

SPECIAL BOARD OF ADJUSTMENT NO. 955

AWARD NO. 536

CSX TRANSPORTATION INC.

VS.

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim for S. J. Abrams for all time lost as a result of attending an investigation held May 18, 2004 and being wrongfully disciplined in the form of 30 days actual suspension by letter dated June 7, 2004. Claim is also for removal of any notations within the claimant's history of the incident, original charges, investigation and suspension served.

STATEMENT OF FACTS: S. J. Abrams (hereinafter *Abrams/claimant*) entered the carrier's service in May 2000. Thereafter his on-the-job performance met or exceeded carrier standards until he began to encounter some excessive absenteeism problems in April 2003. Such problems now appear to have been timely addressed informally and therefore are not

considered a part of this employee's relevant disciplinary history as related to this particular appeal.

On May 3, 2004, while assigned and working Pensacola Yard Job Y150-03, claimant was *perceived*, by Road Foreman of Engines G. W. Holzworth, as mounting moving equipment. Holzworth's perception was duly reported and, under date of May 7, 2004, Abrams was noticed to attend an investigative hearing. Such investigative notice stated in pertinent part as follows:

\* \* \* \*

Arrange to attend a formal investigation to be held in the terminal manager's office, 4700 Sycamore Drive, Pensacola, Florida, commencing at 1000 hours on May 11, 2004.

The purpose of this investigation is to develop the facts and place your responsibility, if any in connection with a report received that on May 3, 2004, at approximately 1344 hours, while working Yard Job Y150-03 you mounted moving equipment and all circumstances relating thereto.

You may have representation in accordance with your working agreement and you may have witnesses present who have knowledge of the matter under investigation.

You have the option of a Time Out in lieu of the investigation scheduled above. If you elect to attend the Time Out option, there will be no discipline assessed and the only record will be a notation to your personal file. To elect the Time Out option, sign in the space below and send a copy of this letter (no later than 24 hours prior to the scheduled hearing) to Southern Region Administration, via fax to company number 426-6225 or bell number 904-279-6225, or send via U.S. mail to 6735 Southpoint Drive So., CSX Building II, 2<sup>nd</sup> Floor - J645, Jacksonville, FL 32216-6177. If you choose the Time Out option you should also notify your local chairman of that election. If you do not submit the signed

election form with 24 hours prior to the date of the hearing, we will assume that you have elected to proceed with customary handling under the Railway Labor Act and the hearing will be convened as scheduled.

\* \* \* \*

Abrams timely rejected the "Time Out" option and, on May 18, 2004, the consequential investigation was convened in Pensacola, Florida, with Jacksonville Division Trainmaster J. Johnson presiding as the designated hearing officer. Abrams personally appeared, together with his designated representative UTU Local Chairman E. E. Murphy. Both announced ready for trial and confirmed that the carrier's notice had been timely received. However, they both denied the charges and accused the carrier's witness of either faulty perception or willful fabrication.

Following completion of such hearing the evidence was presumably reviewed by Jacksonville Division Manager R. R. Downing who, under date of June 7, 2004, issued the following disciplinary notice, to wit (*emphasis added or in original*):

\* \* \* \*

Reference the formal investigation conducted on May 18, 2004, in the terminal manager's office, 4700 Sycamore Drive, Pensacola, FL, to develop the facts and place your responsibility, if any, in connection with a report received that on May 3, 2004, at approximately 1355 hours, while working Job Y150-03, you mounted moving equipment and, all circumstances relating thereto.

The evidence developed in this investigation clearly proves that you are guilty of violating CSXT Safety Rule 2101. **Therefore, you are assessed thirty (30) days actual suspension commencing at 0001 hours, Monday, June 14, 2004, and ending 2359 hours, Tuesday, July 13, 2004.**

**It is your responsibility to mark up for duty with crew management immediately following the conclusion of this suspension. Your failure to promptly mark up for duty following this suspension will be considered an absence without authority and may result in further disciplinary action.**

The importance of working safely and strict adherence to the operating rules cannot be over emphasized.

\* \* \* \*

Thereafter such decision was timely challenged (claim filed), internally reviewed by the carrier and ultimately referred 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.

In our review of the transcript of hearing we find no material *procedural* error in the manner such proceedings were initiated or conducted. In sum we find that claimant was afforded proper notice and a

fair and impartial evidentiary review, both in accordance with the contractual due process requirements.

As regards the *substantive* issues, this Board is ever mindful that in disciplinary matters it is the carrier that bears the initial burden of proof.<sup>1</sup> *Ergo* the evidence offered in support of each carrier allegation must be substantiated by a *preponderance of the credible evidence*, particularly since the alleged wrongful conduct does not include an act that is of the type normally recognized and punishable under state/federal criminal law.

Here the carrier's only witness, Foreman Holzworth, presumably testified exclusively from memory (*i.e.* without reference to any timely made notes or any other corroborative evidence or accreditation). Normally that would not pose a proof problem for the carrier, unless he (Holzworth) was proven to have perception problems or a demonstrated bias toward the claimant or the organization. We take arbitral notice that in a normal disciplinary scenario the supervisor's testimony is entitled to great

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<sup>1</sup> § 1.93. *Formulation of the Necessary Amount of Proof*: Formulation of burden-of-proof requirements presents a way of thinking about how a case is proven. The party bearing the burden of proof, generally the employer in discipline and discharge cases and the union in contract interpretation cases, must present enough competent evidence to persuade the arbitrator as to its claim. That burden of proof is often said to be by the preponderance of evidence in contract interpretation cases and either clear and convincing evidence or, less often, evidence beyond a reasonable doubt in discipline and discharge cases. The Common Law of the Workplace – 2<sup>nd</sup> Edition, BNA 2005.

deference over the claimant, who is presumed to have a vested stake in the outcome.

However, on this occasion we have other members of claimant's crew who were equally credible, and testified to a materially different set of occurrences. And while this Board is not blind to the existence of *semper fidelis* among colleagues and comrades in the workplace, there is no suggestion in this record that claimant's crewmembers, who were called to testify, knowingly lied under oath.


Given such an evidentiary deadlock (equally credible but directly conflicting perceptions and recollections of carrier/organization witnesses) we are necessarily required to have our decision turn only on the fact that, on this occasion, the carrier fell short in fulfilling its proof burden as described hereinabove.

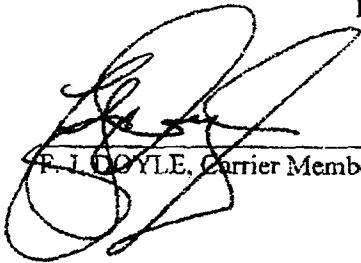
AWARD: Given such proof deficiency and the generally recognized "presumption of innocence" concept, we must necessarily answer the issue as follows: *S. J. Abrams' claim for thirty days back pay and seniority is*

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*hereby sustained.* Carrier is directed to implement this award within 30  
days of the effective date hereof.

  
DON B. HAYS, Neutral Member

  
F. J. DOYLE, Carrier Member

  
R. G. BOLING, Organization Member

1/27/06  
DATE