

PUBLIC LAW BOARD NO. 5918

AWARD NO. 13
NMB CASE NO. 13
UNION CASE NO.
COMPANY CASE NO. TRND96-31

PARTIES TO THE DISPUTE:

SOUTHERN PACIFIC TRANSPORTATION COMPANY
(SPCSL CORP)

- and -

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM:

Claim of SPCSL Engineer G. D. Finley for reinstatement to service with seniority rights unimpaired, with all notations pertaining to discipline expunged from his personal work record and that he be compensated for all time lost from the date he was removed from service until the date he resumes service for the alleged violation of Rules 1.6 and 1.9 of the Safety and General Rules for All Employees in connection with alleged willful disregard for the affairs of the company, indifference to duty in connection with injury he sustained on September 2, 1996 near East St. Louis, IL and statements he allegedly made prior to the incident.

OPINION OF BOARD:

Engineer G. D. Finley (Claimant) was the regular assigned engineer on Monday, September 2, 1996 on pool freight board assignment LB 1 02-E, train MNGVCOI, with engine consist SP300, 339, 171, listed at 10:15 a.m. at Bloomington, IL. After delivering the train to the Terminal Railroad Association (TRRA) at Madison, IL at 5:00 p.m., Engineer Finley and Conductor Hagler were deadheaded from Madison to East St. Louis, IL via Yellow Railroad Transit Van, a crew hauling service retained by Carrier.

As he was alighting from the van, Claimant's foot became entangled in telephone some antenna wire on the floor. Van driver Chris Meskill shouted a warning, but Claimant fell to the

street as he was exiting the van. At the subsequent investigation, Conductor Hagler testified that he did not see Engineer Finley fall, but he heard a "thump" and saw the wire in the doorway and Claimant lying on the ground. Road Foreman of Engineers Hal Lamb, who was summoned to the scene, queried Claimant about his injuries and supervised ambulance service. Van Driver Meskill testified that Engineer Finley "was just laying there", complaining that he was seeing double and had a pain in the back of his neck.

Claimant was transported by ambulance to the Memorial Hospital in Belleville, IL and treated in the emergency room by Doctor Newell. [Carrier subsequently was unable to locate the emergency room report and the only paper trail from the hospital is a request for treatment signed by Engineer G. D. Finley and Doctor Newell on September 2, 1996.] The record indicates that Claimant suffered no broken bones and was sent home by the ER doctor on September 2, 1996, with pain medication. His personal physician certified on September 17, 1996 that he began treating Claimant on September 2, 1996 for "acute cervical spine sprain and left shoulder contusion" suffered in the fall and that Engineer Finley would be disabled "for at least 6 to 8 weeks".

Two days after the incident, Dispatcher Mike Meyers referred Ms. Patricia Carroll, a driver employed by a different crew hauler, Black's Limousine Service, to Trainmaster Huff, after she reported that she suspected Claimant had staged a fake fall on September 2, 1996. On September 4, 1996, Roadmaster Huff interviewed Ms. Carroll and obtained the following written statement from her:

"Sept. 4, 1996
TO BOB HUFF.- In reference to Gary Finley:

Mr. Gary Finley got into my van at Main St and said that he had a proposition for me. This was the first week of August He said that he was going to get his share of some money before the merger went through, and he said that since some other man fell down the hill at Main St. then he could just as easily do it too without hurting himself. He said that he would give me \$500. 00 if I would say that he fell down the hill and take him to Brokaw Hospital to make it look good. He said that he would lay and jerk around and scream very loud to make it look good. He said that he would sue the railroad for 5 million dollars and he would stay home for a year and do nothing and let the railroad support him. He said that it would be very hard for them to prove a back injury. He also wanted me to let a car side swipe my van on Labor Day Sept. 2, 1996 so that he could sue Richard Black (my boss) and get a settlement from him also. I told him that he was crazy. He said that he could jerk and make it look good too. He said that he would make it worth my while. He said that he could fake pain better than anyone.

Isl Patricia Carroll, Black's Van Driver"

On September 10, 1996 the Carrier sent the following letter to Mr. G. D. Finley:

"You are hereby suspended from service pending formal investigation scheduled to be held in the trainmasters Office, 1000 South 22nd, East St. Louis, IL at 9:00 a.m., September 18, 1996 to develop the facts and place responsibility, if any in connection with your alleged failure to comply with rules and instructions. It has been alleged that you have been careless, negligent, disloyal, have displayed willful disregard for the affairs of the company and indifference to duty and that you may have been dishonest. This is evidenced by your personal injury you allege you sustained about 5:30 p.m., September 2, 1996, near East St. Louis, IL, while exiting a Yellow Railroad Transit van and statements you have made prior to and after this alleged accident.

You are charged with responsibility which may involve violation of Rules 1. 1, 1. 1.2, 1.6 and 1.9 of the Safety and General Rules for All Employees.."

Following the investigation, a letter dated September 20, 1996 was addressed to Mr. G.

D. Finley, over the signature of Mr. C. L. Alexander, Superintendent, SPCSL, informing

Claimant that he was dismissed from the service of the Southern Pacific Lines for "disloyalty,

willful disregard for the affairs of the Company, indifference to duty and dishonesty" in

connection with the personal injury sustained September 2, 1996, and "the statements made prior to and after this alleged incident." The claim seeking reversal of the discharge was appealed and remained unresolved on the property until submission to this Board for final and binding determination.

The evidence against Claimant consists solely of the testimony of Black's Limousine driver Carroll that Engineer Finley had solicited her as an accomplice in staging a fake injury. Carrier also presented the testimony of another Yellow Railroad Transit Van driver, Rodney Peach, that Claimant had made statements about lawsuits after he caught his foot in the same antenna wire several weeks before doing so on September 2, 1996. For his part, Claimant admitted making some "joking" remarks about lawsuits prior to the September 2 incident, but denied making the balance of the statements attributed to him in Ms. Carroll's accusations and strenuously denied faking his injury or trying to set the Carrier up for a false injury claim recovery.

In discipline and discharge matters, the burden of persuasion is upon the Employer to demonstrate, by at least a preponderance of the record evidence, that the employee is guilty as charged. Carrier concedes that: "It is at least arguably possible that the Claimant really was injured in the fall, but it is, of course, also possible that he is faking the injury." Nonetheless, Carrier premises the discharge of Claimant on the conclusion that he was not only careless but also dishonest and disloyal because he "intentionally tangled his foot in the radio wire in order to stage the fall". This conclusion, in turn, is grounded on Carrier perceptions of suspicious circumstances surrounding his fall and the implausibility of his denials of Ms. Carroll's

accusations. Mere suspicion and the uncorroborated accusations of intent to defraud are not sufficient to carry Carrier's burden of proof on the extremely serious charges of dishonesty, disloyalty and intentional injury for profit. Even though the circumstances might be suspect, an accused employee is not required to prove his innocence in the absence of *prima facie* evidence of culpability. On the charges of dishonesty, disrespect and disloyalty, the record evidence is, at best, equivocal. Therefore, with respect to the charges that Claimant violated Rule 1.6., Sections 4 and 8 and Rule 1.9, we must issue the Scotch Verdict, i.e., "Not Proven".

However, we also conclude that Claimant is not without fault in this matter. We find that Carrier persuasively demonstrated that Engineer Finley bears responsibility for negligent inattention and carelessness for safety which was contributory to his injury. In that regard, credible testimony of Yellow Van driver Peach shows that Claimant was aware of the potential for injury from the antenna wire prior to September 2, 1996. His failure to be "alert and attentive" to that known obstacle constituted carelessness and negligence, all in violation of Rules 1.1.2 and Rule 1.6, Sections 1 and 2.

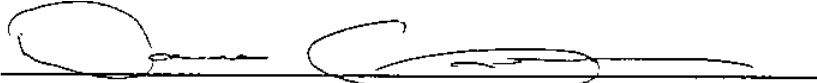
Based upon all of the foregoing, and in consideration of the Claimant's prior discipline record since hire date in 1990, which includes two (2) prior dismissals and three (3) suspensions, we shall reduce the discharge to a suspension without pay. Carrier shall reinstate Claimant without back pay, conditioned upon completion of necessary physical and Rules examinations.

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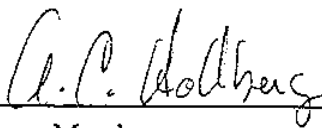
Claim sustained in part and denied in part, as indicated in the Opinion.



Dana Edward Bischen, Chairman
Dated at Spencer, New York on February 15, 1998


Union Member

Dated at Memphis, TN
on March 16, 1998


Company Member

Dated at Albany
on March 2, 1998