labor Act, as amended. The Carrier's liability in regard to this case ceased when the Claimant refused reinstatement without infringing on his rights to progress this claim. It was the Claimant's action which caused the lack of earnings after January 28, 1998.

The advice not to return to work was not in the best interest of the Claimant. It also placed the Claimant in further jeopardy. It certainly exposed the Claimant to the charge of being absent from duty without authority.

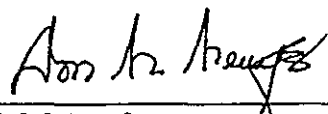
AWARD

Claim is sustained in accordance with the findings. Carrier is order to comply within 30 days of its date.


R.G. Richter, Chairman
Neutral Member


L.F. Kell, Jr.
Carrier Member

Dated 2/22/99


D.M. Menefee
Employee Member