

SPECIAL BOARD OF ADJUSTMENT

NO. 894

CONSOLIDATED RAIL CORPORATION

-VS-

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DOCKET NO. CRE-19761-D

CASE NO. 1618

CLAIMANT: J.V. Gautieri

FOR THE CARRIER: S.R. Friedman, ~~Assistant~~ Director
Labor Relations

FOR THE ORGANIZATION: Robert Godwin, General Chairman
BLE

NEUTRAL: Dr. James R. McDonnell

STATEMENT OF CLAIM

Appeal of Engineer J.V. Gautieri, #871539, from the discipline of "dismissed in all capacities" assessed following an investigation in connection with the following:

Outline of Offense:

(1) Your alleged falsification of the circumstances involved in the incident on March 14, 1996 at approximately 0.5:15 a.m. while assigned as the engineer on MO-440 when you reported that you sustained an alleged personal injury in the cab of Engine 3284 in the vicinity of Derry Road Crossovers on Track #2, Harrisburg Line.

(2) Your attempt to use an alleged personal injury allegedly sustained by you on March 14, 1996 as subterfuge for personal monetary gain.

(3) Your alleged failure to properly perform the duties of an engineer's on March 14, 1996 while working assignment ML-440.

We request Appellant be paid for all time lost as a result of this incident, his benefits restored and the discipline expunged from his record.

FINDINGS

Upon the whole record and all evidence after the June 18, 1997 hearing in the Carrier's office, Philadelphia, Pennsylvania, and study of post-hearing submissions received on or before June 18, 1997, the Board finds that the parties herein are carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and the subject matter.

DECISION

The Claimant, J.V. Gautieri, has been employed by the Carrier for a period of eighteen (18) years.

On March 14, 1996, the Claimant operated train ML-440 from the Harrisburg, PA terminal. With the train in full motion, the electrical cabinet door on the lead locomotive #3284 dropped open. It struck the Claimant and conductor E.W. Malumphy.

Claimant stopped the train, called in a report and subsequently he and E.W. Malumphy were transported to the Good Samaritan Hospital in Lebanon, PA. They were examined by attending physicians. Later both men received treatment and examination at Lebanon Magnetic Imaging.

The Carrier filed Charges approximately one week later.

Three days of investigation and hearings followed on October 15, 1996, October 21, 1996 and October 25, 1996. The process developed four (4) volumes (837 pages) and one (1) volume of exhibits.

On November 1, 1996, Claimant received a Notice of Discipline from the Carrier noting dismissal in all capacities.

The Board takes note of the procedural matters raised by the Organization.

The Organization claims that the treatment of the Claimant and Conductor Malumphy were disparate. Conductor was not disciplined following his hearing.

The Board cannot judge this issue of disparate treatment without a full review of the investigation and hearings held for Mr. Malumphy. We cannot know if circumstances, mitigating or otherwise differed between the two employees. The matter of disparate treatment must, therefore be set aside.

The Organization made a number of complaints regarding a fair and impartial investigation. They noted that requests for the presence of certain witnesses were denied by the Hearing Officer. They also noted that the Carrier called witnesses who were not noted prior to the Hearing, most notably Dr. Pinsky.

The Organization listed specific instances where the Hearing Officer violated the fair and impartial standard. The Board has examined each of those noted sections, and finds that although the words and actions of the Hearing Officer were not fatal to the Organization's defense, they were at times excessive, aggressive and questionable. Far too much conjecture from witnesses was allowed, he injected his own opinion too often, he testified, interfered and became sarcastic with witnesses. Hearing Officers must be seekers of truth and facts, they must avoid any temptations to control the Hearing using such tactics as noted above.

Other procedural objections are de minimus to the matter.

Finally, to the merits of the case.

The Carrier has failed to carry its required burden of proof in the instant Claim. They have not shown by a preponderance of evidence that the Appellant is guilty as charged.

The electrical door fell on the two men, they sustained injuries. They reported the matter immediately and received treatment on the day of the incident.

Investigations and Hearings followed which established a number of pertinent facts. There were no witnesses to the incident other than the two Appellants involved. Testimony taken from the Carrier's witnesses was based on theory, conjecture and opinion. Each of the witnesses raised interesting but unproven points. They inferred, guessed, and assumed too much. They were unable to establish clear and convincing evidence to carry the burden of proof. Tests made on the door and its latches were inconclusive, opinions about what might or might not have occurred were unconvincing. The testimony of Dr. Pinsky was of little worth. It is unacceptable to hear medical testimony when the care giver has never met or examined the injured party. Dr. Pinsky gave us unfounded opinion and generalized theory about a medical condition. He could not offer sufficient specifics related to the Appellant.

The Charges of falsification of circumstances, subterfuge for personal monetary gain, and failure to properly perform the duties of an engineer are unproven and must be dismissed.

For these reasons the Board makes the following Award.

AWARD

The appeal is sustained. The Appellant shall be made whole for all losses sustained. He shall be returned to his former employment within 30 days of the date below.

S.R. Friedman Dissent Attached
S.R. Friedman, ~~Assistant~~ Director
Labor Relations

James R. McDonnell
Dr. James R. McDonnell
Neutral

Robert Godwin
Robert Godwin, General Chairman
BLE

February 20, 1998
Date

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CARRIER'S MEMBER DISSENTING OPINION

The majority in its award determined that the Appellant should be returned to service based on a lack of evidence produced by the Corporation to substantiate that Appellant either staged his injury or simply reported a pre-existing condition as a "new" injury. The majority contends that the Corporation failed to show by a preponderance of the evidence that the Appellant had committed a fraud against his employer. The "preponderance" rule is employed in civil lawsuits as a standard of evidentiary proof, usually considered to be a level of more than 50% certainty. This standard is inapplicable in railroad disciplinary cases. The standard recognized by the authorities in the railroad industry is substantial evidence, which is considered to be more than a "mere scintilla" but not necessarily a preponderance. A higher level of proof was mistakenly required in this case because it is clear that substantial evidence was provided to demonstrate that, at minimum, Appellant tried to claim an old injury as a new injury. Dr. Pinsky made it clear that no human being could have sustained a rotator cuff injury like that of Appellant, in the manner alleged by Appellant. An eight-year-old kid who follows baseball can tell that a rotator cuff injury is caused by repetitive motion and not a bump on the shoulder. The other evidence submitted by Carrier management provided a sufficient level of evidence to conclude that wrong doing by the Appellant was more likely than not. The majority's election to discount Dr. Pinsky's testimony flies in the face of the use of medical experts in tort cases who provide information about ailments, injuries and their causation by reviewing medical documentation and without examining the principal. Therefore, based on all of the above, the Carrier Dissents from this Award.



**S. R. Friedman
Carrier Member**