SPECIAL BOARD OF ADJUSTMENT NO. 894

AWARD NO. 1633

CONSOLIDATED RAIL CORPORATION

VS.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM: System Docket No. CRE-19826-D - Appeal of Engineer A. W. Scott from the discipline of Dismissal in all capabilities assessed by letter dated May 2, 1997 in connection with the following charge:

Your conduct unbecoming an employee of Conrail when you misrepresented yourself as District Superintendent Garofolo in order to restore yourself to service at approximately 3:37PM on April 15, 1997 and then proceeded to work WPME-70 as an Engineer on duty at 7:00PM on April 15, 1997. NORAC RULES THAT MAY APPLY: D

STATEMENT OF FACTS: A. W. Scott (hereinafter *Scott/claimant*) has been a locomotive engineer with the carrier since October 4, 1974. On April 14, 1997, shortly (7:20PM) after going on duty at Metuchen, New Jersey, Engineer Scott observed SMT Jitney #317 in the parking area, which

he perceived to be the vehicle that would be used to transport him and his conductor to Train WPME-70. Scott reactively entered Yardmaster Hoffman's office to protest what he (sic) perceived as a safety risk. According to Yardmaster Hoffman, Engineer Scott became agitated and aggressively moved toward the supervisor, while concurrently launching into a vitriolic and disrespectful (verbal) barrage. A verbal conflagration escalated, epithets were exchanged, and ultimately Yardmaster Hoffman crudely ordered Engineer Scott out of his (sic) office. Scott ignored the directive and thrust himself against the supervisor in a defiant and intimidating (threatening) manner. Yardmaster Hoffman responded to Scott's advance and the two men stood toe-to-toe and continued to exchange epithets and threats, until they were separated by an observer (Jitney Driver E. Taylor).

Subsequently, District Superintendent J. J. Garofolo was contacted at his home and given a briefing of the incident. Superintendent Garofolo then directed that claimant should be summarily removed from service for *conduct unbecoming*.

On April 15, 1997, at approximately 3:37PM, an individual who identified himself as "Joe Garofolo" called the lead crew dispatcher in the CACD Office in Dearborn, MI and *authorized* A. W. Scott's return to service. Pursuant to this authorization, A. W. Scott was returned to service and began working his regular 7:00PM assignment. Later that same evening (approximately 11:15PM) Superintendent J. J. Garofolo was monitoring the operation at Metuchen Yard, via his radio, when he heard the claimant's voice during a routine transmission. Superintendent Garofolo immediately attempted to determine why Engineer Scott was working in violation of his earlier removal order, and to identify the individual who had authorized such return to service.

He (sic) learned that the person authorizing the claimant's return to service had identified himself as "Joe Garofolo." In an attempt to identify the *impostor*, Superintendent Garofolo personally listened to the tape recorded conversation and opined that he believed the voice of the individual, claiming to be "Joe Garofolo", to be that of Engineer Scott.

Accordingly, Scott was *again* summarily removed from service and escorted from the property.

Based upon such sequence of events a Notice Of Investigation, dated April 18, 1997, was issued instructing Scott to attend a formal investigation, scheduled to be held on April 24, 1997 in connection with the following charge:

* * * *

"Your conduct unbecoming an employee of Conrail when you misrepresented yourself as District Superintendent Garofolo in order to restore yourself to service at approximately 3:37PM on April 15, 1997 and then proceeded to work WPME-70 as an Engineer on duty at 7:00PM on April 15, 1997. NORAC RULES THAT MAY APPLY: D"

* * * *

The formal investigation was held and concluded on April 24, 1997. Following the investigation General Manager D. R. Greer reviewed the evidence and issued his decision, stating in pertinent part as follows:

* * * *

"This is Notification That You Are Being Assessed The Following Discipline For the Offense Shown:

Discipline: DISMISSED IN ALL CAPACITIES

Outline of Offense:

Your conduct unbecoming an employee of Conrail when you misrepresented yourself as District Superintendent Garofolo in order to restore yourself to service at approximately 3:37 PM on April 15, 1997 and then proceeded to work WPME-70 as an engineer on duty at 7:00PM on April 15, 1997.

TO BE EFFECTIVE:

[ ] _____ days from the date of receipt of this notice or as soon thereafter as may be arranged.

[X] Immediately"

* * * *

By letter dated May 8, 1997, and in accordance with Article G-m-11(k) of the B of LE Agreement, the disciplinary sanction was appealed to the highest officer of the carrier designated to handle such disputes on the property. Following such appeal hearing, claimant and his representative were notified by letter, dated July 8, 1997, that the charges were found to have been proven by substantial evidence and therefore the appeal was denied. Thereafter, the dispute was submitted to this Board for final resolution.

FINDINGS: Under the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this Board is duly

constituted by agreement and has jurisdiction of the parties and subject matter.

During the hearing, and throughout the appeal's process, the organization raised multiple *procedural* objections, charging the carrier with a series of contractual improprieties, each of which is averred to have independently flawed the due process protections mandated by the collective bargaining agreement; such objections relevant to this appeal are summarized as follows:

A. Engineer Scott was improperly (*summarily*) removed from service pending a fact-finding investigation in violation of Article G-m-11, Discipline and Investigation, Paragraph (b) (1).

B. That on the day (April 23, 1997) preceding the formal investigation the carrier's investigating officer *covertly* conducted a preliminary hearing (suborning or shaping testimony) without the claimant or organizational representative being advised or present, thereby flawing the investigative process and/or the (carrier's) witnesses' candor and objectivity.

C. During the investigation the carrier's hearing officer abused his authority by *manipulating* the evidence, questions and admissions so as to deny claimant a fair and impartial hearing.

D. That the carrier's *deciding official* (General Manager D. R. Greer) should be presumed to have been *prejudiced* (prejudgment) because of the inordinately short period of time (approximately four hours) between his receipt of transcript (evidence) and issuance of decision.

E. The Notice of Discipline (Form G-32) was not *timely (10 day) served* as mandated by Article G-m-11.

It will serve no useful purpose for this Board to reiterate our rationale for concluding that no *reversible procedural error* occurred during the pre-investigation meeting, evidentiary investigation or the (final) decision making process. It will suffice to incorporate, by reference, all of our logic and conclusions expressed in Award No. 1632-- Engineer Scott received a fair and impartial investigation in substantial compliance with the contractual (due process) requirements.

With specific reference to the factual scenario described hereinabove, we are persuaded that neither Superintendent Garofolo, nor any other authorized carrier official, made the telephone call authorizing claimant's return to service. The rule (Article G-m-11 (Paragraph (9)(2)), relied on by the organization to support their demand for claimant's reinstatement is as follows:

> *When an engineer is required to perform service during a period of suspension, the balance of said suspension shall be eliminated.*

Such rule appears to focus on a situation in which actionable misconduct has been charged, investigated and a disciplinary suspension of a specific duration, has been imposed. Furthermore, in our judgment, such contract provision implies that the carrier's decision to utilize the suspended individual (employee) was an *authorized and intentional act*, most probably caused by an unanticipated (intervening) operational need. *Unauthorized or negligent restorative acts*, particularly from unproven sources, will not, without more definitive proof, serve to nullify an existent and specific disciplinary suspension. Clearly these conditions (precedent) did not exist on April 15, 1997, when the (Garofolo) impostor made the telephone call to fraudulently return Engineer Scott to active service, and attempted to ensnare the carrier in a situation that would arguably nullify the insubordination charge.

THE TAPE

The evidence offered by the carrier in support of this charge against Engineer Scott is primarily based on the taped telephone conversation between the (Garofolo) impostor and the lead clerk. The organization objects to the admission of such tape into the record; however, we consider

such objection to be *specious*, void of foundation and legal merit. The *tape* was sufficiently authenticated as an *official company record*, made and retained in the normal course of business; furthermore, there is no allegation of tampering or claimed (suspicious) interruption in the chain of custody. In our judgment such a predicate would presumably qualify such evidence for *judicial* admission, and clearly should and would be admitted in an internal (quasi-judicial) investigation process, which is administered by laymen and not strictly bound to the judicial rules of evidence and procedure. The most serious (due process) danger during this type of investigation is not that the fact-finder will allow *too much irrelevancy* in the record, but rather that he *will not admit enough* that is relevant (Elkouri and Elkouri, How Arbitration Works, Fourth Edition, Chapter 8), [Shulman, Reason, Contract and Law in Labor Relations, 68 Harv.L.Rev. 999 (1955)].

As regards the taped voice comparison, we have been unable to confirm that the *impostor* was Engineer Scott. Although we, and our retained experts, find the two voices suspiciously similar, we (they) cannot

conclude with certainty that they are one and the same person, and we will not speculate on such a serious matter.

Furthermore, the addition of the carrier's *circumstantial evidence*, which clearly points to no other benefactor but Engineer Scott, does not elevate the quantum of proof offered to the level required. The general rule, when considering circumstantial evidence, is that in order to sustain a termination, such evidence must be inconsistent with any other rational conclusion, and exclude every other reasonable theory on hypothesis, *except that of guilt* (Hill & Sinicropi, Evidence in Arbitration, Chapter 2, p. 4 *et seq.*, BNA 1980). Although we are sensitive to the possibility of *collusion* and *conspiracy*, we cannot, without more definitive proof, eliminate all other reasonable possibilities regarding *who*, and *why*, such a fraudulent telephone call was made.

Burden of proof is a judicial concept that is often applied in an arbitral setting; its basic utility is to identify the party that has the affirmative obligation to persuasively prove a pivotal fact or issue [Goerske, "Burden of Proof in Grievance Arbitration", 42 Marq.L.Rev. 135, 156

(1959)]. Notwithstanding the fact that this appeal is essentially civil in nature, the charging party (carrier) has the affirmative responsibility to allege and prove, with a reasonable degree of certainty, the wrongful act and the specific rule violated. Unlike the stringent standards imposed by the courts, there is no statutory requirement or controlling case law which mandates that the carrier's charges be measured by the same degree of specificity as a criminal action [Aaron, "Some Procedural Problems in Arbitration", 10 Vand.L.Rev. 733, 741 (1957)]. However, the credible evidence must be *clear and compelling* -- in our judgment the carrier's evidence falls fatally short of satisfying such proof requirement.

AWARD: Based on the credible evidence of record, giving due regard to the respective proof responsibilities, we are obligated to *dismiss the carrier's charges* involved in this appeal, and *reverse the disciplinary*

sanction; claim sustained. Carrier is directed to implement this award within 30 days of the effective date hereof.

DON B. HAYS, Neutral Member

S. R. FRIEDMAN, Carrier Member

E. W. RODZWICZ, Organization Member

February 6, 1998
DATE

AWARD NO. 1633

CARRIER MEMBER'S DISSENTING OPINION

The majority in the above-entitled award incorrectly determined issues contained in this case; firstly the quantum of evidence requisite to establish guilt. The authorities have developed a well-established standard in the railroad industry referred to as SUBSTANTIAL EVIDENCE. This standard requires proof exceeding a "mere scintilla." It is not intended or recognized as amounting to a "preponderance" of the evidence and certainly the standard in criminal cases of "proof beyond a reasonable doubt" does not apply. In this case, there was direct testimony and circumstantial fact presented that the Appellant imitated Superintendent Garofolo, for the intended purpose of returning to service illicitly. The majority chose to ignore these facts and thereby violated a second well-established precept in railroad disciplinary hearings that credibility issues are determined by the reviewing party. The majority overruled the reviewing officer's determination that the credibility of Superintendent Garofolo far surpassed that of the Appellant. The misguided result in this case violates the long-standing principle concerning the exclusive right of the carrier's reviewing officer to decide credibility issues.

Finally, it appears the neutral party treated the instant case in combination with Award No. 1632 which also involved the Appellant. For that case, the Appellant was found responsible for threatening a yardmaster. The discipline of dismissal was reduced to a lengthy suspension. It appears these two separate events were evaluated as part of one occurrence, resulting in the discipline assessed in Award No. 1632. Any employee engaged in threatening behavior imperils their valued employment relationship with Conrail. Such behavior should be judged separately from other charges arising from distinct events, even if a tenuous relationship exists between them. It appears these events were compromised in order to permit the Appellant to return to service, notwithstanding the seriousness of his actions. Based on all of the foregoing, **I DISSENT.**

S R Friedman

S. R. Friedman - Carrier Member
Director - Labor Relations