SPECIAL BOARD OF ADJUSTMENT NO. 894

AWARD NO. 1637

CONSOLIDATED RAIL CORPORATION

VS.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM: System Docket No. CRT-19772-D - Philadelphia Division Case - Appeal of Engineer J. V. Gautieri of the discipline of "Dismissal" assessed in connection with the following:

Your willful disregard of public and personal safety, federal law and Conrail rules when you did not conduct nor require the required brake tests be done during your tour of duty on job WPCA-29 which registered on August 14, 22, 23 and 28, 1994 and numerous other occasions as stated in your own testimony in a deposition conducted on May 20, 1997. This was brought to the attention of Transportation Superintendent Kovar on June 12, 1997.

We request Appellant to be paid for all time lost as a result of this incident, his benefits be

restored and the discipline be expunged from his record.

STATEMENT OF FACTS: Mr. J. V. Gautieri (hereinafter claimant) entered the service of the carrier as an engineer, and acquired seniority on the Seniority District "G" Roster of Engineers, effective July 6, 1978.

On May 20, 1997, Engineer Gautieri gave testimony in a deposition taken at the offices of a law firm located in Pennsauken, New Jersey. His deposed testimony, given under oath, focused on facts surrounding an alleged injury (severed leg) to a trespasser, which occurred on August 15, 1994, while Mr. Gautieri was employed and operating as the engineer on Traveling Road Switcher WPCA-29. In his testimony Gautieri stated that on August 15, 1994, and on numerous other dates both before and after August 15, 1994, he worked as the engineer on WPCA-29 with the same Conductor, Ernie Hauser. On each date that he worked the assignment, which was home-terminaled out of Camden, NJ, Engineer Gautieri and Conductor Hauser would service industries and pick up and set out cars at locations such as Delanco, West Burlington, Florence and Fieldsboro. Gautieri stated that the trip to these locations formed a loop, and that he and

Conductor Hauser would first set off cars at these intermediate points and then pick up cars on the return trip, stopping at each of the same locations. Gautieri further testified that at each location where cars were set off, or picked up, *he and his conductor knowingly failed to conduct brake tests to their train required by Federal law and by Conrail NORAC and Air Brake Rules.*

A copy of the printed deposition taken was provided to Philadelphia Division Transportation Superintendent Kovar on June 12, 1997. As a result of the statements and admissions contained therein, Gautieri was notified to attend a formal investigation in connection with the following charge:

> "Your willful disregard of public and personal safety, federal law and Conrail rules when you did not conduct nor require the required brake tests be done during your tour of duty on job WPCA-29 which registered on August 14, 22, 23 and 28, 1994 and numerous other occasions as stated in your own testimony in a deposition conducted on May 20, 1997. This was brought to the attention of Transportation Superintendent Kovar on June 12, 1997.
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> Rules that may apply: NORAC D, F, N, S, 70, 950, 951, 956, 960 and EC-99, 13, 10.2.4 and Federal Rule CFR 49.232.13."

In addition to the Notice of Investigation, Gautieri was also notified by separate letter that his Locomotive Engineer Certificate was suspended

because his actions on the cited dates may have violated 49 CFR Part 240 of Federal law.

The investigation was held on July 29, 1997. We would note parenthetically that prior to the date on which Gautieri gave his deposition, and continuing to the date of the hearing before this Board, claimant has remained dismissed on an unrelated charge, which is also under review by another board. Following the formal investigation, Gautieri was notified by Form G-32, Notice of Discipline, dated August 8, 1997, that he was dismissed in all capacities.

The dismissal was appealed pursuant to Article G-m-11(k) of the BLE Agreement by the BLE District Chairman in a letter to the Senior Director-Labor Relations dated August 25, 1997. A conference was held on September 4, 1997, to discuss the procedural and merit-based objections to the disciplinary action taken. The Senior Director-Labor Relations, by letter dated September 17, 1997, denied the appeal of discipline. Failing to reach a mutually satisfactory settlement the dispute was thereafter timely submitted to this Board for final adjudication.

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.

There being no material *factual* dispute, based on Engineer Gautieri's *sworn admission against interest*, our primary responsibility devolves into a determination of the procedural propriety of the organization's Motion to Dismiss. From the outset of the original investigation, and continuing throughout the appeals process, the organization has objected to the *timeliness* of the carrier's charges, which are based on admitted violations during calendar year 1994 (i.e. *more than seven* calendar days after the last known actionable occurrence).

Article G-m-11 of the applicable collective bargaining agreement provides in pertinent part as follows (emphasis added):

> "An engineer directed to attend a formal investigation to determine his responsibility, if any, in connection with an act or occurrence *shall be notified in writing within 7 days from the date of the act or occurrence or in cases involving stealing or criminal offense within days from the date the Corporation becomes aware of such act or occurrence.*"

Inasmuch as this collective bargaining agreement contains both expressed and implied rights and obligations it is akin to a commercial contract and therefore must be interpreted subject to the general precepts of contract law (Cox, Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case, Arbitration and the Law, 12th Annual Meeting, National Academy of Arbitrators: BNA Books, 1959). The law presumes that both parties understand the import of their written agreement and that they had the intention (meeting of the minds) which all their selected terms manifest (12 American Jurisprudence, §27).

Counsel for the claimant resourcefully argues that a Board award, which is based on the consideration of merits, would constitute a "*de facto*" change in the current agreement provisions. In support of such argument we are cited to, *inter alia*, several awards issued by this Board under the chairmanship of A. VanWart (*e.g.* SBA 894, Awards 1 and 46).

It is axiomatic that in order to qualify for *summary judgment*, in both a judicial and arbitral forum, the official record must persuasively show that there is *no genuine issue as to any material fact*, and that the moving party

is entitled to judgment as a *matter of (contract) law*. Of course, the party seeking summary judgment always bears the initial responsibility of identifying those portions of the record which he believes demonstrate the absence of any genuine issue of material fact. Furthermore, if there is a factual dispute, the movant may still prevail if he can persuasively show (legal) entitlement, assuming all material facts are either undisputed or presumed to be as alleged by the *respondent*.

If there is any aspect of the interpretation and adjudication process of a labor agreement that compels *strict construction*, many courts, and the majority of arbitration awards, consistently hold that it is in those procedural portions of the grievance machinery which impose "*time limits*" [Pressman's Union v. International Paper Co., 107 LRRM 2618 (Ct. App. 3rd Cir. - 1981)]. However, we recognize that other courts and arbitrators have (conversely) stressed that it is inadvisable to be overly technical in language construction, when the net effect is to preclude an employee's access to the grievance system [Forrest Industries v. Woodworkers of America, Local No. 3-436, 381 F.2d 144 (9th Cir., 1967), Kent County,

Michigan, Department of Public Health, 75 LA 948 (Kruger, 1980), Tennessee Dressed Beef Co., 74 LA 1229 (Hardin, 1980); National Park Service, 72 LA 314 (Pritzker, 1979)].

Notwithstanding such divergent "case law", in this dispute it is significant, if not pivotal, that the explicit limitation provisions described in Article G-m-11 mandate that the carrier's limitation period expired at the end of seven calendar days, measured from the occurrence, unless the alleged act involved theft or other *criminal act.* The contract appears explicit in regard to the time within such notice of investigation shall be served, and the mandatory words selected by the drafters do not appear to permit *arbitral derogation.* Such provision represents a *condition precedent* to the carrier's initiation of disciplinary action.

Although counsel for the carrier resourcefully argues that the collective bargaining agreement tolls the running of limitations where a *criminal act* is involved, such procedural exception must be rejected for want of sufficient proof. Although counsel refers this Board to a generic legal definition of a criminal act, such argument ignores the critical

ingredient; a positive or negative act in violation of a *penal law* against a state or federal authority (9 ALR 922). An examination of the record before this Board reveals a void of any proven violation of a *penal* statute, of which the claimant stands accused by the *enforcing public authority.* Although we find such admitted deliberate omissions to be abhorrent, we are not authorized to ignore the unambiguous contractual mandate.

AWARD: 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 - DISSENT
S. R. FRIEDMAN, Carrier Member

E. W. RODZWICZ, Organization Member

March 27, 1998
DATE