

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 5905**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES** )  
 ) Case No. 42  
and )  
 ) Award No. 36  
**GARY RAILWAY COMPANY (formerly** )  
**ELGIN, JOLIET AND EASTERN RAILWAY COMPANY)** )

Martin H. Malin, Chairman & Neutral Member  
T. W. Kreke, Employee Member  
J. F. Ingham, Carrier Member

Hearing Date: June 11, 2009

**STATEMENT OF CLAIM:**

1. The dismissal of Marie A. Price for violation of Rules 0.7, 1.53, 1.56, 1.61 and 19.8 in connection with a personal injury sustained by her on August 5, 2008, is unjust, unwarranted and in violation of the Agreement (Carrier's File UM-13-08).
2. As a consequence of the violation of Part (1) above, Ms. Price shall be entitled to the remedy provided for in Rule 57(c) of the Agreement.

**FINDINGS:**

Public Law Board No. 5905, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On August 20, 2008, Carrier directed Claimant to report for an investigation on August 27, 2008, concerning her alleged violation of Maintenance of Way Rules 0.7, 1.53, 1.56, 2.62 and 19.8, in connection with an incident at Naperville Road on August 5, 2008, at 2:10 p.m. The hearing was held as scheduled. On September 4, 2008, Claimant was notified that she had been found guilty of the charge and dismissed from service.

On August 5, 2008, Claimant was part of a gang that was traveling eastbound moving various pieces of track equipment on Carrier's main line, approaching Naperville Road. A crane was shoving a flat car and a caboose. Claimant was on the caboose. Because the equipment following those three pieces would not shunt the signals at the Naperville Road crossing, Claimant was required to dismount the caboose and flag the crossing after the crane, flat car and caboose passed. Claimant ended up on the ground and injured her ankle. What led to that

condition is in dispute.

The crane operator testified that Claimant dismounted the caboose before the movement stopped. He also testified that Claimant was not facing the caboose when she dismounted. The Trackman who was in charge of the movement testified that Claimant dismounted the caboose before the movement had stopped, that she was facing away from the caboose and that she had a book in her arm when she dismounted. Claimant testified that she did not attempt to dismount the caboose. Rather, she was standing on the bottom step, facing away from the caboose, waiting for the movement to stop when she fell, perhaps propelled by slack action.

Thus, whether Carrier proved the charges turns on the relative credibility of Claimant versus the Trackman and Crane Operator. If the Trackman and Crane Operator are credited, Claimant dismounted from moving equipment, was facing in the wrong direction when she dismounted and did not have a secure handhold.

The hearing officer issued a detailed report, including findings that credited the testimony of the Crane Operator and Trackman over that of Claimant. As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position, relative to the hearing officer, to resolve credibility conflicts. Accordingly, we defer to the credibility findings made on the property as long as they are reasonable. We conclude that the hearing officer's credibility findings are reasonable and so defer to them and hold that Carrier proved the charges by substantial evidence.

Carrier proved that Claimant committed several very serious safety violations. Moreover, at the time of the incident, Claimant had less than one year of service with Carrier. The record contains absolutely no evidence that would mitigate against the seriousness of Claimant's misconduct. We are unable to say that the penalty imposed was arbitrary, capricious or excessive.

#### AWARD

Claim denied.



Martin H. Malin, Chairman



J.F. Ingham  
Carrier Member

9/8/09



T. W. Kreke  
Employee Member

9-8-09

Dated at Chicago, Illinois, September 1, 2009.