

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 46

System Docket No. BMW-307D

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant William Gaida was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Scheduled Agreement.

(b) Claimant Gaida shall be reinstated into Carrier's service with all seniority entitlements and shall be compensated for all lost wages, including overtime benefits which would accrue to him, as provided for in Rule 15 of the Scheduled Agreement.

FINDINGS

The Claimant, a Track Foreman, was dismissed from service following an investigative hearing under the following charge:

Your responsibility, if any, in that on October 10, 1997, between 11:35 a.m. and 12:01 p.m., you failed to affirm, with the employee having charge of the track [another Foreman], that you had absolute and continuous protection in order to foul Track 1 at Sudbury Road, Milepost 20, on the Fitchburg Main Line.

This may have resulted in a collision between MBTA Train 421 and a Swingmaster speed swing which was fouling Track 1 per your direction.

NORAC Rule 132, Protection When Fouling or Working On a Track, Paragraphs 1 and 2, and NORAC Rule 4, Job Briefings, in its entirety, may apply.

From the record, the Board finds no convincing proof as to the Claimant's violation of Rule 4.

Rule 132, Paragraphs 1 and 2, read as follows:

Trains must be fully protected against any known condition that may interfere with their safe passage.

If work on or adjacent to a track will create a condition interfering with the safe passage of trains, that work must not be attempted without permission of the employee in charge of the track.

On October 10, 1997, an employee, under the direction of the Claimant, was operating a speed swing on Track 1, Fitchburg Main Line. A passenger train on Track 1 struck the speed swing, causing fatal injury to the operator.

There are two separate questions to be resolved:

1. What direction, if any, was provided by the Train Director to the Claimant as to his right to foul Track 1?

2. Assuming the Claimant's version of such direction was accurate, was his action nevertheless contrary to Rule 132?

Train Director's Instructions

There is no doubt that the other Foreman had clearance to be on Track 1 with his on-track vehicle but following Train 421.

Earlier on October 10, 1997, the Claimant had requested and received permission to foul Track 1 and possibly Track 2 on two

occasions. His assigned task for the day had not been completed. There is no dispute that he then received a radio call from the Train Director at the Train Director's initiative. According to the Claimant, the Train Director advised that the Claimant's crew had permission to foul Track 1; that this had been cleared with the Foreman who had control of the track; that it was not necessary to obtain direct permission from the other Foreman; and that no mention was made concerning Train 421. On this basis, the Claimant proceeded to have the swing equipment occupy Track 1, and the collision with Train 421 followed.

This version is confirmed by the Roadmaster, who had advised the Claimant that the Train Director was trying to reach him by radio. After the Claimant spoke with the Train Director by radio, the Road Foreman, in the presence of two other employees, testified as follows:

I said what's going on now and he said the tower called me and I got the Number 1 track. I said what track. He said the Number 1 with [the other Foreman's] permission.

In contrast, the Train Director denied granting permission to the Claimant. He testified as follows:

I knew [the Claimant] was working up there because he had foul time on number 1 previous so I related to him that later on in the afternoon he'd be working with [the other Foreman].

The Board concludes that the Claimant's version is more logical and therefore more believable. In his letter to the

Claimant following the hearing, the Hearing Officer did not reach a contrary conclusion. He stated:

Whether you were advised [as to clearance for Track 1] by [the Train Director], or merely presumed that you received such advice based on the inadequate communication by both parties, is a matter that was not resolved in the record.

Violation of Rule 132

This leads to the second question. Despite the advice apparently given by the Train Director, did the Claimant proceed to foul Track 1 in violation of Rule 132, since he had no direct contact with the other Foreman? The record establishes that there had been an accepted practice of "piggy-backing" -- that is, an employee having authority to occupy a track could permit another employee to share this authority. While this is not encompassed in a Rule, the fact that the Carrier thereafter issued orders forbidding "piggy-backing" lends weight to the contention that the practice was previously accepted.

Nevertheless, Safety Rules must be precisely followed. The severe consequences of failure to do so is borne out by the tragic incident here under review. Thus, the Board concludes that the Claimant cannot be held to be without some responsibility here. Regardless of assurances, he did not in fact directly confer with the Foreman holding track authority. Under the particular circumstances described above, however, the Board finds the penalty of dismissal to be unduly harsh.

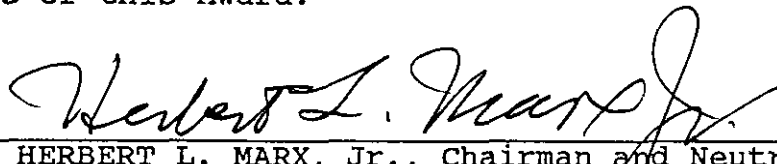
This is supported by the Claimant's exemplary record as a Foreman for eight years and the endorsement given him by the

Engineer of Track and four Roadmasters as having an "excellent" safety record and being a "first rate employee".

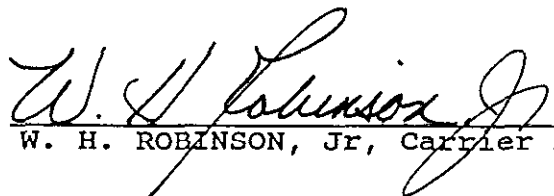
The Award will determine that the Claimant's penalty was excessive and that he shall be reinstated with seniority unimpaired but without back pay or retroactive benefits. The resulting lost time shall be on his record as an appropriate disciplinary suspension.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.


HERBERT L. MARX, Jr., Chairman and Neutral Member


B. A. WINTER, Employee Member


W. H. ROBINSON, Jr, Carrier Member

NEW YORK, NY

DATED: JULY 3, 1998