

In the Matter of Arbitration

between

United Transportation Union (C&T)

and

CSX Transportation, Inc.
(Former B&O Railroad Co.)

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Case No. 23 A
UTU No. 55129/1374
Carrier No. 4-(89-2136)

Case No. 23B
UTU No. 54582/1374
Carrier No. 4-(89-575-D)

STATEMENT OF CLAIM

"Request of Conductor David L. Drespling, ID No. 41009; for removal of discipline entry from his service record, and pay for attending investigation conducted on February 22, 1989 at Troggio's Restaurant, 1750 New Butler Road, New Castle, Pennsylvania, and pay for all time lost in connection therewith (Date of incident: July 28, 1988)."

"Request of Conductor David L. Drespling, ID No. 41009; for removal of Discipline Entry from his service record, pay for attending investigation conducted September 29, 1988 at Troggio's Restaurant at New Castle, Pennsylvania, and pay for all time lost in connection therewith. (Date of incident: September 16, 1988)."

BACKGROUND:

The claimant, together with three other members of his crew, was charged with responsibility in connection with the derailment and collision involving Trains R39927 and W49828 at Barberton, Ohio at approximately 0610 hours Thursday, July 28, 1988. That investigation was held on September 15 and 16, 1988 and continued on February 22, 1989.

The testimony and evidence presented at that investigation indicated that the claimant was assigned to duties as conductor on Train R39927. While en route from Lordstown, Ohio, the train proceeded west to Milepost 18.4, Lambert, Ohio on Conrail trackage. At approximately 0551 hours the train experienced an undesired emergency with its head end and two car lengths south of Milepost 22. As a result of the undesired emergency, a derailment occurred at approximately Milepost 21.1, apparently caused by an air hose separation between the 52nd and 53rd cars of the train. The 56th and 57th cars were fouling the main line. Subsequently east bound ore train, No. W49828, struck the cars fouling the main line, causing its four locomotives and fifteen of its cars to derail. The brakeman on the ore train was killed and two other members of the ore train were taken to the hospital, apparently suffering from shock.

The investigation was originally scheduled for August 4, 1988. Incident to an oral request from Local Chairman S.J. Marino on August 1, 1988 and a written request from Claimant Drespling dated August 3, 1988 the investigation was postponed until August 25, 1988. It was again postponed until September 15, 1988 incident to a letter from Local Chairman Marino dated August 21, 1988 on behalf of the ore train conductor who was physically unable to attend the investigation.

On September 15, 1988, the charged engineer, claimant conductor and flagman of Train R39927 were present at the investigation along with the rear brakeman of the ore train who was also charged. The other charged employees of the ore train and the head brakeman of the claimant's crew were not present due to physical impairment.

On September 15, 1988 at the beginning of the investigation the claimant stated he was not ready to proceed as he had been unable to obtain representation of his choosing. He explained that he wished to designate as his representative someone from the office of the General Chairman of the UTU or a representative from the International Union at Cleveland. The claimant then introduced into the record his letter to the General Chairman requesting representation from that office.

In his request for assistance from the General Chairman's office the claimant stated in pertinent part:

"On 7/31/88 Local Chairman S.A. Marino and I discussed the accident face to face. In my opinion Mr. Marino acted like he did not want to represent me because he was representing Conductor G.T. Cassella, the Conductor on W49828. I feel and know that I could not be represented properly by Mr. Marino due to his additional involvement with a member of the other crew which I do not want to discuss in this letter."

The claimant also introduced into the record the General Chairman's reply dated August 5, 1988 explaining why that office could not represent the claimant but recommending that

the claimant utilize Local Chairman Marino as his representative. The claimant then stated for the record that he had also written to the International Union for assistance but had not, as yet received a reply and did not know what other options were available to him.

When pressed by the Investigating Officer as to whether he was now willing to designate Mr. Marino as his representative, the grievant replied that it was his belief he "could not get proper representation at this time by Chairman Marino." The claimant also noted the absence from the investigation of the other charged employees as well as those whom he and Local Chairman Marino had earlier requested the Carrier to summon as witnesses. The Investigating Officer noted for the record the claimant's objections to proceeding and continued with the hearing.

On September 16, 1988 the Investigating Officer called the claimant to testify at the hearing. The claimant again stated he was unable to obtain representation of his choosing and again noted that several witnesses whom he had earlier requested the Carrier to have attend the hearing were not present. After some discussion as to whose obligation it was to produce those witnesses the Investigating Officer attempted to question the claimant. However, in response to each question asked by the Investigating Officer, the claimant read from a prepared statement as follows:

"As stated previously, I have no representative available

at this investigation. I am not refusing to answer any questions. I am not qualified to represent myself. Again, I am not ready to proceed with this investigation."

The Investigating Officer finally discontinued his efforts to obtain substantive answers from the claimant and proceeded to question other charged employees and witnesses. Toward the conclusion of the September 16, 1988 hearing, the Investigating Officer advised that it would be necessary to schedule another session of the investigation at a later date when the absentees (including the entire crew of Train W49828 and the head brakeman of the claimant's crew) could be available. The hearing was adjourned and continued on February 22, 1989.

Following conclusion of the September 16, 1989 hearing the Carrier notified the claimant to attend an investigation on September 22, 1988 to determine his responsibility for failing to provide relevant answers to questions directed to him by the Investigating Officer on September 16, 1988. On September 17, 1988 the claimant requested a postponement due to not having proper representation. That request was granted and the investigation was postponed until September 29, 1988.

At the September 29, 1988 investigation the claimant was represented by Mr. J.C. Rainer, a member of the United Transportation Union (E). Following that investigation the Carrier on October 20, 1988 notified the claimant he had been adjudged at fault for "failing to provide relevant answers to

questions directed to you by the investigating officer during a formal investigation that was convened at New Castle, Pennsylvania on September 16, 1988 in violation of OPERATING RULE 501 of the CSX OPERATING RULE BOOK, Form ROP 100 at which you were a charged employee.

The discipline administered is dismissal from service."

Prior to reconvening on February 22, 1989 of the investigation into the July 28, 1988 derailment and collision, the claimant requested a postponement due to continuing problems in obtaining representation of his own choosing. As before the General Committee's office again declined to do so but referred the claimant back to Local Chairman Marino who was still deemed unacceptable by the claimant. Another employee was apparently willing to represent the claimant but was unfamiliar with the procedures and felt he was not qualified. Finally, J.C. Rayner who had previously represented the claimant at the September 29, 1988 investigation into the charge of insubordination was willing to represent the claimant again but was then off duty due to injury.

The request for postponement was denied and the claimant did not appear at the continuation of the hearing on February 22, 1989. Also absent from the hearing on that date were the flagman of Train R39927 who had since retired and due to physical impairment the head brakeman of Train R39927 and all three charged crew members of the ore train. The investigation was finally concluded on February 22, 1989 without the testimony of any of the ore train crew and the head brakeman

of Train R39927.

On March 20, 1989 the Carrier notified the claimant that following the investigation conducted on February 22, 1989, it determined that on July 28, 1988 while on duty as conductor on train R39927, he failed to require the employees working under his direction to comply with Conrail Operating Rules No. 99 and No. 102 which resulted in a derailment involving that train and train W49828. The Carrier further advised the claimant that the discipline administered for this offense was dismissal from the Carrier's service.

With regard to the derailment and accident on July 28, 1988 the Carrier asserts that the claimant's guilt is supported by substantial credible evidence and that the procedural objection regarding his lack of representation does not justify disturbing the discipline imposed. The Carrier contends that the evidence clearly establishes that no member of the claimant's crew provided flagging protection when their train derailed and was fouling the line. It further argues that except for a few faint efforts to communicate by radio with the dispatcher, there is no indication that the claimant's crew took any action to prevent the serious accident which occurred. The Carrier also contends that no denial of the charges was ever made by the claimant and no contention by the claimant that other witnesses were not telling the truth or that there is any information that might have mitigated the claimant's responsibility.

The Carrier rejects the Organization's contention that the claimant's discipline should be overturned. It argues that the Organization's own policies were largely responsible for the fact that the claimant had no representation of his choosing, together with some unexplained animosity between the claimant and the Local Chairman. Moreover the General Committee of the Organization advised the claimant that he could be properly represented by Local Chairman Marino who had a duty to provide the required representation.

The Carrier contends it is doubtful whether any additional postponements of the investigation would have aided in resolution of the stalemate over the claimant's choice of representation. It argues that the burden was on the claimant to assure that he was represented if he so chose but that having rejected Local Chairman Marino, the claimant was then bound by whatever procedures were available to him under the Organization's rules. Accordingly whether his representative turned out to be an assistant Local Chairman or a member of the Protective Committee, or as occurred in the September 29, 1988 investigation, a member of another local, it was nevertheless the claimant's responsibility to contact that individual and make necessary arrangements to be represented.

The Carrier asserts that it complied fully with the provisions of the applicable Agreement and that it had no obligation to grant innumerable requests for postponement to allow the employee to arrange for representation, particularly when the request was not timely.

The Carrier contends that the claimant acted at his own peril in refusing to answer questions posed at the September 16, 1988 investigation. It cites awards of several tribunals in this industry which hold that the refusal to testify in his own behalf when given the opportunity to do so is tantamount to a waiver of defense. The Carrier notes that an investigating officer's decision in such a case is considered to be adequately supported by whatever evidence is available even though such evidence, because of the employee's own actions, does not include the employee's version of the facts. The Carrier contends that hiding behind a procedural objection in refusing to answer questions lends additional credence to the charges and suggests a dearth of evidence in the claimant's favor.

With respect to the separate finding by the Carrier that the claimant on September 16, 1988 was guilty of insubordination and concealing information during a formal investigation, the Carrier asserts that this was substantiated by clear and convincing evidence and that the factors cited by the Organization do not mitigate the claimant's culpability. It contends that the claimant's recitation from his prepared statement in response to questions asked by the investigating officer was not an "answer" which provided the information needed to help develop the facts surrounding the derailment and accident. Moreover, even after the consequences of his failure to provide relevant answers was explained to the

claimant, he continued to avoid supplying substantive responses.

The Carrier notes that the Organization's letter to the claimant dated September 17, 1988 advised him that an employee's refusal to testify is at his own peril, allowing the Carrier to reach a determination without the employee's input. However, the Carrier disagrees with the Organization's view that the waiver of defense is the entire penalty for refusal to testify and that the claimant has a constitutional right against self-incrimination. The Carrier contends that the claimant was also subject to the additional sanction for insubordination as he had an affirmative obligation to provide information going beyond his own interests. The Carrier emphasizes that since other employees were also charged, then guilt or innocence was predicated upon information developed in the investigation. It argues that the Carrier has a right to expect the cooperation of its work force in developing the facts surrounding an incident of this gravity which included a fatality and official interest of the Federal Railroad Administration and the Ohio Public Utilities Commission.

The Carrier acknowledges that there are remedies in the Agreement for denial of an employee's right to a fair and impartial investigation. It argues however that there are few situations which excuse or mitigate insubordination, noting that the usual response to questionable instructions is to obey first and grieve later which the Carrier asserts is the proper course for the claimant to have followed.

Concerning the investigation into the derailment and accident of July 28, 1988, the Organization asserts that the claimant was denied a fair hearing as guaranteed by Rule 17 of the Agreement. The Organization points to the claimant's written request that identified witnesses, including the operator from Warwick Tower on duty at the time of the derailment, be in attendance at the hearing. Also by letter dated August 21, 1988 Local Chairman Marino identified witnesses, including the Warwick Tower operator whom the Organization requested the Carrier to have attend the investigation.

The Organization states that those requests were refused and were brought to the attention of the investigating officer on several occasions during the hearing but to no avail. The hearing officers refused to postpone the hearing until individuals who could contribute information as to the cause of the derailment and accident were present. The Organization emphasizes that one of the main factual disputes in this investigation was the actual time of the derailment which could have been settled through testimony of the Warwick Tower Operator as to the correct time the ore train departed Warwick Tower.

With respect to the September 29, 1988 investigation into the Claimant's alleged insubordination, the Organization contends that the Carrier's actions in withholding the claimant from service on September 16, 1988 and the discipline of

dismissal from the Carrier's service violated Schedule Rule 17. It states that the claimant was not afforded a fair hearing inasmuch as he constituted no danger to himself, other employees or Carrier property. Accordingly the incident could have been handled in due course in accordance with the Agreement. However, by taking the claimant out of service prior to investigation, the investigation was flawed as there was now a compelling reason for the claimant to be found guilty so that the Carrier could avoid liability for time out of service, the Organization contends.

Regarding the merits of that dispute, the Organization argues that the claimant did not violate any of the Carrier's rules in the performance of his duties. It further contends that at no time during the hearings held on September 15 and 16, 1988 did the claimant refuse to answer questions or conceal facts concerning matters then under investigation.

The Organization asserts that when the claimant on September 16, 1988 responded to questions of the Investigating Officer that he did not have proper representation and was therefore not ready to proceed with the investigation he should not have been subjected to the additional charge of insubordination. The Organization cites several awards in this industry in support of its position together with a decision by the U.S. Supreme Court in the case of Kastigar vs. U.S. (406 U.S. 441) upholding 5th Amendment rights against compulsory self-incrimination in a proceeding brought by the Federal Government.

FINDINGS:

Schedule Rule 17, Discipline and Grievances, reads in pertinent part as follows:

"No employee shall be disciplined without a fair hearing by a proper officer. At a reasonable time prior to the hearing the Employee will be apprised of the precise charge against him and he shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by Counsel of his choosing. Witnesses may be examined separately but those whose evidence conflicts will be brought together."

Regarding the investigation into the derailment and accident on July 28, 1988, I find that the Carrier's action constituted a denial of the claimant's due process rights and deprived him of the fair hearing to which he was entitled under the Agreement.

From the very beginning of this investigation the claimant made known to the Carrier that he was without representation of his choosing. The record shows that on August 3, 1988, in requesting a postponement, the claimant wrote the Carrier explaining his lack of representation to be the basis of his request. On the first day of the hearing, the claimant described his persistent but as yet unsuccessful efforts to obtain such representation from within his union. Those efforts included a discussion on July 31, 1988 with his Local Chairman which for reasons of the latter's perceived conflict-of-interest prompted the Claimant to look else-

where. On the next day, August 1, 1988 the claimant then called the General Chairman's office seeking assistance. He then followed up with a letter confirming his interest in obtaining representation from that source. Following receipt of the General Chairman's response dated August 5, 1988, the claimant then wrote to his international union headquarters to obtain representation at the investigation.

Unlike the situation in Award 14 of this Board, the claimant did considerably more than merely show up at the investigation and for the first time assert without supporting evidence his inability to obtain representation. The record in this case amply documents the claimant's continuing and persistent attempts to obtain counsel of his own choosing. It also indicates both his own and the Organization's early requests for the presence of certain witnesses and their protests over the Carrier's refusal to provide the claimant a postponement to secure representation of his own choice.

It is acknowledged that tactics designed to stall or subvert the investigative process should not be tolerated by an investigating officer. It is also clear that investigations should be held promptly while memories are still fresh. Nevertheless fair treatment of a charged employee whose career may be at stake is no less a consideration for the hearing officer and that employee's contractual right to a fair hearing must be honored.

The claimant's right to be represented by counsel of his choosing does not mean that he can insist, without

accountability, upon being represented by counsel of his preference where that individual or institution is unwilling to serve in such capacity. Neither does it require that the Carrier provide an unlimited amount of time or innumerable postponements which delay the investigation unreasonably. In the instant case however there is no reason to believe that the claimant was not acting in good faith in refusing to accept the Local Chairman as his representative owing to perceived conflict of interest, notwithstanding the encouragement of the General Committee that he do so.

While the possibility exists that some employees may attempt to exploit this avenue to subvert the investigative process, the circumstances attending this claimant's representation problems are likely to be extremely rare and truly exceptional. Of the several supporting Awards cited by the parties, pro and con this issue, none presents a factual situation even closely related to that involved in this dispute.

Accordingly I find no support for the Carrier's suggestion that the claimant was engaged in deliberate "stonewalling" tactics to circumvent the investigative process. His well-documented efforts to obtain counsel of his choosing ultimately proved successful when he was able to obtain representation from the ranks of a sister local of his Organization for the charge of insubordination flowing from

his refusal to testify on September 16, 1988 without representation. Had the investigating officer honored the claimant's request for a second postponement on September 15, 1988 and coupled it with a warning of its finality, it would have been consistent with the Carrier's procedures for conducting investigations and would have satisfied the requirements for a fair hearing. It would also have done nothing to prejudice the Carrier's position in light of its awareness from the onset of the investigation that it would be necessary, in any event, to continue the hearing at a later date due to the unavailability of several charged employees and witnesses on September 15, 1988.

Turning now to the investigation of September 29, 1988 into the charge of insubordination by the claimant on September 16, 1988, I concur in the Carrier's contention that the defense of 5th Amendment rights against compulsory self-incrimination is based on Constitutional law and not in an arbitration proceeding under the Railway Labor Act. As such those protections are more appropriately to be considered by the courts and not this Board.

I also disagree with the Organization's contention that the claimant's removal from service for alleged insubordination is intrinsically violative of Agreement Rule 17. There are occasions when the Carrier may remove an employee pending investigation, usually in connection with serious violations of the Carrier's Operating Rules. While those violations frequently do involve matters affecting safety, they are by no

means limited solely to safety issues. Other serious charges such as violation of Rule G, theft, moral turpitude or insubordination may also be grounds for removal prior to investigation. In the instant case the claimant was removed for reasons arguably constituting insubordination. In any case the mere fact of removal before investigation may not be regarded per se as a prejudgment of the outcome of the investigation.

As to the merits of the Carrier's finding that the claimant was guilty of insubordination and concealment of facts under investigation, I find that this material error and void, ab initio. Rule 17 of the Agreement guarantees the right to a fair hearing. That includes the right to be represented at the hearing by "Counsel of his choosing." By denying the claimant a postponement at the investigation on September 15 and 16, 1988, the investigating officer deprived the claimant of his fundamental rights under the Agreement. The claimant's firm but polite exercise of his contractual rights to be represented by Counsel of his choosing in this situation do not constitute insubordination or concealment of facts as urged by the Carrier. The claimant was under no duty to acquiesce in the denial of his rights. Indeed there is sound authority which holds that for the claimant to have given testimony would have constituted a waiver of his objection to the right of the Carrier to compel him to testify.

Summarizing, I find therefore that the separate claims in

Cases 23A and 23B should be sustained and the Carrier's actions set aside as to each. In view of these findings it is unnecessary to address other issues raised by the parties.

AWARD

The claims are sustained.

ORDER:

The Carrier is directed to comply with these awards within thirty (30) days of the date of issuance, indicated below.



Jack Warshaw
Arbitrator

Bethesda, MD

MAY 22 1990