PUBLIC LAW BOARD NO. 6365

AWARD NO. 2
CASE NO. 2

PARTIES TO DISPUTE

THE BELT RAILWAY COMPANY OF CHICAGO
and
UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM

Claim is hereby made on behalf of Conductor Kenneth D. Filipiak ("Claimant") that the unmerited discipline he received on January 15, 1999 resulting in his unjust removal from service be expunged from his personal record and that he be paid for all time lost. Further, that he be reimbursed for all medical costs incurred as a result of the harassment and intimidation against him by the Carrier.

FINDINGS AND OPINION

The Board after hearing upon the whole record and all the evidence, finds that the parties herein are the Carrier and Employee, respectively, within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted under Public Law 89-456 and has jurisdiction over the parties and dispute involved herein; and that the parties were given due notice of the hearing thereon.

For purposes of expediting the adjudication process, the neutral member of the Board shall render an interim, albeit binding, ruling in this case as indicated hereinbelow. A subsequent explanatory opinion on the procedural and substantive issues that are involved in the Claimant's case will be issued by the Board.[1]

Claimant was dismissed from service by the Carrier on January 15, 1999, resulting from an investigation which was triggered following his removal from service on the charge that he allegedly gave false statements to the Carrier's Claim Agent on May 26, 1998 or allegedly gave false testimony under oath on November 3, 1998 during his deposition taken in the lawsuit between Janik v. The Belt Railway Company of Chicago, regarding the events surrounding the death of Conductor Eugene Janik on May 26, 1998. Several weeks after his dismissal, the Claimant was reinstated to service on February 26, 1998 with the understanding that he had a right to appeal the discipline assessed.

Briefly, the facts indicate that the Claimant worked as the helper on the 6:30 a.m. East Yard Industry Assignment on May 26, 1998. The crew assigned to this job also consisted of an engineer and conductor, the latter position being performed on that day by Janik. At the start of this crew's assignment, they were instructed to couple up and pull a train from the East Classification Yard to the East Departure Yard. This required the crew to couple several tracks in the East Classification Yard. At approximately 7:30 a.m., Conductor Janik instructed the crew, via radio, to tie onto Track #0 in the East Classification Yard and stretch the cars. He then told them to stop. No other radio contact was made by Janik to his crew. After a brief lapse of time, the Yardmaster tried to contact him on the radio but received no response. The

[1] The procedural issues in this case, which will be discussed in the companion explanatory opinion, pertain to the time limits governing an investigation, pre-investigation discovery rights, if any, and the removal of the Claimant from service pending the Carrier's inquiry on the charges against him.

Claimant then attempted to contact Janik. Receiving no response, the Claimant walked back several cars to ask Janik if he was having a problem with his radio due to a lack of radio contact. After walking past three or four cars, the Claimant found Janik coupled between the cars and immediately called for help and medical assistance. Shortly thereafter, medical assistance arrived, and the Claimant was instructed to separate the cars, which he did. Janik was fatally injured in this accident.

Claimant discovered Janik coupled between the cars at 7:51 a.m. Four hours later at 11:51 a.m., he gave a recorded statement to Roy W. Gelder, the Carrier's Director of Risk Management and Planning, relative to the fatal injuries sustained by Janik. During this interview, the Claimant explained the work that he and Janik performed that morning. He then briefly described how he found Janik: "I looked and Gene was facing me and he was coupled up and there was no question about it, he was dead.***"[2] Toward the end of this interview, the Claimant finally admitted that he was in "shock" and "shook up" over the incident that resulted in the death of his friend and co-worker. (Org. Ex. 10)

On May 29, 1998, the Claimant signed a handwritten statement which was prepared by the attorney representing Janik's estate regarding the events surrounding this accident. In relevant part, the statement reads: "When I came on the third car I turned and Gene was looking at me. He had his arms reached out towards me and was trembling. It looked like he wanted to scream but he couldn't talk. I started screaming 'Oh no, it can't happen.' I ran to him and said 'Gene, I'm here.' Then his arms started to drop and his eyes closed. It sounded like a gasp. I knew he was dead." (Org. Ex. 11) On November 3, 1998, the Claimant gave testimony in a sworn deposition which was taken in connection with the Janik lawsuit. Claimant testified that Janik was still alive when he found him, that his eyes were open and did not close until "[i]t might have been like a minute or two, three minutes. He wasn't alive very long." (Org. Ex. 12; Claimant's Deposition at 53) Moreover, the Claimant's testimony revealed that Janik had been "scissored" between two misaligned drawbars rather than "coupled up"[3] (Id. at 33, 35)

The Carrier found the handwritten statement the Claimant signed and his deposition testimony inconsistent with the statement he gave to Gelder on the day of the incident and contrary to the observations of other Carrier employees at the accident site who claimed that Janik's body was coupled up at the midsection and that the drawbars were not misaligned. Because of these purported inconsistencies, the Carrier determined Claimant either gave a false statement to Gelder or testified falsely at his deposition which warranted his dismissal from service.

This Board, having duly head the proofs and allegations of the parties finds as follows:

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[2] The transcript of the East Yard Radio Channel on May 26, 1998, from 7:00 a.m. to 7:55 a.m., regarding radio communications between the Yardmaster and the Claimant's crew indicates that the Claimant said, upon discovering Janik, "Shit, shit, he's gone. Gene's coupled up." (Tr. 12)

[3] On the same day of the accident claiming Janik's life, a lawsuit was filed under the Federal Employers' Liability Act ("FELA") on behalf of the decedent's estate against the Carrier in the U.S. District Court of the Northern District of Illinois alleging negligence and seeking damages in the sum of $2.5 million. After the Claimant had been deposed, an amended complaint was filed against the Carrier setting forth a "survival count, " and alleging a violation of the Safety Appliance Act. In this regard, the damages now sought in the lawsuit were increased to a total of $6.5 million.

1. When juxtaposing the Claimant's statement at the time he was interviewed by a Carrier officer four hours after the accident that resulted in Janik's death with the May 29, 1998 written statement he signed for the law firm representing Janik's estate and his sworn testimony at the deposition of November 3, 1998, there were no glaring inconsistencies to factually support the Carrier's allegations that he falsely described Janik's demise and the manner in which the decedent succumbed as a result of being coupled up or scissored between the cars. In answering the neutral's questions at the arbitral proceeding before this Board, the Carrier acknowledged that the generic term "coupled up" can be construed in different ways; e.g., being caught between the drawbars of the cars and solely between the knuckles of the cars.

2. In describing the manner in which Janik had been caught between the drawbars of the cars (which the Claimant said were misaligned) and the knuckles of the cars, the Claimant's use of the terminology "coupled up" was not inconsistent with the written statement he signed and the testimony he gave at his deposition.

3. The first statement that Claimant gave when interviewed by the Carrier four hours after Janik's death did not detract from his subsequent signed statement and testimony the fact that he discovered Janik, a friend and co-worker, crushed between the cars, had to be an indescribable shock to his system that made him unable to discuss coherently what he had seen. The Carrier officer interviewing him on the day of the accident recognized his mental plight and never asked what he actually observed except to have the Claimant repeat his earlier taped radio communication that Janik was dead without further elaboration. Although the Claimant expanded his initial observation by stating that Janik was alive at the time he found him was not inconsistent with the findings contained in Dr. Cogan's autopsy report, which the Board fully credits.

4. The Carrier's rebuttal evidence, submitted to discredit both the Claimant and Dr. Cogan's autopsy report, carries no weight. This evidence involved written statements by two internists which, contrary to the Carrier's contention, were not affidavits since neither was notarized. Besides, the doctors the Carrier relied upon were not subject to cross-examination. Further, they may have been internists, but no professional credentials were furnished indicating they were also trained pathologists or experienced in forensic medicine.

5. The Claimant's version on how he found Janik caught between misaligned drawbars and the knuckles of the cars is credited by the Board. Although other employees, who had gone to the accident site, claimed that Janik was only caught between the knuckles and that the drawbars were not misaligned did not make the type of visual and personal inspection, as did the Claimant who helped the medics uncouple the decedent.

6. Based on the evidence of record, the Claimant did not give false or misleading information to the Carrier or testify falsely at his deposition; nor did the law firm representing the decedent's estate in a FELA lawsuit cause him to change his account of what he observed upon discovering Janik.

7. The Carrier's decision to subject the Claimant to a disciplinary investigation that resulted in his dismissal was, in the neutral's opinion, pretextual and linked to the fact that he provided information and testimony that may have proved useful in the decedent's FELA lawsuit against the Carrier. Litigation of this kind is an anathema to railroads, yet injured employees or the estate of an employee fatally injured in a railroad accident has the right to bring a FELA lawsuit. And employees familiar with the occurrence giving rise to such legal action have a responsibility to provide statements and testimony when required to do so. In the latter instance, that right cannot be abridged by intimidation and retaliation by the Carrier. Here, the Carrier's action against the Claimant bordered on retaliatory activity which this Board does not countenance.

Based on the foregoing findings, the Claimant's dismissal from service will be set aside and expunged from his personal employment record. Further, he will be paid for all time lost as a consequence of the Carrier's misplaced disciplinary action. The compensation to which the Claimant is entitled will include the period that he was improperly removed from service pending the investigation as well as the period he was in a dismissed status until the date of his return to service.

AWARD

Claim sustained.

ORDER

The Carrier shall comply with this Award upon receiving a duly executed copy thereof.

Charles P. Fischbach
Chairman and Neutral Member

Timothy E. Coffey, Carrier Member

Christopher W. Votteler, Employee Member

Dated at Chicago, Illinois,
this 30th day of May, 2001

PUBLIC LAW BOARD NO. 6365, CASE NO. 2

CARRIER MEMBER'S DISSENT

The Carrier must take formal exception to this award.

In sustaining this claim, Referee Fischbach holds the Carrier to a legal burden of proof, rather than the "substantial evidence" burden of proof which has been cited in thousands of awards. It is clear that this referee became immersed in the emotion of this case, which arose out of an accident resulting in an employee fatality, and simply ignored legitimate evidence which supported the Carrier's actions herein. Moreover, this referee inexplicably states that a "subsequent explanatory opinion on the procedural and substantive issues that are involved in the Claimant's case will be issued by the Board"; apparently feeling it necessary to decide the case a second time. This award centers almost exclusively on the Organization's arguments and gives little or no objective review of the Carrier's position.

The referee also states that he found no "glaring inconsistencies in the Claimant's testimony", again changing the manner in which a Carrier is required to review evidence in a discipline case.

The referee fully credits the doctor whom the Organization cited as supportive of its argument, yet, unbelievably, gives no weight to the signed, written statements of two board certified internists who fully reviewed the decedent's medical records.

Further, the referee ignored the testimony of Carrier witnesses who were at the scene soon after the accident - testimony supporting the Carrier's interpretation of the evidence.

Finally, the referee did not think it enough to sustain the claim, rather he entered into an attack on the Carrier's intentions herein, calling them "pretextual". He also accused the carrier of entering into "intimidation and retaliation...." This language is baseless, incendiary and gives the Carrier no credit for making an honest interpretation of the evidence in this case.

Referee Fischbach actually stated to the parties that this was his last railroad arbitration case and that he wanted it to be the one for which he is remembered. I hope that all parties reading this dissent will ensure that he keeps his promise, as he can no longer be classified as a neutral.

I respectfully dissent.

Timothy E. Coffey

Timothy E. Coffey
Carrier Member

PUBLIC LAW BOARD NO. 6365

AWARD NO. 2
CASE NO. 2
(SUPPLEMENTAL OPINION)

PARTIES TO DISPUTE: THE BELT RAILWAY COMPANY OF CHICAGO
and
UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM

Claim is hereby made on behalf of Conductor Kenneth D. Filipiak ("Claimant") that the unmerited discipline he received on January 15, 1999 resulting in his unjust removal from service be expunged from his personal record and that he be paid for all time lost. Further, that he be reimbursed for all medical costs incurred as a result of the harassment and intimidation against him by the Carrier.

FINDINGS AND OPINION

The Board after hearing upon the whole record and all the evidence, finds that the parties herein are the Carrier and Employee, respectively, within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted under Public Law 89-456 and has jurisdiction over the parties and dispute involved herein; and that the parties were given due notice of the hearing thereon.

For purposes of issuing an expeditious ruling in this case, the findings and conclusions set forth in the Board's Award, dated May 30, 2001, dealt exclusively with the substantive merits. It was noted, however, that the procedural issues raised by the Organization would be discussed in a companion explanatory opinion. Specifically, these issues pertain to the time limits governing the investigation in Claimant's case;[1]

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[1] Another time limit violation the Organization raises is based on the dual contention that the Carrier failed to notify the Claimant within five days after it had information of his alleged offense and then failed to hold the investigation seven days thereafter in accordance with Article 21(c) of the Agreement. The charge against the Claimant was linked to the allegation that he either gave a false statement to a Carrier officer regarding the death of Conductor Eugene Janik or testified falsely at his deposition as to what he observed. In this latter regard, the Claimant's testimony when deposed paralleled a written statement he gave to counsel for Janik's estate on May 29, 1998, which purportedly differed from what he told a Carrier officer who interviewed him shortly after Janik's death. A copy of the Claimant's May 29, 1998 written statement was apparently turned over on October 9, 1998 to outside counsel representing the Carrier in the Janik FELA lawsuit. The Carrier did not become aware of this written statement until November 3, 1998 when preparing for the Claimant's deposition.

Based on these facts as recounted by the Carrier, which the neutral member of the Board credits, no time limit violation occurred in this instance. Whatever advance information counsel for the Carrier had concerning the alleged inconsistencies in Claimant's statements germane to Janik's death cannot be imputed to the Carrier. Only when the Carrier first became aware or had direct knowledge of the Claimant's May 29, 1998 written statement did the time limits under Article 21(c) begin to run; i.e., from November 3, 1998. Since an investigation was scheduled three days later on the alleged offense against the Claimant, the Carrier complied with Article 21(c) of the Agreement.

pre-investigation discovery rights; and the removal of the Claimant from service pending the Carrier's inquiry on the charge against him.

After a thorough review of the parties' respective arguments and companion evidence on these procedural issues, the Board finds that the Carrier committed serious, and arguably, fatal errors. Regarding the time limits, the evidence clearly shows that the Carrier denied the Organization's final appeal of this claim in an untimely manner. The Carrier had sixty days in which to answer the Organization's appeal dated August 29, 1999, which it received on August 31, 1999. Pursuant to the contractual sixty-day time limit requirement, the Carrier had until October 30, 1999 to answer the appeal in writing which should have been mailed that day. Although the Carrier's denial letter was dated October 27, 1999, which fell within the sixty-day time limit provision, the envelope containing that letter, however, was postmarked on November 2, 1999. As evidenced by the postal service postmark, the Carrier's denial letter was three days beyond the contractual time limits.

The Carrier, albeit belatedly, attempted to justify its position that the denial letter was not time barred on the strength of an affidavit it submitted to the Board on April 18, 2001. According to this affidavit, given by Patrick J. O'Brien, the Carrier's Vice President, Controller and Treasurer, the affiant states that he prepared a response to the Organization's appeal letter dated August 29, 1999 which was inserted in an envelope and "placed with the Belt outbound mail bin on Friday, October 29, 1999." This affidavit cannot be credited for the following reasons. First, the affidavit was submitted to the Board after the appeals process on the property had been exhausted. Documentary evidence cannot be introduced at the arbitral stage of the process if it was not considered by the parties and made part of the record in the course of handling the claim on the property. Second, an affidavit by an absent witness, as here, if offered to prove the truth of the matter asserted therein, is hearsay and highly suspect evidence.[2] The most often cited reason for excluding this evidence is the absence of the opportunity to cross-examine the "out-of-court" affiant. Nor can the trier of fact (or, in this instance, the Board) assess the quality of the affiant's recollection, his truthfulness or ability to intelligently convey what he might have thought happened. Simply put, a written statement cannot be relied upon to establish the entire truth of the matter, and in a hearing cannot be given the same weight as oral testimony in the course of which the impartial arbiter can observe the witness and which is subject to cross-examination that may give rise to uncertainties which are prone to further inquiry. Accordingly, the evidence of record as it relates to the time limits has not been refuted by any credible proof offered by the Carrier. It is apparent, therefore, that the instant claim could have been sustained on the basis of the contractual time-limit requirement.

With respect to "pre-investigation discovery," the Organization maintained that to prepare for the Claimant's investigation in order to ensure that he received a fair and impartial hearing, it was entitled to

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[2] The Carrier made the same mistake when relying upon the written statements by the two doctors it retained to discredit the Claimant's observation that Conductor Janik was still alive when he found him coupled between the cars, and to disprove the autopsy findings contained in the postmortem examination report of Dr. J. Lawrence Cogan, Cook County Deputy Medical Examiner, who performed the autopsy on Janik. See interim Award No. 2 (May 30, 2001) at 3. As previously noted, both statements, by doctors who only practiced general internal medicine, were not affidavits per se because they were not given under oath or notarized. Nevertheless, the Carrier offered these written statements in evidence to prove the truth of what was asserted therein without being subject to cross-examination. Such evidence was clearly inadmissible under the hearsay rule.

receive beforehand an array of documents in the Carrier's possession. The documents the Organization requested involved a copy of the tape recording and transcript of the Claimant's statement to the Carrier's Director of Risk Management and Planning on May 26, 1998 regarding the accident resulting in Janik's death; copies of all statements given by or attributed to the Claimant after May 29, 1998; a copy of the transcript of the Claimant's deposition of November 3, 1998; a copy of the transcript and tapes of the East Yard radio transmissions on May 26, 1998 between 7:00 a.m. and 7:55 a.m.; a copy of the Claimant's personnel file; and photographs of the scene of the accident where Janik sustained his fatal injuries. The Carrier refused to produce this documentation on grounds that no contractual language existed granting "discovery rights" to either the Organization or management. Further, the Carrier opined that the Organization acquired copies of most of the requested documents entered into evidence at the investigation prior to this probe. According to the Carrier, periodic recesses were granted in the course of the investigative hearing to give the Organization and Claimant ample time to examine the documents and photographs it did not have the opportunity to review prior thereto.

Generally, there are no formal discovery procedures in labor arbitration. However, the deliberate withholding of requested documents and information until the hearing that is relevant to the matter at issue, may, in certain circumstances, provide sufficient grounds for their exclusion. While a formal investigation in the rail industry conducted internally by a Carrier employed and unilaterally designated hearing officer cannot be equated to a de novo arbitral proceeding, the procedural safeguards preserving due process and a fair and impartial hearing still control. To guarantee the fairness and impartiality of an investigation, a limited form of discovery by the Organization on behalf of the charged employee, which is an essential element of due process, should be permitted notwithstanding the absence of contract language or a rule sanctioning the production of evidence or relevant information prior to the hearing. As noted, such discovery should be permitted in certain circumstances where the Carrier has in its possession tapes, transcripts and other documents that are germane to the accusation(s) or issue(s) subject to the investigation and of critical importance to the charged employee in mounting a defense against the allegations being probed. Since fairness and impartiality are integral components of due process, it is incumbent upon the parties to thoroughly develop, without surprise, the facts as they relate to the matter under investigation. To arbitrarily withhold documentary and other written evidence until the investigation is held, during which the Organization and the charged employee are allowed to recess periodically to examine the evidence it had earlier requested, is palpably unreasonable. Under these circumstances, the fairness and impartiality of the investigation has been compromised, abridging the charged employee's due process rights.

Here, the Carrier resorted to this arbitrary practice and erred when denying the Organization's discovery request involving the production of documents and material that were definitely relevant to the charge against the Claimant. In denying limited pre-investigation discovery, the Carrier compounded this error when only permitting the Organization and the Claimant periodic recesses during the hearing to examine some of the documentary evidence for the first time. While this two-pronged procedural error may not have been fatal to the investigative process to which the Claimant was subjected, it, nevertheless, compromised the Claimant's entitlement to a fair and impartial hearing.

The final procedural issue raised by the Organization concerns the Carrier's action removing the Claimant from service pending the investigation. On this issue, the Organization complains that the Carrier had no contractual support to withhold the Claimant from service before the investigation was held. According to the Organization, the Carrier's action was tantamount to prejudging the Claimant's guilt on a charge that

did not warrant such a precautionary measure of this kind. From the Organization's perspective, the Carrier committed a fatal error in this instance that procedurally flawed the investigative process. Contrarily, the Carrier asserted that the seriousness of the allegations warranted the Claimant's removal from service which was consistent with past practice where the charge, as shown, was equivalent to theft. Besides, the Carrier noted that the Claimant was still paid after his removal from service pending the investigation which was convincing evidence that there was no prejudgment on the part of management.

Although the Carrier here may not have been restricted by any provision in the parties' Agreement from withholding an employee from service who is charged with an offense or rule violation, the absence of a contractual restriction does not mean that an unfettered or absolute management right exists countenancing such selective action, notwithstanding the nature of the offense or violation. It is axiomatic in the rail industry that an accused employee will not be held from service pending an investigation except in extremely serious cases; e.g., intoxication, theft of property, dishonesty, physical altercation at the workplace, insubordination, or a major operating offense representing a continuing safety risk to the accused employee, or other employees or equipment. When a situation involving any one of these offenses is alleged, the Carrier's removal of the affected employee before an investigation is held is permitted. Mindful of these exceptions, the authority to withhold an employee from service, whether it be linked to a contract provision or an established practice, must be narrowly and not liberally construed in order to preserve the fairness and impartiality of the ensuing investigative hearing which is integral to the disciplinary process. This process must guarantee elementary procedural safeguards to avert prejudgment or disparate treatment.

Despite the absence of a contract provision restricting the removal of an employee from service, the Carrier in this case was governed by industry-wide practice and did not have an exclusive prerogative to withhold the Claimant from service before convening the investigative hearing. Such an industry-wide practice cannot be unilaterally usurped by an alleged contrary past practice putatively established on the property by the Carrier without the Organization's acquiescence. For the Board to hold to the contrary under circumstances where the purported violative conduct cannot be characterized as a "major" offense, would be ignoring the perception of prejudgment or precipitous action which was comparable to assessing discipline without due process. In the case at hand, the evidence does not support the Carrier's removal of the Claimant from service pending the investigation. Simply put, the situation here cannot be viewed as a major offense which impelled his immediate suspension. Notwithstanding the Carrier's contention, the fact that the Claimant was paid while being withheld from service does not lessen the perception of prejudgment on its part. The Carrier committed grave procedural due process errors upon which the instant claim could have been sustained by the Board without consideration of the merits of the case.[3]

Without minimizing the due process considerations in this case, the Board decided to entertain the merits of the dispute because of the ramifications caused by the Carrier's action which, if left unaddressed, would

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[3] The record also indicates that Carrier representatives, including the individual designated as the hearing officer in the Claimant's investigation, discussed beforehand the evidence that was to be presented at the hearing. A pre-investigation meeting of this kind in the absence of the Claimant and his Organization representative, which the Carrier described as "preparatory," must be viewed as highly irregular since it taints the impartiality of the investigative process. Under such circumstances, the investigation and resultant disciplinary measure issued by the Carrier would be *void ab initio*.

have stigmatized the Claimant as an untruthful employee. The Claimant became embroiled in events that unfolded following Conductor Janik's fatal accident. These events mushroomed into a controversy of major proportion between the parties when the Carrier preliminarily removed the Claimant from service pending an investigation questioning his veracity over statements and deposed testimony he gave regarding his descriptive observation of Janik after he found him coupled between cars, and ending after the Carrier conducted the investigation and dismissed the Claimant for allegedly giving false testimony during his deposition in connection with the FELA lawsuit on behalf of Janik's estate. Before this investigation was held, the Carrier and Organization had reached an understanding that any such inquiry would be unnecessary if the deposition of Cook County Deputy Medical Examiner Cogan (in connection with the same FELA lawsuit) corroborated the Claimant's statements and deposed testimony that Janik was still alive at the time he discovered him. Although Dr. Cogan's testimony clearly indicated that Janik could have lived up to one hour after being fatally coupled between cars (which, in fact, corroborated the Claimant's written and oral versions), the Carrier chose to discredit his testimony and hold the investigation on the charge against the Claimant. To that end, the Carrier retained two doctors to issue second-hand opinions which this Board found to be inadmissible hearsay evidence. In the absence of a scintilla of credible proof to substantiate the charge against the Claimant, and on the basis of the findings and conclusions set forth in the May 30, 2000 interim Award that set aside the Carrier's disciplinary action dismissing him from service, the Board's ruling then and now should serve to confirm the Claimant's trustworthiness and truthfulness.

In retrospect, the Carrier could have resolved this matter in the manner described, but, instead, acted in bad faith when it failed to adhere to the understanding it had with the Union. By making the Claimant the target of an investigation without ample jurisdiction, the Carrier exacerbated a horrendous situation involving the tragic death of one of its valued employees. The Carrier's questionable motivation in pursuing the investigative route can be traced to the very finding contained in the interim Award, which bears repeating:

> The Carrier's decision to subject the Claimant to a disciplinary investigation that resulted in his dismissal was, in the neutral's opinion, pretextual and linked to the fact that he provided information and testimony that may have proved useful in the decedent's FELA lawsuit against the Carrier. Litigation of this kind is an anathema to railroads, yet injured employees or the estate of an employee fatally injured in a railroad accident has the right to bring a FELA lawsuit. And employees familiar with the occurrence giving rise to such legal action have a responsibility to provide statements and testimony when required to do so. In the latter instance, that right cannot be abridged by intimidation and retaliation by the Carrier. Here, the Carrier's action against the Claimant bordered on retaliatory activity which this Bard does not countenance.
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> (Id. at 4)

In the final analysis, the Board's critical assessment of the Carrier's conduct should not dissuade the parties from putting aside their rancor in order to heal the wounds resulting from this case which would be a more fitting memorial to Conductor Eugene Janik who lost his life in the service of the Carrier.

AWARD

The findings and conclusions set forth in the interim Award dated May 30, 2001, as augmented by the procedural rulings and supplemental findings hereinabove, are hereby affirmed.

Charles P. Fischbach
Chairman and Neutral Member

Timothy E. Coffey, Carrier Member

Christopher W. Votteler, Employee Member

Dated at Chicago, Illinois,
this 30th day of October, 2001

PUBLIC LAW BOARD NO. 6365, CASE NO. 2 (SUPPLEMENTAL OPINION)

CARRIER MEMBER'S DISSENT

The Carrier must take formal exception to this "Supplemental Opinion", the first ever seen on this 120-year old railroad. Having prepared a formal Dissent to the initial award, the Carrier did not intend to author another. The Carrier understands that reasonable minds can review the same evidence and arrive at different conclusions. However, this Award and Supplemental Opinion contain language that borders on contempt and reasoning that can only be described as baffling. The patent disrespect and outright venom exhibited by the Referee in this matter cannot go unchallenged. The Referee gives the Carrier no credit for honestly appraising evidence and responding in a supportable manner. The Referee's findings are an affront to the Carrier and the professionals involved in the handling of this case. This award is an aberration and must be disregarded if cited by the Organization in future discipline cases.

This opinion continues to hold the Carrier to a legal burden of proof, rather than the "substantial evidence" burden of proof which has been cited in thousands of awards. Moreover, the referee makes rulings related to procedural issues that completely ignore past practice.

Initially, the referee holds that the Carrier improperly withheld documentation from the Organization until the time of the hearing. A review of the investigation transcript shows that 18 exhibits were entered into the record. The only exhibits not seen by the Organization prior to the hearing were a series of fourteen (14) photographs and a 24-page radio transcript. In both instances, the Organization was offered an opportunity to postpone the hearing so it could review the documents. It declined and took a recess to review the evidence. The Organization then returned to the hearing, where full latitude was given to question the witness who proffered the evidence. What the referee fails to discuss is the fact that the Organization entered an affidavit into the record that was not seen before the hearing by the Carrier. As was his practice in his entire handling of this case, the referee ignores logic in this award and supports the Organization's arguments as if the Carrier posed none of its own.

The referee also states that the Carrier erred in withholding the Claimant from service, even though the Carrier presented a logical explanation for its belief that the charges, if proven, were akin to theft potentially amounting to millions of dollars. He also ignored the Carrier's past practice in this regard, which equates theft to a major offense warranting being withheld from service pending a hearing. Moreover, any possible perception of prejudgment was removed by the fact that the Carrier paid the Claimant between the date he was taken out of service and the date discipline was assessed.

The referee then misrepresents what was described by the Organization as "an understanding" that the Carrier would not proceed with the investigation if it believed the medical examiner's deposition testimony supported the Claimant's testimony. In reality, the undersigned told the Organization only that the Carrier would reconsider its position if the testimony supported the Claimant's story. No guarantees were given. Upon review of the deposition testimony, it was the opinion of the Carrier that, as compared to the reports of two other doctors who reviewed the medical records, the medical examiner gave testimony that was wildly inconsistent and often medically insupportable.

Finally, the referee accuses the Carrier of acting in bad faith and feels the need to once again attack the Carrier's intentions herein, calling them "pretextual". He also accuses the Carrier of entering into "intimidation and retaliation...." This language is baseless, incendiary and gives the Carrier no credit for making an honest interpretation of the evidence in this case. How dare he call into question the character of the fine people who toil for this Copay.

As stated in my previous dissent, the referee actually stated to the parties that this was his last railroad arbitration case and that he wanted it to be the one for which he is remembered. I hope that all parties reading this dissent will ensure that he keeps his promise, as he can no longer be classified as a neutral.

I respectfully dissent.

Timothy E. Coffey
Carrier Member