

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE**

and

MASSACHUSETTS BAY COMMUTER RAILROAD COMPANY

Case No. 2

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The discipline [sixty (60) days suspension, requalification on the RWP Rules and the NORAC Rules before being allowed to work as a work equipment operator] imposed upon Mr. P. McInnis under letter dated February 18, 2006 on charges of alleged violation of NORAC Rule 132, RWP Rules 335, 313 and 315 and the Attending to Duties and Safety sections of the MBCR Code of Conduct while assigned as Work Equipment Operator (WEO) on the bucket loader and in connection with an incident when the bucket loader was struck by Train #759 on January 26, 2006, was arbitrary, capricious, excessive, and in violation of the Agreement (Carrier's File MBCR-03D/0206 MBC).
2. As a consequence of the violation referred to in Part (1) above, Mr. P. McInnis shall now receive the remedy prescribed by the parties in Rule 15(6)."

Findings:

At the time relevant to this matter, the Claimant was employed by the Carrier as a Work Equipment Operator (WEO) on Track Gang V-342, operating a bucket loader.

By letter dated January 31, 2006, the Claimant was directed to attend a formal investigation and hearing on charges that on January 26, 2006, the Claimant had fouled the track with the bucket loader that he was operating, that he had not received proper authority to foul the track, that no RWP Job Briefing was conducted prior to this work, and that as a result, Train #759 struck the bucket loader. After a postponement, the investigation was conducted on February 8, 2006. By letter dated February 18, 2006, the

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Claimant was informed that as a result of the hearing, he had been found guilty as charged, and that he was being assessed a sixty-day suspension, and that he would have to requalify on the RWP and NORAC Rules. The Organization thereafter filed the instant claim on the Claimant's behalf, challenging the Carrier's issuance of discipline. The Carrier denied the claim.

The Carrier initially emphasizes that the collision between one of its commuter trains and a piece of track equipment undoubtedly occurred because of the joint failures of the Claimant and his Foreman. The Carrier asserts that the Claimant's actions exhibited gross negligence regarding his own personal safety and the protection of the Company's equipment. Accordingly, the Claimant's conduct warranted severe discipline, and the record fully supports the finding of guilt by the Hearing Officer.

The Carrier argues that the record leaves no doubt that the Claimant did not receive a proper job briefing before work began. The Carrier emphasizes that there was no discussion that the location was a "hot spot," of Train #759 being on the schedule, and of whether Train #759 had passed or not. The Carrier contends that there never was a clear understanding of whether or when the foul time had been issued by the dispatcher. The Carrier insists that the Foreman's final communication to the Claimant, "all set to go," could not have been more ambiguous, yet the Claimant did not question it. The Carrier asserts that it was totally irresponsible for the Claimant to assume that the use of this term meant that foul time already had been secured, especially when the Foreman specifically had answered "no" when the Claimant asked if he had secured such time from the dispatcher.

The Carrier asserts that the cursory discussion between the Claimant and his Foreman did not rise to the level of "job briefing," but it acknowledges the Hearing Officer's finding that the charge regarding Rule 315, that no RWP job briefing was conducted, was not proven. The Carrier nevertheless argues that the Claimant did not acknowledge understanding of the on-track safety procedures before proceeding with his work. The Carrier maintains that from a safety standpoint, if the Foreman failed to conduct a proper job briefing, then the Claimant had an obligation to ask about such matters and determine with total clarity what safety procedures were in place. Instead, the Claimant was satisfied, and placed his personal safety in peril, by accepting the words "all set to go" from the Foreman.

The Carrier goes on to argue that there can be no dispute that the Claimant violated NORAC Rule 132, in that he attempted to perform the work of retrieving the rail without permission from the Train Dispatcher, who was in charge of the track. The Carrier insists that the alleged miscommunication between the Claimant and his Foreman is not an acceptable excuse in matters of such importance. The Carrier contends that the Claimant should have made certain that proper on-track safety was being provided before entering the track area.

The Carrier then asserts that it is equally clear that the Claimant violated Rule 335, in that the Claimant fouled a track without on-track having been established. The Carrier maintains that if the Claimant had complied with this Rule, then the incident never would have happened. The Claimant failed to clearly understand the status of his foul time. Similarly, the Carrier argues that the record proves that the Claimant violated Rule 313

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by failing to properly communicate with his Foreman about all safety procedures before the work commenced. The Carrier additionally argues that the Claimant violated the MBCR Code of Conduct because the Claimant did not take the safe course, nor did he comply with all of the safety requirements related to his position.

The Carrier emphasizes that in its appeal, the Organization has not pointed to any procedural error, but instead has argued on the merits that the incident could have been avoided if the Carrier had tightened its procedures relating to the Job Briefing Form. The Carrier maintains that the Claimant's failure to comply with the procedures, and not the procedures themselves, was the cause of the incident in question. The Carrier argues that human failure was the cause of this unfortunate incident. The Claimant did not fulfill his responsibilities as a Work Equipment Operator, and he did not comply with the rules.

The Carrier asserts that the evidence in the record was sufficient to support the decision of the Hearing Officer that the Claimant was guilty as charged. The Carrier emphasizes that Board Awards consistently have held that a Board will not substitute its judgment for that of a Carrier unless the Carrier's findings were unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. The Carrier argues that the only other determination to be made by this Board is whether the measure of discipline was appropriate under the circumstances. The Carrier insists that it was.

The Carrier maintains that everyone involved in this dispute, including the Organization, understand that this incident was an extremely dangerous situation. The Carrier argues that under the circumstances, a sixty-day suspension must be considered as lenient. The Carrier points out that the violations at issue could be considered as grounds for dismissal. The Carrier asserts that there is no basis in this record for modification of the discipline imposed, and that discipline should not be disturbed.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Foreman conducted at least two job/safety briefings with the Claimant on the date in question. The Organization argues that the Claimant mistook the Foreman's use of the common term "set to go" as confirmation that foul time had been obtained. The Organization points out that the Foreman never stated that he had obtained foul time, and that the Claimant simply misunderstood the Foreman's response to a question and assumed such. The Organization acknowledges that this misunderstanding was the cause of the unfortunate incident in question.

The Organization asserts that in the wake of this incident, the Carrier elected to conduct a hearing as a formality and assess discipline, rather than utilize any of the numerous options available to it, such as education, training, coaching, and counseling. The Organization points out that the Board long has held that discipline should be progressive in nature, and that its intended purpose is to rehabilitate, correct, and guide employees.

The Organization emphasizes that while the incident at issue is serious, there is no indication that the Carrier took into consideration the Claimant's more than twenty years' seniority as a WEO and his unblemished personal record. The Organization argues that the discipline imposed upon the Claimant was excessive, capricious, and punitive in nature, and it serves absolutely no purpose other than punishment.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating NORAC Rule 132, as well as RWP Rules 313 and 335. This Board finds that there is insufficient evidence to prove that the Claimant was guilty of violating RWP Rule 315. The record is clear that the Claimant's actions in violation of the various rules were in some part responsible for the serious collision that took place between one of the Carrier's commuter trains and a piece of track equipment. We find that the Claimant's negligent actions justified the Carrier's taking disciplinary measures against the Claimant.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

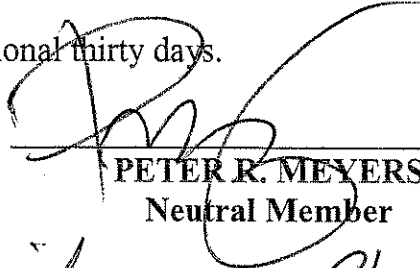
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The Claimant in this case received a sixty-day disciplinary suspension, and he was also required to re-qualify on the RWP and NORAC rules. As stated above, the Claimant was guilty of failing to comply with the rules because he did not make sure that on-track safety was being provided before fouling the track and he did not obtain the required permission to perform his work. However, a full review of this matter makes it clear that it was his foreman who was largely responsible for the situation that occurred on January 26, 2006. It was the Claimant's foreman who was responsible to hold a job briefing and to be in charge of the operation that took place that day. There is no question that the Claimant could have done a better job making sure that everything was working properly and going according to the rules, but the Claimant was not the person primarily responsible for the collision that occurred. That responsibility belongs to his foreman. The foreman received a sixty-day suspension which was upheld by this Board. This Board finds that the Carrier, perhaps in an effort to be "fair," issued the same amount of discipline to the Claimant and we find that that severe discipline was arbitrary and capricious. We order that the Claimant's sixty-day suspension be reduced to a thirty-day suspension. This Board does not have any problem with the Claimant being re-qualified on the rules because that will assist him in the future. However, we find that with respect to the very lengthy discipline issued to this twenty-year employee who has no previous disciplinary background, we find that the Carrier acted improperly and its action must be set aside in part.

AWARD:

The claim is sustained in part and denied in part. The sixty-day suspension issued

to the Claimant shall be reduced to a thirty-day suspension and the Claimant shall be made whole for the additional thirty days.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

CARRIER MEMBER

DATED: 11/2/07

DATED: 11/02/07