COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT P. DRUMHEISER, Complainant	:	
v.	:	DOCKET NO. E-27403A
CONSOLIDATED RAIL CORPORATION, Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. Robert P. Drumheiser, Complainant herein, is an adult individual residing at 4240 Catalina Lane, Harrisburg, PA 17109. (Amended Complaint; C.E. 3 at No. 7)

2. Consolidated Rail Corporation, Respondent herein, is a corporation with offices at 1138 Six Penn Center Plaza, Philadelphia, PA 19103. (Amended Complaint; C.E. 1)

3. Complainant filed a verified complaint with the Pennsylvania Human Relations Commission on December 13, 1983, at Docket No. E-27403A. (Complaint; C.E. 3 at No. 33)

4. A copy of the complaint was served on Respondent on December 23, 1983. (Complaint, Return of Service; C.E. 3 at No. 34)

5. Complainant, by way of Interlocutory Order, amended his complaint on September 16, 1988.

6. Complainant was born on October 14, 1922. (Amended Complaint; C.E. 3 at No. 7)

7. Complainant was hired by the Pennsylvania Railroad Company, as a fireman, on or about November 11, 1941. (Amended Complaint; N.T. 27; C.E. 3 at No. 8; C.E. 28; C.E. 29)

8. Complainant qualified for the position of engineer with the Pennsylvania Railroad Company in 1945. (Amended Complaint; N.T. 27; C.E. 3 at No. 9)

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*To the extent the Conclusions of Law or Opinion which follow include necessary findings of fact in addition to those in this section, such findings shall be considered to have been included herein. The following abbreviations have been utilized for reference purposes:

N.T. - Notes of Testimony
C.E. - Complainant's Exhibit
R.E. - Respondent's Exhibit

9. On September 14, 1983, Complainant was an engineer in freight service in the Harrisburg Division of Respondent's Eastern Region. (N.T. at 278; C.E. 3 at No. 20)

10. On September 14, 1983, Complainant, T. W. Zimmerman, Conductor, and F. E. Trout, Trainman, were taken out of service by Respondent. (C.E. 3 at Nos. 12, 21)

11. Complainant, T. W. Zimmerman, and F. E. Trout were removed from service because of allegations by Respondent that, as crewmembers on the same train, they exceeded the maximum authorized speed for the train, passed E-21 Temporary Block Station, and failed to examine bulletin boards and bulletin books. (C.E. 3 at No. 21; C.E. 15; C.E. 16; R. E. 4, R.E. 7)

12. Zimmerman's and Trout's offenses were substantially similar to Complainant's. (C.E. 3 at No. 21; C.E. 15; C.E. 16; R.E. 4; R.E. 7)

13. Zimmerman was 56 years old at the time Respondent took him out of service. (C.E. 3 at No. 2)

14. Trout was 53 years old at the time Respondent took him out of service. (C.E. 3 at No. 21)

15. On September 27, 1983, Respondent conducted an investigatory hearing into the allegations it had made against Complainant, Zimmerman and Trout, and transcribed those proceedings. (R.E. 7)

16. Following this hearing, and as a result thereof, Complainant, Zimmerman and Trout were dismissed in all capacities by Respondent on October 6, 1983. (C.E. 15; C.E. 16; R.E. 4; R.E. 7)

17. Complainant, Zimmerman and Trout appealed their dismissals. (C.E. 5, at Tab A; C.E. 17; C.E. 18)

18. Complainant had 42 years of service with Respondent at the time he was dismissed. (C.E. 5; C.E. 6)

19. Zimmerman and Trout were notified by letters dated November 1, 1983, that there was no justification for extending leniency, and that their appeals were denied. (C.E. 17; C.E. 18)

20. By letter dated December 16, 1983, Zimmerman was restored to service on a leniency basis, with time out of service treated as a suspension. (C.E. 19)

21. By letter dated December 16, 1983, Trout was restored to service on a leniency basis, with time out of service treated as a suspension, and with a restriction to yard service. (C.E. 3 at No. 25; C.E. 20)

22. Trout's restriction to yard service was lifted by Respondent on September 19, 1984. (C.E. 3 at No. 26; C.E. 21)

23. In a memorandum dated November 29, 1983, F. K. Schwab, Respondent's Senior Director-Labor Relations, recommended that Complainant be restored to service on a leniency basis, with time out of service applying as discipline. (N.T. 291, 298; C.E. 5 at Tab A)

24. Schwab's recommendation for leniency was based on Complainant's 42 years of service with only five disciplinary offenses, three of which resulted in a reprimand, one in a 7 day suspension, and one in a 15 day suspension. (C.E. 5 at Tab A)

25. J. F. Spreng, Respondent's General Manager of the Eastern Region, rejected Schwab's recommendation for leniency toward Complainant, in a memorandum dated December 12, 1983. (N.T. 274; C.E. 5 at Tab B)

26. J. F. Spreng became Respondent's General Manager of the Eastern Region on October 15, 1982. (N.T. 274)

27. As General Manager, Spreng was the ultimate responsible officer for the operations of the Eastern Region. (N.T. 278, 284)

28. Spreng did not disagree with Schwab that Complainant's official discipline record was not serious, and merited leniency. (C.E. 5 at Tab B)

29. Spreng relied on the September 17, 1983, hearing record in determining Complainant's guilt of the charges against him. (C.E. 5 at Tab B; N.T. 284)

30. In his memorandum recommending leniency, Schwab only considered Complainant's official discipline record; he did not consider informal discipline in making his recommendation. (C.E. 5 at Tab A)

31. Spreng went beyond Complainant's official discipline record in considering Schwab's recommendation for leniency. (C.E. 5 at Tab B; C.E. 9; R.E. 7 at 25-6)

32. In addition to Complainant's official discipline record, Spreng considered Complainant's informal discipline record, which consisted of a warning letter Complainant allegedly received for speeding on October 21, 1977, and a July 8, 1983, Locomotive Engineer Evaluation form prepared by J. A. Seidel, Road Foreman. (C.E. 5 at Tab B)

33. The rating scale on the Locomotive Engineer Evaluation form ran from 0 to 5, with 0 for "not observed", 1 for "very poor", 2 for "somewhat deficient", 3 for "standard", 4 for "above average", and 5 for "outstanding". (C.E. 28, 29; R.E. 6)

34. Complainant was rated 3, or "standard", on all activities observed on the July 8, 1983, evaluation except for "speed observance" and "familiarity with terrain and slow orders", on which he was rated 2, or "somewhat deficient." (R.E. 6)

35. The basis for the 2 rating was that Seidel had to remind Complainant about speed compliance on one occasion, although Complainant thereafter had no further problems. (R.E. 6)

36. The evaluation form makes no provision for acknowledgement or rebuttal of the evaluation by Complainant, and Complainant was not shown the evaluation until after the September 14, 1983, incident. (N.T. 102-3; R.E. 6)

37. In addition to the July 8, 1983, evaluation, Seidel evaluated Complainant on July 14, 1983, and July 27, 1983. (C.E. 28; C.E. 29)

38. Complainant was rated 3, or "standard", in all activities observed, including "speed observance" and "familiarity with terrain and slow orders", on the July 14 and July 27, 1983, evaluations. (C.E. 28; C.E. 29)

39. Spreng made no mention of this improvement in Complainant's performance in his consideration of Schwab's recommendation of leniency. (C.E. 5 at Tab B)

40. Respondent's goal was to evaluate each locomotive engineer once every six months, although evaluations could occur more frequently. (N.T. 255, 262)

41. Spreng refused to entertain any thought of leniency for Complainant, and insisted he remain dismissed. (C.E. 5 at Tab B)

42. Prior to his rejection of the recommendation for leniency, Spreng had been approached twice by Gregory A. Hite, local chairman of Complainant's union, who requested that Complainant be restored to service on a leniency basis. (N.T. 287, 289, 290-1)

43. Hite was responsible for negotiating with Respondent to get disciplined employes back to work, through leniency or otherwise. (N.T. 135)

44. It is more difficult to present a case for leniency to Respondent where an employe does not have dependent children and a mortgage, than where an employe has these obligations. (N.T. 132-3)

45. Complainant did not have these obligations to plead on his behalf. (N.T. 132-3)

46. Complainant's official discipline record was not serious. (N.T. 147-8, C.E. 5 at Tab A; C.E. 8)

47. Some of Respondent's employes had discipline records five or six pages long. (N.T. 147-8)

48. Respondent has no guidelines or other criteria concerning the use of an employe's informal discipline record in determining whether or not leniency should be granted. (N.T. 173-4; C.E. 5)

49. Prior to Complainant's violation on September 14, 1983, Complainant's official discipline record consisted of the following:

1) 12/27/63 - Reprimand
Failure to obey instructions of Yardmaster

2) 11/24/65 - Fifteen (15) days suspension
Colliding with running draft, Rule 400N-5, violation Rule 112.

3) 2/23/68 - Reprimand
Exceeded authorized speed

4) 10/23/82 - Reprimand
Failure to report for assignment

5) 6/21/83 - Seven (7) days suspension
Violation of Rule 291, 106, 927 of the Operating Department.

(C.E. 9)

50. No personal injury or property damage was caused by the September 14, 1983, incident. (N.T. 39-40)

51. Respondent does not consider an offense to be any more or less serious by how far a temporary block station or block limit station is passed. (N.T. 273)

52. Complainant passed the temporary block station by approximately 6.7 miles. (N.T. 97)

53. Complainant stopped at the first place where his train was easily accessible, once he received a valid radio transmission and realized he was required to stop. (N.T. 97-8; R.E. 7 at 5)

54. The distance by which Complainant passed the temporary block station was not raised as a concern during Respondent's September 17, 1983, hearing into the matter. (R.E. 7)

55. On September 14, 1983, Respondent operated under Rules of the Transportation Department Revision No. 1, effective September 26, 1982. (N.T. 61; R.E. 1)

56. Rule 75 (d) of the Rules of the Transportation Department provides:

> Employees reporting for duty must examine the Bulletin Boards and Bulletin Books to familiarize themselves with all General Orders, Bulletin Orders, Division Notices or other instructions pertaining to any portion of territories on which they are qualified or ordered to operate. Employees affected by these Orders must have a copy of the current Summary Bulletin Order while on duty.
>
> A copy of each General Order must be inserted in the place provided in the Timetable and changes must be entered on other pages as required.
>
> Conductors, engineers and track car drivers reporting for duty at a place where there is no Employees Register, where General Orders or Bulletin Orders are not posted, or where Employees Register, General Orders or Bulletin Orders posted do not cover the territory over which they are assigned to run must report to the train dispatcher or operator and receive instructions covering the General Orders or Bulletin Orders effective in that territory.
>
> The territories in which an employe is qualified must be shown on the Employee Qualification page of the employee's Timetable in addition to other required information.
>
> (R.E. 1)

57. Rule 704 of the Rules of the Transportation Department provides, inter alia, that employes must identify themselves by name, occupation and location. (R.E. 1)

58. Rule 705 of the Rules of the Transportation Department provides, inter alia:

> Except as prescribed by Rule 713 and in connection with switching, classification, and similar operations wholly within a yard, employees must not answer or acknowledge originating calls unless proper identification procedures as prescribed by Rule 704 are used.
>
> Radio calls properly directed to a station must be promptly acknowledged. Employee must identify the station in accordance with the requirements of Rule 704 and standby to receive except when this would interfere with other duties relating to the safety of railroad operations. If the station acknowledging transmission fails to identify itself properly, the employee shall require a proper identification before proceeding with the transmission.
>
> . . .

(R.E. 1)

59. Rule 926 of the Rules of the Transportation Department provides that engineers:

> must obey the instructions of road foremen, trainmasters, train dispatchers, yardmasters and operators within their jurisdictions, and of the conductor in charge of their train, unless by so doing, they would endanger its safety or commit a violation of the rules.

(R.E. 1)

60. Rule 937 of the Rules of the Transportation Department provides:

> Conductors have charge of the trains to which they are assigned, and all persons employed aboard are subject to their instructions. They are responsible for the prompt movement, safety and care of their trains, for the vigilance, conduct and proper performance of duty of train employees, and for the observance and enforcement of all rules and instructions.

(R.E. 1, C.E. 4 at No. 22)

61. Rule 945 of the Rules of the Transportation Department provides that trainmen:

> must obey the instructions of division officers, their conductor, engineer and officers of other departments on matters pertaining to those departments.

62. Rule 946 of the Rules of the Transportation Department provides that trainmen:

> are responsible for the display of train signals, the proper protection of trains, the handling of switches, the coupling and uncoupling of cars and engines, the manipulation of brakes and assisting the conductor or engineer in all duties necessary for the prompt and safe movement of their train.

63. Under Rules 926 and 937, Zimmerman had the duty and authority to assure that Complainant properly performed his job while assigned to Zimmerman's train. (R.E. 1; C.E. 4 at No. 22)

64. Respondent considered Zimmerman to be in direct control and in charge of the train. (N.T. 206-7; R.E. 7)

65. Although Zimmerman was in direct control and in charge of the train, he failed to keep himself appraised of the situation at the head of the train, and did not take any corrective action. (N.T. 206-7)

66. Zimmerman admitted, at the September 17, 1983, investigatory hearing conducted by Respondent, that he had violated Rules 75(d) and 937. (R.E. 7 at 23)

67. Zimmerman had the authority and ability to apply the brakes from his location at the rear of the train, and to safely stop the train. (N.T. 176, 206)

68. Zimmerman was as responsible for the incident as Complainant. (R.E. 7)

69. Zimmerman was as derelict in his duties as Conductor, as Complainant was in his duties as Engineer. (R.E. 7)

70. Prior to Zimmerman's violation on September 14, 1983, Zimmerman's official discipline record consisted of the following:

1) 8/10/54 - Reprimand
   Failure to observe tractor trailer, resulting in damage to three tractor trailers and one tractor.

2) 7/22/63 - Reprimand
Failure to properly instruct members of crew.

3) 7/22/63 - 15 days deferred
Deserting assignment

(R.E. 7 at 26)

71. Prior to Trout's violation on September 14, 1983, Trout's official discipline record consisted of the following:

1) 1/18/52 - Reprimand
Leaving assignment

2) 2/6/64 - Reprimand
Failure to properly retard SOU 35720, resulting in derailment.

3) 2/8/64 - Two (2) days deferred
Failure to properly retard F6EX38202

4) 11/9/67 - One (1) day deferred
Failure to use authorized pathway.

5) 6/8/73 - Dismissed in all capacities; Restored on leniency basis 2/6/74.

Failure to assist the engineer in all things requisite for safe movement of train; Failure to take necessary action to comply with signal indication resulting in collision.

6) 1/10/81 - Thirty (30) days suspension
Falsification of timecard

(R.E. 7 at 26-7)

72. Respondent did not consider Zimmerman's or Trout's informal discipline record in determining to grant them leniency.

73. On October 9, 1982, Jeffrey L. Sutch was employed by Respondent as an engineer in its Eastern Region. (C.E. 4 at No. 17; C.E. 27)

74. Sutch's date of birth is May 16, 1951, and he was age 31 on October 9, 1982. (C.E. 4 at No. 13)

75. On November 5, 1982, Sutch was dismissed in all capacities for passing a signal in stop position on October 9, 1982, resulting in the

derailment of, and damage to, his train and the track it was on. (N.T. 192; C.E. 13; C.E. 4 at No. 14)

76. Following an internal appeal of his dismissal, Sutch was restored to service by Respondent on December 9, 1982, and was restricted from passenger service, with the sixty days he was out of service serving as a suspension. (C.E. 27; C.E. 4 at Nos. 15, 16)

77. Respondent's decision to reduce the discipline of dismissal, which it had levied against Sutch, was based solely on leniency. (C.E. 4 at No. 16; C.E. 27)

78. Respondent did not consider Sutch's informal discipline record in determining to grant him leniency.

79. Prior to Sutch's violation on October 9, 1982, Sutch's official discipline record consisted of the following:

1) 10/1/79 - Fifteen (15) days suspension
   Going by stop signal

2) 11/2/80 - Reprimand
   Failure to report for overtime

3) 3/28/81 - Five (5) days suspension
   Violation of Atlantic Region Timetable

(C.E. 9)

80. Sutch's official discipline record, prior to his violation on October 9, 1982, was no worse than Complainant's official discipline record, prior to Complainant's violation on September 14, 1983. (C.E. 9)

81. On March 31, 1983, Sutch was again dismissed in all capacities by Respondent for failure to stop at a Temporary Block Station and Train Order Station, failure to receive a Clearance Form A, and speeding, all of which occurred on March 9, 1983. (C.E. 9, 14)

82. Following an appeal, Respondent refused to restore Sutch to service. (C.E. 10, 11)

83. Respondent considered Sutch's October 9, 1982, offense similar in severity to his March 9, 1983, offense. (C.E. 10, p.2)

84. Respondent considered Complainant's September 14, 1983, offense similar in severity to Sutch's March 9, 1983, offense. (C.E. 9)

85. Respondent considered Complainant's September 14, 1983, offense similar in severity to Sutch's October 9, 1982, offense. (C.E. 9; C.E. 10)

86. Sutch was refused a leniency reinstatement based solely on his past formal discipline record. (C.E. 10; C.E. 11)

87. Rescinded discipline is no longer part of an employee's prior discipline record, and may not be used in determining any future discipline. (N.T. 201-2)

88. Respondent has the option of granting a request for informal handling, and may deny it. (N.T. 264-5)

89. Informal handling involves an investigation of the facts, without a formal hearing or the keeping of a transcript. (N.T. 227)

90. An employe may appeal a disciplinary decision, not admit guilt, and still be considered for leniency. (N.T. 207; C.E. 5 at Tabs A, B)

91. R. H. Geisel and R. E. Hollinger were charged by Respondent with the unauthorized passing of a temporary block station, and with failing to check that information in their train orders corresponded to the applicable Clearance Form "A". (C.E. 22; C.E. 23)

92. D. O. Whitcomb was charged by Respondent with the unauthorized passing of a temporary block station, and with failing to receive a Clearance Form "A" and a hand signal to proceed. (C.E. 24)

93. J. G. Kollra was charged by Respondent with the unauthorized passing of a temporary block station. (C.E. 26)

94. D. F. Schrey was charged with passing a block limit station. (C.E. 25)

95. Geisel was born on August 1, 1951. (C.E. 4 at No. 1)

96. Kollra was born on December 23, 1948. (C.E. 4 at No. 10)

97. Schrey was born on October 26, 1931. (C.E. 4 at No. 7)

98. Whitcomb as born on July 2, 1951. (C.E. 4 at No. 4)

99. Hollinger was 35 years old at the time of his suspension. (C.E. 3 at No. 44)

100. Passing a temporary block station or a block limit station is a serious offense. (N.T. 160, 229-30)

101. Geisell, Hollinger, Kollra and Whitcomb each received a 30 day suspension for their violations, which Respondent dispensed through informal handling. (C.E. 22-4; C.E. 26)

102. Schrey received a 20 day suspension for his violation, which Respondent dispensed through informal handling. (C.E. 25)

103. Schrey passed the block limit station by 10-12 miles. (N.T. 272-3)

104. The length of Schrey's 20 day suspension was, at most, increased only slightly as a result of his past record, which was not clean. (N.T. 238-9, 267)

105. Respondent had a continuing need for the services Complainant was performing as an engineer. (N.T. 292; C.E. 5 at Tabs A, B)

106. An employe qualifies for an age annuity if the employe stops all work for pay, is at least 60 years old and has completed at least 30 years of service; an employe must be at least 60 years old to qualify to retire on such an annuity. (C.E. 3 at No. 10; 20 C.F.R. §216.5)

107. Complainiant was eligible to retire on an age annunity. (Amended Complaint; C.E. 3 at Nos. 7, 8, 11; C.E. 5; C.E. 6)

108. Zimmerman and Sutch were not old enough to meet the minimum age requirement to retire on an age annuity, as of the dates they were reinstated on leniency. (C.E. 3 at No. 21; C.E. 4 at No. 13)

109. Maurice Logan was local union chairman of the Brotherhood of Locomotive Engineers from 1959 until 1963 and from 1967 until 1982. (N.T. 139, 157-8)

110. Complainant was reinstated by Respondent pursuant to an October 16, 1984, order of a Special Board of Adjustment. (C.E. 3 at Nos. 39, 41)

111. Complainant earned $31,715.13 in wages between January 1, 1983, and September 14, 1983. (R.E. 9)

112. J. W. Chajkowski and J. B. Koch are engineers employed by Respondent at Complainant's work location in 1983, who have equivalent seniority dates to Complainant. (C.E. 1; C.E. 2)

113. J. W. Chajkowski earned $15,143.57 in wages between September 1, 1983, and December 31, 1983.

114. J. B. Koch earned $13,447.32 in wages between September 1, 1983, and December 31, 1983.

115. J. W. Chajkowski earned $38,339.91 in wages between January 1, 1984, and October 31, 1984. (C.E. 1)

116. J. B. Koch earned $34,424.12 in wages between January 1, 1984, and October 31, 1984. (C.E. 1)

117. Complainant lost five weeks of vacation pay in 1985, because he did not work enough days in 1984 to qualify for it. (C.E. 2)

118. J. W. Chajkowski earned $4,423.30 in vacation pay, as a result of his employment in 1984. (C.E. 2)

119. J. B. Koch earned $3,983.90 in vacation pay, as a result of his employment in 1984. (C.E. 2)

120. Complainant lost the value of the employer contributions to his regular railroad retirement fund. (N.T. 50)

121. J. W. Chajkowski received $1,843.08 in employer funded retirement contributions between September 1, 1983, and December 31, 1983. (C.E. 7)

122. J. B. Koch received $2,021.08 in employer funded retirement contributions between September 1, 1983, and December 31, 1983. (C.E. 7)

123. J. W. Chajkowski received $5,106.75 in employer funded retirement contributions between January 1, 1984, and October 31, 1984. (C.E. 7)

124. J. B. Koch received $5,053.84 in employer funded retirement contributions between January 1, 1984, and October 31, 1984. (C.E. 7)

125. Complainant lost 26.6849480 shares of Respondent's stock, due to his unemployment in 1984. (C.E. 2)

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the Act.

2. Respondent is a person and an employer within the meaning of the Act.

3. The Commission has jurisdiction over the parties and subject matter of this case.

4. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.

5. Complainant has the initial burden of establishing a prima facie case of unlawful discrimination under Section 5 (a) of the Act.

6. Complainant may establish a prima facie case of unlawful age discrimination by producing evidence which shows that:

a) at the time of the action complained of, he was a member of the class of people protected from age discrimination under the Act;

b. he was subjected to an adverse employment action;

c. he was treated less favorably than other, younger employes were treated under similar circumstances.

7. Complainant has proven a prima facie case of unlawful age discrimination.

8. Once Complainant proves a prima facie case of unlawful discrimination, the burden of production shifts to Respondent to show a legitimate, non-discriminatory reason for its actions through the production of admissible evidence.

9. Respondent has produced admissible evidence of legitimate, non-discriminatory reasons for its actions.

10. Where Respondent shows a legitimate, non-discriminatory reason for its actions, Complainant may prevail if he shows the reason is pretxtual, by a preponderance of the evidence.

11. Where evidence of a Respondent's reasons for its conduct is received, so that Respondent has done everything that would have been required of it had Complainant properly made out a prima facie case, it does not matter whether Complainant did so; the trier of fact must decide whether Complainant carried his ultimate burden of proving unlawful discrimination.

12. Complainant has carried his burden of pursuasion that the legitimate, non-discriminatory reasons articulated by Respondent are pretextual.

13. Complainant has carried his ultimate burden of proving unlawful discrimination by a preponderance of the evidence.

OPINION

This matter arises on a complaint filed by Robert P. Drumheiser ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against Consolidated Rail Corporation ("Respondent"), on December 13, 1983, at Docket No. E-27403A. The complaint was subsequently amended, by way of an Interlocutory Order, on September 16, 1988. Complainant alleged that Respondent violated the Pennsylvania Human Relations Act ("Act"), Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., by removing him from service, discharging him, and refusing to restore him to service on a leniency basis because of his age.

Commission staff conducted an investigation into the allegations of the complaint, and determined that no probable cause existed to credit the allegations contained therein. The Commission endeavored to eliminate the practices complained about by conference, conciliation and persuasion. These endeavors were unsuccessful, and the case was approved for a public hearing under Section 9(d) of the Act. The hearing was held in Harrisburg, Pennsylvania, before Michael M. Smith, presiding as the duly appointed permanent hearing examiner on the case.

In his complaint, Complainant has alleged that Respondent unlawfully discriminated against him because of his age. In a case such as this, which involves allegations of disparate treatment, Complainant has the initial burden of establishing a prima facie case of unlawful discrimination. If Complainant carries this burden, an inference of unlawful discrimination is created. Respondent must then rebut this inference by producing admissible evidence of a legitimate, non-discriminatory reason for its

actions. If Respondent is successful, Complainant may still prevail by showing that the reason given by Respondent is, in reality, a pretext for unlawful discrimination. Allegheny Housing Rehabilitation Corp. v. Com., Pennsylvania Human Relations Commission, 516 Pa. 124, 532 A.2d 315 (1987); General Electric Corp. v. Com., Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976). Finally, where Respondent presents evidence of a legitimate, non-discriminatory reason for its conduct, thereby doing everything that is required of it had Complainant made out a prima facie case, the issue becomes whether, on all the evidence produced by both sides, Complainant has carried his ultimate burden of proving discrimination by a preponderance of the evidence. Allegheny Housing, Id; Montour School District v. Com., Pennsylvania Human Relations Commission, 109 Pa. Cmwlth. 1, 530 A.2d 957 (1987).

In formulating the requirements of a prima facie case, it is well accepted that the elements are to be adapted to the type of discrimination alleged. Allegheny Housing, Id.; General Electric Corp., 365 A.2d 649. Complainant has alleged age based discrimination involving his removal from service, his discharge, and the refusal of Respondent to restore him to service on a leniency basis. He is presently pursuing only the claim that Respondent refused to grant him a leniency reinstatement, and is no longer contesting the other charges. See 1/25/89 Reply Brief of Complainant ("C. Reply Brief") at 3-4, and 1/19/89 Brief in Support of Complainant by Commission Council ("C. C. Brief") at 28. Accordingly, a prima facie case of unlawful discrimination may be made out with a showing that:

1) At the time of the action complained of, Complainant was a member of the class of people protected from age discrimination under the Act;

2) Complainant was subjected to an adverse employment action;

3) Complainant was treated less favorably than other, younger employes under similar circumstances.

In regard to the first element of the prima facie case, the Act currently protects individuals from employment discrimination if they are at least forty years of age. 43 P.S. §§954(h), 955(a). At the time of the alleged unlawful discriminatory action herein, the Act protected individuals between the ages of 40 and 70 inclusive. 43 P.S. §§954(h). It is undisputed that Complainant was 60 years old at the time Respondent removed him from service on September 14, 1983, and that he had turned 61 years old at the time Respondent refused to restore him to service on a leniency basis. See 1/19/89 Brief of Respondent ("R. Brief") at 3-4. This satisfies the first element of Complainant's prima facie case.

It is also undisputed that Respondent removed Complainant from service, dismissed him, and refused to restore him to service on a leniency basis. See R. Brief at 8, 11, 15-16. These three actions are clearly adverse to Complainant. As a result, they satisfy the second element of his prima facie case.

Prior to discussing the final element of the prima facie case, it should be noted that Respondent believes the Commission should formulate the case in a slightly different manner than it has. It would have Complainant prove that:

1) at the time of the action complained of, he was a member of a protected class;

2) who was performing duties he was qualified to perform;

3) who was discharged from his position; and

4) there was a continuing need for the services he was performing.

Of these four elements, the record supports a finding, and Respondent admits, that Complainant has satisfied all but the fourth. See R. Brief at 19-20. While not adopting it as a necessary element, the Commission also notes that the record supports a finding that the fourth element has been satisfied, as well. Complainant presented evidence that K. F. Schwab, Respondent's Senior Director-Labor Relations, recommended that Complainant be restored to service on a leniency basis, with no indication Respondent could not use his services, if he was restored. Complainant also presented evidence that J. F. Spreng, Respondent's General Manager of the Eastern Region, denied Schwab's request in a memorandum in which he stated the reasons for the refusal were Complainant's performance, attitude, and guilt of the charges. No mention was made that his services were not needed. Finally, Spreng testified at the public hearing that the discharge of a senior engineer, such as Complainant, required that he be replaced with another engineer. N.T. 292. This evidence is sufficient to establish a continuing need for Complainant's services, and to make out the disputed element of Respondent's proposed prima facie case.

Turning now to the third and final prong of Complainant's correct prima facie case, Complainant has presented evidence of eight younger employes of Respondent, whom he alleges committed similar offenses to his and were granted leniency. Of these employes, the most comparable are T. W. Zimmerman, F. E. Trout, and Jeffrey L. Sutch. Zimmerman and Trout were involved in the same offense as Complainant. They were both charged with exceeding the maximum authorized speed for their train, passing a temporary block station, and failing to examine bulletin boards and bulletin books, as

was Complainant. At the time of the offense, on September 14, 1983, Zimmerman was 56 years old and Trout was 53 years old. Like Complainant, both were removed from service and dismissed in all capacities. Unlike Complainant, both were later restored to service on a leniency basis.

Jeffrey Sutch was involved in a separate offense, which occurred on October 9, 1982. He was charged with passing a signal in stop position, causing the derailment of, and damage to, his train and the track it was on. Like Complainant, Sutch was dismissed in all capacities, and, unlike Complainant, was later restored to service on a leniency basis. At the time of these occurrences, he was 31 years old.

Respondent admits, and the evidence supports, the fact that Zimmerman and Trout committed offenses which were similar to Complainant's. See R. Brief at 25. The evidence also supports a finding that Sutch's October 9, 1982, offense was similar to Complainant's. This finding is based on two admissions by Respondent. The first admission is that Complainant's offense was similar to a second offense committed by Sutch in March, 1983. C.E. 9; R. Brief at 25. The second admission is Respondent's statement, in a August 1, 1983, letter from K. F. Schwab, that Sutch's 1983 offense was similar to his 1982 offense. These two admissions establish that Respondent considered all three offenses to be similar, and discredits Respondent's present contention that the 1982 offense is not similar.

Based on this evidence, of at least three younger employes who committed offenses similar to Complainant's, and who were treated more favorably, Complainant has established the third and final prong of his prima facie case. Respondent raises the additional argument that the Zimmerman and Trout comparisons are insufficient to raise an inference of age

discrimination, because they are over 40, are within Complainant's protected class, and are only slightly younger than Complainant. R. Brief at 25, n. 6, citing Respondent's Pretrial Memorandum at 14-15. Assuming this to be true, Complainant has still presented evidence of an employe, Jeffrey Sutch, who is thirty years younger, who is not within Complainant's protected class, who committed a similar offense, and who was treated more favorably. As the Pennsylvania Supreme Court has explicitly recognized, the burden on a complainant to establish a prima facie case is not onerous. Allegheny Housing, 365 A.2d at 319. Consequently, the Sutch comparison alone is sufficient to satisfy the third prong.

Furthermore, in Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989), it was held that a 49 year old employe, who was replaced by a 46 year old, made out a prima facie case of age discrimination, although there was only a three year age difference. Complainant, at almost 61 years old, was over four years older than Zimmerman, at 56, and over seven years older than Trout, at 53. These age differences are greater than the difference in Carter, and are great enough to warrant an inference of age discrimination.

Finally, the record establishes that Complainant was eligible to retire on an age annuity, under 20 C.F.R. §216.5, which requires a minimum age of 60, plus length of service. Zimmerman and Trout, having not yet reached age 60, were not eligible for this annuity. Complainant alleges that his eligibility to retire was a negative factor in Respondent's decision to refuse him leniency, while Zimmerman's and Trout's ineligibility was a positive factor in their reinstatement. The record establishes that Respondent was aware of Complainant's eligibility, and that Spreng mentioned Complainant's eligibility in his memorandum denying leniency. This evidence is sufficient to raise an inference that Respondent's decision to reinstate

Zimmerman and Trout was based on their ineligibility to retire, while its decision not to reinstate Complainant was based on the fact that he would still have a retirement income. Since eligibility for an age annuity is dependent on age, making leniency determinations on this basis would discriminate on the basis of age. Although this inference is rebuttable by Respondent through its articulation of valid, nondiscriminatory reasons for the difference in treatment, it does provide a definite, age-based explanation for the difference in treatment, despite the relative closeness in age. When these two comparisons are combined with the Sutch comparison, and Complainant's age-based eligibility to retire is considered, the inference of age discrimination is confirmed, and the combination is more than sufficient to establish the final prong of Complainant's prima facie case.

Once Complainant establishes his prima facie case, the burden shifts to Respondent to rebut the inference of unlawful discrimination with evidence of a legitimate, nondiscriminatory reason for its actions. Respondent presented evidence that it refused to restore Complainant to service on a leniency basis because of the seriousness of the offense, his attitude concerning the offense, his past disciplinary record, and the right of Respondent to expect its employes to put "safety first." R. Brief at 26-28. At this stage, it does not matter whether this evidence is ultimately deemed credible, or whether it ultimately withstands Complainant's evidence of pretext. The evidence is sufficient to rebut Complainant's prima facie inference of unlawful discrimination, and to require Complainant to persuade the Commission, by a preponderance of the evidence, that he was the victim of intentional discrimination. See Allegheny Housing, 365 A.2d at 318-20.

To carry his burden, Complainant has raised a number of arguments aimed at proving the pretextual nature of Respondent's asserted, nondiscriminatory reasons for his differential treatment. In analyzing Complainant's evidence of pretext, however, it is first necessary to understand the basic events surrounding Respondent's decision to deny Complainant a leniency reinstatement. The record establishes that K. F. Schwab, Respondent's Senior Director-Labor Relations, had originally recommended to J. F. Spreng, Respondent's General Manager of the Eastern Region, that Complainant be granted a leniency reinstatement. C.E. 5 at Tab A. Spreng rejected this recommendation, and denied Complainant a leniency reinstatement in a December 12, 1983, memorandum to Schwab. C.E. 5 at Tab B. In his memorandum, Spreng outlined several reasons for refusing leniency to Complainant. One reason was that during Complainant's "entire career as an Engineer there is a pattern of inattention to duty while operating an engine, especially in the area of signals and speeding." A second reason was that "with 42 years of service we would expect Mr. Drumheiser to improve his performance, instead, his performance has remarkably declined." A third reason was that his performance and attitude, particularly in 1983, showed that he should not be operating an engine. The memorandum also noted that "after a long but not inspiring career" Complainant was eligible to retire, and that retirement might be his best course of action. Finally, Spreng stated that Complainant's "firmly established guilt of the charges", as "set forth by trial record", required that "there should be no thought of leniency."

The evidence further establishes that Schwab relayed Spreng's decision to D. F. Riley, the General Chairman of Complainant's union, the Brotherhood of Locomotive Engineers. C.E. 5 at Tab C. This was done by way

of a January 4, 1984, letter from Schwab to Riley. In this letter, Schwab stated that Complainant's appeal for leniency was being denied because his guilt was clearly established, and because Complainant's past discipline record, which included "offenses reflecting a pattern ...of inattention to duty while operating an engine," made the discipline given commensurate with the offense proven. Id.

Based on this evidence, the Commission finds that the Schwab memorandum represents Respondent's official reasons for denying leniency to Complainant. The Commission also finds that these reasons emanate from the Spreng memorandum. Respondent does not seriously dispute these conclusions, relying heavily on the Spreng memorandum to support its contention that Complainant was discharged for nondiscriminatory reasons. R. Brief at 26-8. Complainant, on the other hand, argues that Respondent's reasons are pretextual, and that the Spreng memorandum provides independent evidence of age bias toward Complainant.

In support of his contention that Respondent's articulated, nondiscriminatory reasons are pretextual, Complainant has presented evidence of eight younger employes whom he alleges were treated more favorably than he was, under similar circumstances. Three of these employes are Zimmerman, Trout, and Sutch, who as previously discussed were all dismissed and then reinstated on leniency. The remaining five employes are R. H. Geisel, age 31, R. E. Hollinger, age 35[1], D. O. Whitcomb, age 31, D. F. Schrey, age 51, and J. G. Kollra, age 34. These five employes received suspensions as a result of informal handling, without a formal hearing, and without being dismissed prior to the leniency determination.

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[1]Respondent alleges that Hollinger's age was unidentified at trial. R. Brief at 23. Respondent was served with a request for admission which stated, inter alia, that Hollinger was 35 years old. Respondent denied the request "as stated" and objected to it in part, but did not state specifically that Hollinger's age was part of its denial or objection, as required by the Commission's Special Rules of Administrative Practice and Procedure, 16 Pa. Code §42.92. C.E. 3 at No. 44. It is, therefore, deemed admitted that Hollinger was 35 years old.

Of these eight comparison employes, Complainant presents Sutch as the most compelling case of differential treatment. As previously stated, Sutch was a 31 year old engineer who was restored to service, on a leniency basis, after his dismissal for the unauthorized passing of a signal in stop position. This violation resulted in the derailment of, and damage to, his train and the track it was on. Respondent argues that none of the reasons it raised, for the denial of a penalty reduction in Complainant's case, was present in Sutch's case. R. Brief at 30. The evidence, however, does not support this conclusion.

One reason given by Respondent, for refusing to reduce Complainant's penalty, is the seriousness of the offense. In discussing Complainant's prima facie case, it has already been determined that Sutch's offense was substantially similar to Complainant's. It has also been determined that Respondent considered the offenses to be similar, whether or not the actual charges levied were the same. By definition, one offense cannot be similar to another, without being similar in seriousness. Otherwise, it would not be similar. Also, it is objectively reasonable to consider Sutch's offense, which caused property damage, as similar in severity to Complainant's greater number of offenses, which did not result in any damage to person or property. As a result, the Commission finds Respondent's present claim, that Sutch's offense was not as serious as Complainant's, to be pretextual.

Another reason given by Respondent, for refusing to reduce Complainant's penalty, is that Respondent has a right to expect its employes to put safety first. Sutch's violation of the rules resulted in property damage to both his train and the track it was on. Complainant's violation resulted in no injury or property damage. For Respondent to argue that

Complainant did not put safety first, by exposing his train to the possibility of harm, while Sutch did put safety first, by not only exposing his train to the possibility of harm, but actually causing harm, is so clearly inconsistent with common logic as to be unworthy of belief. As a result, it is found that Respondent did not believe that Sutch failed to put safety first, to at least as great an extent as Complainant, and that Respondent's argument to the contrary is pretextual.

The final reason given, for refusing to reduce Complainant's penalty, was the nature and seriousness of his prior discipline record. Respondent argues that Sutch's record was not as serious, and supported its decision to grant him leniency. R. Brief at 30. The evidence reveals that Complainant's record consisted of five offenses, over a 42 year career. Three of these offenses resulted in a reprimand, one in a 7 day suspension, and one in a 15 day suspension. Of these, three occurred in the 1960's, including the 15 day suspension in 1965. Complainant received no discipline between 1968 and 1982, when he received a reprimand for failing to report for an assignment. Finally, on June 21, 1983, Complainant received a 7 day suspension for violating Respondent's Rules 106, 291, and 927.

Sutch's discipline record, prior to his October, 1982, offense, consisted of a 15 day suspension for passing a stop signal, in October, 1979, a reprimand for failure to report for overtime, in November, 1980, and a 5 day suspension for violation of the Atlantic Region Timetable, in March, 1981. A comparison of this record, with Complainant's, reveals that Sutch, at age 31, had already amassed only two less offenses than Complainant, at age 60. Sutch's four offenses, including the one in October, 1982, occurred over a period of almost exactly three years, from the first one to the last. Complainant's six offenses, including the one in September, 1983, occurred

over a period of almost twenty years, from first to last. Complainant had only two offenses, involving a reprimand and a 7 day suspension, between February, 1968, and September, 1983. In comparing suspensions, Sutch had received a 15 day suspension, and a 5 day suspension, over a period of only three years prior to his October, 1982, incident. Conversely, Complainant had received only one 7 day suspension over a period of almost eighteen years prior to his September, 1983, incident.

Based on this evidence, the Commission finds that Complainant's prior discipline record is objectively no worse than Sutch's, in either number or seriousness of past offenses.[2] Respondent does not rely, however, only on Complainant's official discipline record. It also relies on two additional offenses, which Spreng set forth in his December 12, 1983, memorandum denying leniency, and on which he allegedly relied in determining the severity of Complainant's record. The additional offenses involve a warning letter Complainant allegedly received for speeding in 1977, and a "somewhat deficient" rating in speed observance Complainant received on a July 8, 1983, Locomotive Engineer Evaluation Form.

Complainant, in responding to this evidence, argues that only Complainant's official discipline record should have been considered by Spreng. Respondent asserts that it is not limited to the official record in determining leniency. Whether or not Respondent had a policy of allowing the consideration of informal discipline, there is no evidence this alleged policy was ever committed to writing, or was otherwise standardized in any fashion. The only evidence of such a policy was obtained on Respondent's

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[2] To the extent Respondent looked only at the number of offenses, without consideration for the length of time over which they occurred, such an approach would penalize Complainant, for being old enough to have a 42 year service record, while benefitting Sutch, for being young enough to make it impossible for him to have so long a record. Since this distinction is solely a function of the age of the two employes, it would constitute an unlawful age based consideration, and would be additional evidence of age discrimination.

cross examination of Maurice Logan, who was a local union chairman of Complainant's union from 1959 until 1963 and 1967 until 1982. Logan testified that informal discipline could be brought up in discussing leniency. N.T. 172-3. He severly qualified this testimony, however, by stating that he did not believe it was proper to bring it up. More significantly, he also testified that none of Respondent's officials, with whom he had dealt in negotiating leniency, ever brought up such matters. N.T. 173-4.

Giving Respondent the benefit of the doubt, the most that it has shown is that evidence of informal discipline may be used in determining leniency. There is no evidence that it must be considered, that guidelines exist for considering different classes of informal discipline, or that there are any restrictions on Respondent's ability to determine which employes' informal discipline records it will consider, and which it will not. While such subjective determinations are not per se discriminatory, they must be reviewed with suspicion to prevent an employer from hiding unlawful discrimination behind a "complex web of after the fact rationalization." Newport Township v. Com., Pennsylvania Human Relations Commission, Pa. , 551 A.2d 1142, 48 (1988).[3]

In comparing Sutch's treatment to Complainant's, Respondent cites the Commission only to Sutch's official discipline record, which it argues is less serious than Complainant's record. R. Brief at 30. Respondent does not allege, and there is no evidence to support, that Respondent considered any discipline outside of his official record, in determining to grant Sutch leniency. The only reason presented by Respondent for this apparent

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[3] The difference in recommendations between Schwab and Spreng is perhaps the most striking evidence that Respondent had no objective rules or guidelines for the consideration of informal discipline in determining leniency. Schwab did not feel compelled to consider such discipline, and consequently decided that leniency was merited. Faced with the same facts as Schwab, Spreng decided he would consider informal discipline, and denied leniency. This indecision by Respondent's supervisors, as to the use of informal discipline in the same case, clearly shows the subjective nature of the process, and the dangers inherent therein.

disparity is its right to consider informal discipline. It does not, however, provide an explanation of the specific reasons it chose to consider informal discipline in Complainant's case, but not in Sutch's.

Under Newport Township, such a subjective, unexplained disparity must be viewed with particular suspicion. Had a reason other than age justified the disparate use of informal discipline, Respondent would certainly be expected to present it. Complainant has established that the only difference between the two cases is age, if informal discipline is eliminated from consideration. Absent any reason for the disparate use of informal discipline, other than the mere right to be disparate, the Commission finds that Sutch, at age 31, was treated more favorably than Complainant, at age 61, because of age, and that all of Respondent's articulated, nondiscriminatory reasons for the difference in treatment are pretextual.

Respondent also argues that Sutch was treated the same as Complainant because he was discharged, and refused reinstatement, for his involvement in a second incident on march 9, 1983. As previously discussed, Respondent states that this incident was similar to Complainant's. While this appears to be equal treatment, it ignores the fact that Sutch had already been treated more favorably than Complainant when he was reinstated, only five months earlier, for an offense which Respondent also admits was similar in severity. Sutch was allowed to commit two offenses, of similar severity, before leniency was refused, while Complainant was refused leniency the first time he was dismissed for a similar offense. Thus, Sutch was actually treated more leniently than Complainant, and not the same.

The next comparison presented by Complainant is that of Zimmerman, who was the Conductor involved in the same incident as Complainant. Like Complainant, Zimmerman was charged with exceeding the maximum authorized speed for the train, passing a temporary block station, and failing to

examine bulletin boards and bulletin books. Unlike Complainant, Zimmerman was reinstated to service on a leniency basis. Respondent asserts that this differential treatment was justified because Zimmerman was less responsible for the incident, and had a less severe disciplinary record.

In assessing responsibility for these violations, Respondent argues that Complainant, as Engineer, controlled the throttle of the train, placing him in the best position to avoid the violation of Respondent's rules. R. Brief at 28-9. The evidence establishes, however, that Zimmerman, as Conductor, had the authority and ability to apply the brakes from his location at the rear of the train, and to safely stop the train. Further, Complainant's control of the throttle had nothing to do with Zimmerman's failure to examine the bulletin boards and bulletin books, as he was required to do under Rule 75(d) of Respondent's Rules of the Transportation Department. As Conductor, he was in charge of the train, was responsible for the prompt movement, safety and care of the train, for the vigilance, conduct and proper performance of duty of train employes, and for the observance of all rules and instructions. Rule 937 of Respondent's Rules of the Transportation Department. Under Rule 937, all persons employed on his train were required to follow his instructions, and Rule 926 explicitly requires the Engineer to obey the Conductor, unless doing so would endanger the train's safety or commit a violation of the rules.

Not only did Zimmerman fail to properly instruct his crew at the outset of the trip, but Respondent admits that at the time of the incident he was at the end of the train, and was therefore unable to properly monitor what was happening at the front. While Respondent considers this to be exculpatory, R. Brief at 29, Respondent does not explain how Zimmerman's

failure to locate himself where he could properly monitor the train, and carry out his duties, makes him less culpable than if he had located himself in a more advantageous location. More importantly, in Respondent's September 27, 1983, trial record, there was uncontradicted testimony by D. J. Durkin, one of Respondent's Road Foreman, that Zimmerman was in charge of the train, and that when Complainant "asked if E-21 was open, he should have ascertained that the A Form was given and a yellow flag, which he did not." R.E. 7 at 11. Durkin testified that Zimmerman should have done this, regardless of the fact he was 55 car lengths from the front of the train. Id. Since it was this trial record, on which Spreng allegedly relied in determining Complainant's culpability, and since Durkin's testimony directly refutes Respondent's subsequent claim that Zimmerman's location excused his inaction, it provides convincing evidence that Respondent's subsequent claim is pretextual.

From the foregoing, it is clear that Zimmerman was at least as responsible for the incident as Complainant. He was also at least as derelict in his duties as Conductor, as Complainant was as Engineer. As a result, Respondent's assertion that Zimmerman was less at fault than Complainant, due to his inability to control the throttle, and due to his location at the rear of the train, loses its credibility, and it is, therefore, found to be pretextual.

Respondent also alleges that Zimmerman's discipline record was less severe than Complainant's. The record supports the conclusion that Zimmerman's formal discipline record was not as serious as Complainant's. While this appears to be a valid reason for the differential treatment, the evidence is convincing that Complainant would have received leniency, had Spreng not increased the severity of Complainant's record by adding two cases

of "informal discipline". In this regard, Schwab felt that Complainant's 42 years of service, which resulted in an official record consisting of only five offenses, three of which resulted in a reprimand, one in a 15 day suspension, and the last in a 7 day suspension, merited leniency. Spreng did not disagree. Rather than refuting Schwab's assessment of Complainant's official record, he simply added two instances of unofficial discipline, involving an October 21, 1977, warning letter for speeding and a July 8, 1983, evaluation report, which had a notation that Complainant was warned about speeding. Spreng provided no explanation for the addition of these offenses, but only after adding them was he able to establish the "pattern of inattention to duty...especially in the areas of signals and speeding," on which he relied in support of his decision not to reinstate Complainant.

Absent these two, additional offenses, Complainant had only one violation in this area in over 15 years prior to the September, 1983, violation. The warning letter was not offered or admitted into evidence, providing no opportunity to evaluate its contents. As for the evaluation report, it provided no space for Complainant to acknowledge it, or to offer any rebuttal, and he testified that he was never shown the evaluation until after his September 14, 1983, violation. He was also evaluated on two subsequent occasions, July 14 and July 27, 1983, and was rated "standard" on speed observance, with no indication he was having any problems in that area.

While Respondent considered informal discipline in Complainant's case, there is no evidence that it considered informal discipline in Zimmerman's. To the contrary, Respondent cites the Commission solely to Zimmerman's official discipline record, and urges that it be compared to Complainant's official and unofficial record. R. Brief at 30. As with Sutch, Respondent provides no reason for this difference in treatment, other

than its unilateral right to consider an employe's informal discipline record, if it so chooses. The evidence is convincing that Complainant would not have been denied leniency, based on his formal record alone. Respondent has provided no specific reason for choosing to consider Complainant's unofficial discipline record, while declining to consider Zimmerman's, and the only remaining conclusion is that Zimmerman was treated more leniently than Complainant, because of his age. Consequently, it is found that all of Respondent's articulated, nondiscriminatory reasons for granting Zimmerman leniency, but not Complainant, are pretextual.

The third comparison presented by Complainant is that of Trout, who was the Trainman involved in the same incident as Complainant. Like Complainant, he was charged with exceeding the maximum authorized speed for the train, passing a temporary block station, and failing to examine bulletin boards and bulletin books. As with Zimmerman, Respondent alleges that Trout's leniency reinstatement was proper because he did not control the throttle of the train, and because he had a less severe disciplinary record. Unlike Zimmerman, there is no evidence that Trout had any authority to stop the train. While Zimmerman was in charge of the train, Rule 945 of Respondent's Rules of the Transportation Department provides that Trout, as Trainman, must obey the Conductor and Engineer, among others. Rule 946 further provides that the Trainman must assist the Conductor and the Engineer, but gives no independent authority to act. So while Trout did violate the rules, and was at fault for failing to properly assist Complainant to avoid the incident, the evidence establishes that the primary blame must be placed on Complainant and Zimmerman.

Turning to Trout's formal discipline record, it shows that he had six offenses over a thirty-one year period. The two most recent offenses involved a moving violation in 1973, for which he was dismissed and restored

to service on a leniency basis seven months later, and a non-moving violation in 1981, for which he received a thirty day suspension. This record is in distinct contrast to Complainant's official record, which contained only a reprimand and a seven day suspension in over fifteen years prior to the September, 1983, violation. More significantly, there is no evidence that Respondent considered Trout's unofficial discipline record, as it did with Complainant. As with the previous comparisons, Respondent has provided no objective reason for this disparity.

Based on the above analysis, Complainant has succeeded in establishing that one of Respondent's articulated, non-discriminatory reasons for the disparity in treatment between Trout and Complainant was pretextual, but not the other. Although Complainant has failed to prove that Trout was treated more leniently than Complainant because of his age, the unexplained failure of Respondent to consider his informal discipline record does add support for the conclusion that the use of informal discipline is purely subjective, is not routinely used for younger employes, and was used in Complainant's case as a pretext for unlawful discrimination.

Complainant's five remaining comparisons were all given suspensions as a result of informal handling. Respondent first argues that these comparisons should be eliminated from consideration because there is no evidence they would have been treated as leniently were their cases handled formally. The record shows, however, that the granting of informal handling is up to Respondent, and may be withheld. The record also establishes that while informal handling does not involve a formal hearing, it does involve an investigation of the surrounding facts, only without the making of a transcript. Although Respondent argues that a lesser penalty may be given because an employe generally must admit guilt, to obtain informal handling,

the evidence shows that leniency may be granted where guilt is admitted at the formal hearing, or afterward. It may also be granted where an employe does not admit guilt, but simply requests leniency. Frederick Kublic, Respondent's Assistant Manager for Labor Relations, testified that it was possible for an employe to appeal and fight for his rights and still receive leniency. N.T. 210. The only discernable difference between a penalty given through informal handling, and one given after a formal hearing and a request for leniency, is that informal handling skips the formal hearing and initial penalty determination, and moves directly to a determination of the penalty deemed appropriate, after leniency has been considered. As a result, it is found that the five employes who received informal handling may be validly compared with Complainant, who did not.

Respondent next argues that these employes are not comparable because they were not charged with similar offenses to Complainant's. Geisel, Hollinger, Kollra and Whitcomb were charged with passing a temporary block station. Schrey was charged with passing a block limit station. Geisel and Hollinger, who were involved in the same incident, were also charged with failing to check that information in their train orders corresponded to the applicable Clearance Form "A". Whitcomb was also charged with failing to receive a Clearance Form "A" and a hand signal to proceed. Schrey and Kollra were charged with no other offenses.

Like Complainant, each of these employes were engineers, who were charged with what Respondent has testified was the serious offense of passing a temporary block station or block limit station. Unlike Complainant, none were charged with speeding. This differentiates these cases from Complainant's, Zimmerman's, and Trout's, all of whom were charged with the

same offenses. It also differentiates them from Sutch's offenses, which Respondent admitted were similar. And unlike Sutch's violation, which resulted in property damage, none of these five employes caused any personal or property damage, as a result of their violations.

Despite the conclusion that none of the final five comparisons, standing alone, are directly comparable to Complainant's case, their circumstances do lend additional weight and credence to Complainant's other evidence of pretext. All five employes were charged with serious offenses, and none received more than a thirty day suspension. Further, the evidence establishes that an unclean record had little effect on the severity of their penalties. Schrey, for example, who passed a block limit station by 10-12 miles, received a 20 day suspension. Ben Black, Respondent's Director of Unit Train Operations, N.T. 221, testified that while Schrey did not have a clean record, the length of his suspension was, at most, increased "a little" as a result. N.T. 238-9. As with Sutch, Zimmerman and Trout, there is no evidence Respondent considered informal discipline, in reaching any of the five penalty determinations. This evidence supports the conclusion that Complainant was treated differently than younger employes, due to the large amount of weight Respondent placed on his prior record, and due to Respondent's consideration of his informal discipline record, as well as his official record.

In addition to Complainant's comparison evidence, a variety of other evidence has been presented that Respondent's articulated, nondiscriminatory reasons for its actions are pretextual. Respondent argues that Complainant's offense was more serious than most, not only because of his failure to stop at the temporary block station, but because he continued past the station without immediately attempting to stop his train. R. Brief at 26-8. Black, Respondent's Director of Unit Train Operations, testified that Respondent does not consider an offense to be any more or less

serious by how far such a station is passed. This testimony was given in support of Schrey's 20 day suspension for passing a block limit station by 10-12 miles, as opposed to the approximately 6.7 miles by which Complainant passed his station. Based on this testimony, the distance by which Complainant passed the temporary block station should not have been considered as an aggravating circumstance by Respondent.

In addition to Respondent's general rule that distance is not a factor, once a station is passed, the September 17, 1983, trial record fails to show that the distance by which Complainant passed the station was a concern in his case. The distance was not raised as an issue, and Complainant was never given an opportunity to explain why he went past the station as far as he did, since he was never told it was a problem. Distance was also not mentioned as an aggravating factor in Spreng's memorandum denying leniency. As a result, Respondent's argument that it was a genuine concern, despite the general policy to the contrary, and the lack of any apparent concern by Respondent at the time of the penalty determination, loses its credibility, and supports the conclusion that this reason is pretextual.

The second aspect of Respondent's seriousness claim arises from Complainant's failure to stop the train when ordered to do so. In analyzing this charge, a review of the testimony provided during the September, 1983, hearing is particularly instructive, because it is the record on which Spreng made his determination of Complainant's guilt. It reveals that D. J. Durkin, one of Respondent's Road Foremen and the investigator at the scene of the incident, testified that Complainant told him he initially failed to stop his train in response to a radio call because the caller would not identify himself. He further testified that Complainant stated he stopped the train

as soon as the voice identified itself as Bob Troup, Harrisburg Movement Desk. R. E. 7 at 5. This testimony was uncontradicted during the hearing, and there was no testimony that Complainant failed to stop his train as soon as he received what he believed to be a proper instruction to stop.

Rule 705 of Respondent's Rules of the Transportation Department provides that "employees must not answer or acknowledge originating calls unless proper identification procedures as prescribed by Rule 704 are used." Rule 704 provides, inter alia, that "[e]mployees must identify themselves by name, occupation and location." A General Notice at the beginning of the rules states, inter alia, that the rules are designed to provide for the safety of employes and the public, and that "[o]bedience to the rules is mandatory." Further, Rule 926 states that Engineers are not to follow instructions which would endanger their trains' safety or commit a violation of the rules.

Based on these rules, Complainant was correct in disregarding the order to stop until he received proper identification under Rules 704 and 705. The September, 1983, hearing transcript reveals that he promptly stopped the train, safely and without damage to person or property, as soon as he received a properly identified radio communication. His failure to acknowledge or act on the initial, unidentified communication was due to his adherence to Respondent's rules, not his violation of them. Had he obeyed the unidentified instruction, he could have been charged with a violation of Rule 705, for acknowledging an unidentified transmission, and with Rule 905, for following an instruction the acknowledgement of which would constitute a violation of the rules.

Complainant never denied that he violated Respondent's rules when he passed the temporary block station. For Respondent to claim that the severity of this violation was increased, when its own hearing record showed that Complainant was only following its mandatory rules on radio transmissions, is not credible, and this lack of credibility lends further weight to the conclusion that the claim is pretextual.

A third aspect of Respondent's seriousness claim involves Complainant's allegedly poor attitude during the incident. As with the second aspect, this claim arises primarily out of the purported difficulty Respondent experienced in getting Complainant to stop his train. R. Brief at 26-7. As set forth above, any difficulty was caused by Complainant's efforts to obey the rules, not violate them. There is no testimony in the September, 1983, hearing record from which Spreng could reasonably conclude that Complainant's failure to stop when he received the first radio transmission was anything other than his good faith adherence to Respondent's own rules, which by their terms are designed for safety and are mandatory on all employes. Given Respondent's emphasis on obeying the rules, it is not credible that Spreng would honestly consider Complainant to have a bad attitude for not committing additional rule infractions.

Complainant has also presented more direct evidence of Respondent's age bias. After his removal from service, he had Greg Hite, his union local chairman, approach Spreng in an effort to get him reinstated. Hite testified that, in his negotiations with Spreng, he felt compelled to request leniency based on Complainant's length of service and eligibility to retire, because he had nothing else with which to appeal to Respondent's sympathy. He testified that with a 30 year old, he could have appealed to Respondent's sympathy because "the guy has two kids and a mortgage." N.T. at 132. He also

testified that when an employe has "got all his children raised and he owns his own house you have got problems, what do you plead then? It's different." N.T. at 133.

This testimony is significant because it provides an important insight into Respondent's leniency process. As the union local chairman, Hite was responsible for negotiating with Respondent to get employes back to work. To maximize an employe's chances for leniency, he found it advantageous to plead an employe's financial obligations, such as children and a mortgage. When these obligations were not present, such as with an older employe like Complainant, Hite found it harder to appeal to Respondent's sympathy, and had "problems" presenting the case.

Although there is no evidence that Respondent had a formal policy or practice of giving favorable consideration to these type of obligations, the fact that Hite found it beneficial to an employe when they were present, and detrimental when they were not, is persuasive evidence that such factors were a consideration. Since most younger employes will have the appropriate type of financial obligations, while most older employes will not, Respondent's favorable consideration of such obligations has a disparate impact on the basis of age. More importantly, it actually had an impact on Complainant, who did not have those type of obligations for Hite to plead. Consequently, Hite's testimony provides additional credibility and support to Complainant's contention that Respondent was motivated by considerations of age, in denying him leniency, and not by the legitimate, non-discriminatory reasons it has raised.

The final piece of evidence, which supports Complainant's allegations that he was the victim of unlawful age discrimination, involves certain statements made by Spreng in his memorandum denying leniency to Complainant. Although Spreng stated that years of service should be taken

into consideration, the remainder of the memorandum makes it clear that Complainant's length of service, and consequently his age, was a decidedly negative factor in Spreng's evaluation. C.E. 5 at Tab B. Specifically, Spreng stated that "[w]ith 42 years of service we would expect Mr. Drumheiser to improve his performance, instead, his performance has remarkably declined." This statement supports the conclusion that Spreng would not have been as hard on Complainant, if he had less service, and thus less of an expectation of improvement.

In addition, the only reason that Spreng could claim that Complainant's record had "remarkably declined," was because it had been so good for so long. As previously set forth, Complainant had only four formal disciplinary offenses in his first 41 years of service, prior to June, 1983, and only one informal warning. Maurice Logan, drawing on over twenty years of experience as a union local chairman involved in disciplinary matters, testified that he had seen records five and six pages long. Had Complainant been thirty years younger, his recent "decline" would have been remarkably similar to Sutch's record, at the time Sutch was reinstated on leniency, and the conclusion is compelling that he would have been reinstated, as well.

The Spreng memorandum also stated that "[a]fter a long but not inspiring career we note [Complainant] is eligible to retire." Whether Complainant's career was inspiring or not, this statement shows a definite bias against long, workmanlike careers. Prior to his September 15, 1983, suspension and subsequent dismissal, Complainant had what both Schwab and a Special Board of Adjustment, which reinstated him in November, 1984, characterized as a record which merited leniency. There had never been any indication his job was in jeopardy, and the last two evaluations he received

in July, 1983, had rated him "standard" in all categories in which he was rated, including speed observance. For Spreng to consider a long, "uninspiring" career as a detriment is clearly discriminatory against older employes, and specifically against Complainant, who performed satisfactory work over a long period time. Conversely, it benefits younger employes, who have not been around long enough to have such a track record.

This statement also supports Complainant's contention that his eligibility for retirement was a factor in Spreng's decision not to grant him leniency. Spreng testified that the reference to retirement was simply recognition of a suggestion made by Greg Hite that Complainant be allowed to return to work and then retire. N.T. 292. He also testified that he would have allowed Complainant to return to work for one day and retire, which he said would be important to Complainant, because his record would then reflect that he retired from active service, and not after a dismissal. N.T. 297.

Whether or not Spreng's statement about retirement was in recognition of a suggestion made by Hite, it reflects Spreng's knowledge of Complainant's retirement eligibility, which required a minimum age of 60. His memorandum notes that retirement might be Complainant's best course of action, thereby offering it as a possible avenue for Complainant to compensate for his dismissal. Spreng's added testimony that he would have let Complainant return to active service for one day, and then retire, confirms the conclusion that Complainant's retirement eligibility made his permanent dismissal more acceptable than if he was not eligible, like Zimmerman or Sutch, who were too young to qualify.

For all of the foregoing reasons, it is held that Complainant has carried his burden of persuasion on the issue of pretext, as well as his overall burden of persuasion that Respondent unlawfully refused to grant him

a leniency reinstatement due to his age. Complainant has presented evidence of two younger employes who committed similar offenses, and who were treated more favorably than Complainant, in Respondent's leniency determination process. In addition to these comparisons, Complainant has presented a variety of other evidence which supports his claim that Respondent's articulated, non-discriminatory reasons for his differential treatment were pretextual, including evidence of specific age bias contained in Respondent's internal memorandum denying Complainant's request for leniency. Consequently, all that remains is to consider appropriate relief.

The Commission has broad discretion in fashioning a remedy where unlawful discrimination has been proven. Murphy, et al. v. Com., Pennsylvania Human Relations Commission, 506 Pa. 549, 486 A.2d 388 (1985). In fashioning a remedy, the victim of discrimination is entitled to "make whole" relief, which will restore the victim to his or her pre-injury status. Albemarle Paper Company v. Moody, 422 U. S. 405 (1975) (Title VII action); Williamsburg Community School District v. Com., Pennsylvania Human Relations Commission, 99 Pa. Cmwlth. Ct. 206, 512 A.2d 1339 (1986). In this case, Complainant was reinstated by Respondent pursuant to an October 16, 1984, order of a Special Board of Adjustment. As a result, he suffered a loss of wages and benefits from September 15, 1983, the date of his suspension, until his reinstatement.

Respondent argues that Complainant should not be made whole for the entire period of his suspension, because the record supports the conclusion that he would have received some discipline for his actions, even in the absence of unlawful discrimination. R. Brief at 40. The record does support such a conclusion. Sutch received a 60 day suspension for his similar offense, and Zimmerman received a 93 day suspension for his. Since Zimmerman

was involved in the same incident as Complainant, his suspension shall be used. Complainant's award of backpay and benefits shall not begin, therefore, until December 17, 1983, the day after Zimmerman received his notice returning him to service.

From January 1, 1983, through September 14, 1983, Respondent paid Complainant $31,715.13 in wages. This amounts to $123.41 in average daily wages for the 257 days Complainant was on Respondent's payroll in 1983. To help in the calculation of damages for the remainder of 1983, Complainant presented evidence of the wages paid to two locomotive engineers working out of Complainant's work location, who have equivalent seniority dates. These employes are J. W. Chajkowski, who earned $15,143.57 between September 1, 1983, and December 31, 1983, and J. B. Koch, who earned $13,447.32 for the same period. This amounts to $124.13 in average daily wages for Chajkowski, and $110.22 in average daily wages for Koch, for the 122 days between September 1, 1983, and December 31, 1983. Complainant's average daily wage falls at the upper end of this range, and it is reasonable to assume that he would have continued to earn his average daily wage from december 17, 1983, when he should have been returned to service on leniency, and December 31, 1983. This amounts to $1,851.15 for this 15 day period.

Between January 1, 1984, and October 31, 1984, Chajkowski earned $38,339.91, and Koch earned $34,424.12. Francine Ostrovsky, Esquire, Complainant's Commission counsel, urges in her brief that the Commission award Complainant the average of these amounts. This is a reasonable method of calculating Complainant's lost wages for 1984, and results in a due amount of $36,382.02.

As a result of the above calculations, the record supports the conclusion that Complainant lost $38,233.17 in back wages as a result of

Respondent's unlawful discrimination. Turning to the area of benefits, Complainant's first request is for an award of lost vacation pay. The record establishes that Complainant lost five weeks of vacation pay in 1985, because he did not work enough days in 1984 to qualify for it. Respondent asserts that he should receive no additional monetary award for this loss, because the wage calculations for Chajkowski and Koch, on which Complainant's award is based, already include vacation pay. R. Brief at 41-2. Although the record is somewhat unclear on this point, it does support such a conclusion. Despite this conclusion, however, Complainant is still entitled to a proration of vacation pay for November and December, 1984. This is because he lost all his vacation pay for 1985, while receiving remuneration for only ten months of back wages and vacation pay for 1984. To remedy this, it is appropriate to take the average of the $4,423.30 received by Chajkowski, and the $3,983.90 received by Koch, as vacation pay earned in 1984, and prorate it equally over 12 months, awarding Complainant the equivalent of two months pay. This calculation amounts of $700.60, which represents the amount of vacation pay not included in the January 1, 1984, to October 31, 1984, average wages of Chajkowski and Koch, on which Complainant's back pay award was based, and of which Complainant was deprived because of Respondent's unlawful discrimination.

In addition to lost vacation pay, Complainant is entitled to the value of the lost employer contributions, which would have been made to his regular railroad retirement fund, had he remained employed. From September 1 through December 31, 1983, Chajkowski received $1,843.08 in employer funded contributions, and Koch received $2,021.08. The average of these sums comes to $31.67 per day, or $475.05 for the 15 days from December 17, 1983, to December 31, 1983, for which Complainant is entitled to compensation.

Between January 1 and October 31, 1984, Chajkowski received $5,106.75 in employer funded contributions, and Koch received $5,053.84. Taking the average of these two comparisons, as the most appropriate measure of damages, Complainant is entitled to an award of $5,080.30 in lost employer funded retirement contributions in 1984. This amounts to a total award of $5,555.35 in lost contributions.

In addition to the above monetary losses, the record supports the conclusion that Complainant lost 26.6849480 shares of stock in 1984. Although the record does not establish a dollar value for these shares, it is a reasonable measure of damages for Respondent to provide Complainant with 26.6849480 shares of its stock. If Respondent is unable to provide Complainant with exactly 26.6849480 shares, it is reasonable for it to provide the next highest denomination of shares available. Due to a lack of evidence concerning what, if any, dividends would have been received by Complainant since 1984, there is an insufficient basis on which to award lost dividends.

Based on the foregoing, Complainant has established a total monetary loss of $44,489.12 in back wages and benefits, and an entitlement of 26.6849480 shares of Respondent's stock. The record fails to reveal a reasonable basis on which to calculate any additional losses. Respondent alleges, however, that Complainant is entitled to none of these losses, because he failed to mitigate his damages. In the alternative, it alleges that he received $7,675.00 in unemployment compensation benefits, and that this amount should be deducted from his award to avoid a double recovery.

Complainant did testify that he failed to seek employment elsewhere, while he was removed from service by Respondent. He was 61 years

old, however, and after 42 years with Respondent was eligible to retire. Had he exercised this option, he would have had no duty to seek alternative employment. Instead, he pursued the appeal of his dismissal, until he was reinstated by a Special Board of Adjustment consisting of a Respondent representative, a labor organization representative, and a neutral. Given his age, with 42 years as a fireman and engineer with Respondent, providing him with skills not easily transferable outside a railroad setting, it was not unreasonable for Complainant to choose to pursue reinstatement, through direct appeal, as the most effective way to mitigate his damages.

Turning to Respondent's argument that the unemployment compensation received by Complainant should be deducted from his award, it has been held that no deduction need be made. Orweco Frocks v. Com., Pennsylvania Human Relations Commission, 113 Pa. Cmwlth. 333, 537 A.2d 897 (1988). The rationale for not requiring a setoff is that unemployment compensation benefits are collateral in nature, and that disallowing a setoff will discourage employers from unlawful discrimination. Id. at 903, n. 4. Consequently, no setoff shall be allowed in this case.

The final item to which Complainant is entitled is an award of interest on the $44,489.12 in damages. Under Pennsylvania law, interest is at 6% per annum. Goetz v. Norristown Area School District, 16 Pa. Cmwlth. 389, 329 A.2d 579 (1975). Lastly, a cease and desist order is appropriate. Accordingly, an appropriate Recommendation and Final Order follows.

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT P. DRUMHEISER, Complainant	:	
v.	:	DOCKET NO. E-27403A
CONSOLIDATED RAIL CORPORATION, Respondent	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

AND NOW, this 12th day of January, 1990, upon consideration of the complete record in the above-captioned action, the Permanent Hearing Examiner hereby recommends that the attached Findings of Fact, Conclusions of Law and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission, and that the attached Final Order be issued.

BY: Michael M. Smith

Michael M. Smith
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT P. DRUMHEISER, Complainant	:	
v.	:	DOCKET NO. E-27403A
CONSOLIDATED RAIL CORPORATION, Respondent	:	

F I N A L O R D E R

AND NOW, this 1st day of February, 1990, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own finding in this matter and incorporates the Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

O R D E R S

1. That Respondent shall cease and desist from unlawful discrimination on the basis of age.

2. That Respondent shall pay Complainant, within 30 days of the effective date of this Order, the lump sum of $44,489.12, which amount represents Complainant's lost wages and benefits as a result of Respondent's unlawful discrimination, except for the shares of stock in paragraph 3 below.

3. That Respondent provide Complainant with 26.6849480 shares of Respondents stock, or the next highest number of shares available, which Complainant lost as a result of Respondent's unlawful discrimination.

4. That Respondent shall pay Complainant interest, on the amount specified in paragraph 2, at the rate of 6% per annum, calculated from November 1, 1984, until payment is made.

5. That within 30 days of the effective date of this Order, Respondent shall report on the manner of compliance with the terms of this Order by letter addressed to Francine Ostrovsky, Esquire, at the Pennsylvania Human Relations Commission's Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

ATTEST:

Raquel Otero de Yiengst
Raquel Otero de Yiengst
Secretary