

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
and
MASSACHUSETTS BAY COMMUTER RAILROAD**

Case No. 21

STATEMENT OF CLAIM:

Carrier's dismissal of Claimant J. McCord was not in accordance with the Agreement Rules. The Carrier should be required to offer the Rule G Waiver to the Claimant.

FINDINGS:

By letter dated May 15, 2008, the Claimant was directed to appear at a formal investigation on charges arising from the Claimant's alleged involvement in a collision with the Anchor Squeezer while the Claimant was operating a "people mover," resulting in injury to operator of the Anchor Squeezer and damage to both pieces of equipment.

By letter dated May 28, 2008, the Claimant was directed to appear at a formal investigation on charges relating to post-accident drug and alcohol testing that resulted in a positive for cocaine. After two postponements, the investigation of these matters was conducted on June 30, 2008. By letter dated July 20, 2008, the Claimant was notified that as a result of the investigation, he had been found guilty as charged, and he was being dismissed from the Carrier's service with no Rule G Waiver. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discharge him. The Carrier denied the claim.

The Carrier initially contends that the results of the Claimant's post-accident drug and alcohol test are not in dispute. The Carrier asserts that the Organization conceded

this when it declared that the Claimant realized that he has a problem after the events at issue occurred.

The Carrier argues that Rule G, by its very terms, prohibits the offer of a Waiver to the Claimant, who committed serious rule violations when he slammed into the Anchor Squeezer, causing injury and damage. The Carrier maintains that the Claimant consumed large quantities of cocaine, and then presented himself as fit to transport his fellow workers on the People Mover, despite knowing the dangerous nature of all track work. Moreover, a spate of recent tragedies on the rails that were associated with drugs and alcohol did nothing to dissuade the Claimant from his willful disregard of the prohibitions against the use of drugs. The Carrier insists that when the lives of Carrier employees are put at risk, the Carrier has a legal and moral obligation to take all steps necessary to forestall a future occurrence.

The Carrier emphasizes that even if the Claimant had difficulty in discerning oil on the track, the Claimant had three further opportunities to observe the danger of a collision. The Carrier points out that another employee raised his arm as a signal to the Claimant of a stop, the machine ahead of the Claimant was equipped with a brake light that would warn of an imminent stop, and the assistant foreman was on the radio. The Carrier insists that the Claimant failed to take note of any of these warnings.

Pointing to the Claimant's testimony that he was about twenty-five to thirty yards behind the Anchor Squeezer and traveling at a speed of ten miles per hour, the Carrier argues that the Claimant was closer to the Anchor Squeezer than a prudent operator ought to have been, in major violation of NORAC Rule 80. In addition, there is reason to

question the accuracy of the Claimant's alleged speed of ten miles per hour in light of the fact that he heaved the Anchor Squeezer about twenty yards down the track.

As for the Organization's suggestion that the People Mover is not safe when attached to the tool cart, the Carrier insists that the Organization did not present any evidence regarding the circumstances surrounding other accidents that have occurred when the People Mover was towing the tool cart, so it is impossible to consider these other incidents. The Carrier further argues that testing shows that the People Mover and tool cart stop in a "relatively short distance," indicating that there are no safety issues associated with the People Mover towing the tool cart.

The Carrier submits that the evidence demonstrates that the People Mover's brakes were in good working order. The Carrier emphasizes, however, that the Claimant gave confused testimony about his actions in trying to stop the machine; it is unclear whether he applied the brakes or pumped them first. The Carrier asserts that this begs the question as to the true sequence of events on the day of the incident, especially in light of the fact that the Claimant was under the influence of cocaine.

The Carrier maintains that the drivers of all of the pieces of equipment ahead of the Claimant's People Mover were able to react to the unexpected conditions and stop their vehicles at a safe distance from each other. The Claimant was not able to do this, ramming his vehicle into the Anchor Squeezer, causing damage to that vehicle, and injuring its driver. The Carrier contends that this incident clearly demonstrates the dangers of working along the right-of-way, and these dangers exclude the employment and demand the discharge of any employee who jeopardizes safety on the railroad,

knowing that his coordination and judgment are impaired by his decision to consume illicit drugs.

As for any contention that the Claimant was not properly “trained” in the use of the People Mover, the Carrier emphasizes that the Claimant identified himself as qualified to operate this equipment, both in Carrier documents and during his testimony at the hearing.

With regard to the initial offer of a Waiver Agreement to the Claimant, which was withdrawn due to the positive results on the Claimant’s drug test, the Carrier insists that any such verbal Waiver discussions are not legally binding until they are reduced to writing. The Carrier asserts that it had the prerogative to withdraw the Waiver offer at any time prior to signing.

The Carrier argues that it considers a number of factors before offering and concluding a Waiver Agreement. The offer of a Waiver does not preclude the existence of serious rules violations. The Carrier points out that it considered the Claimant’s lack of judgment in failing to maintain safe distances and failing to control his vehicle, resulting in damage and injury, of sufficient significance to initiate charges against him six days before publication of his drug test results.

The Carrier then points out that the Claimant’s drug test results constituted conclusive proof that the Claimant was on the job with cocaine in his system, far in excess of the limits required for a positive test. The Carrier argues that employees who lack the judgment to refrain from ingesting dangerous drugs and appearing for work on the tracks in such condition place their own lives and the lives of fellow workers and the

traveling public in jeopardy. The Carrier emphasizes that its Code of Conduct specifies that such conduct may result in discipline up to and including discharge even for a first offense. The Carrier asserts that the Claimant was in serious violation of several rules, thereby denying himself the possibility of the Rule G Waiver.

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

The Organization initially contends that the apparent reason for the Carrier's denial of the Rule G Waiver was that in the wake of the results of the Claimant's drug test, the accident all of a sudden became a "serious" rule violation. The Organization asserts that it has objected to this from the beginning. The Organization argues that if the Carrier felt from the outset that the accident had been caused by a serious rules violation, then it would not have offered the Waiver as proposed. The Organization suggests that it was the violation of Rule G that made it serious, and not vice versa. This is not what is required by the rule.

The Organization then maintains that the Carrier must prove its case through the testimony of its witnesses, not by inference. The Carrier presented only one witness to testify about the rules, and this witness could not answer when asked if he felt that the Claimant's actions were a serious rules violation. The Organization submits that if a violation is not serious, then the Carrier is required to offer the Rule G Waiver in accordance with the Bypass Agreement.

The Organization contends that the initial offer of the Waiver was reasonable and did not refer to "serious rules violations." The Organization emphasizes that it was only

after the test results were reported that any violations suddenly were deemed to be serious. The Organization insists that the offer of a Rule G Waiver should have been made and the Claimant would have remained off the property until the matter was addressed with the medical authorities.

The Organization further asserts that contrary to the Carrier's contention that the Claimant consumed "large quantities" of cocaine, there is no evidence whatsoever in the transcript regarding any amount of cocaine that may have been consumed. The Organization emphasizes that the only evidence was the test was positive at a certain reported level, but there is no evidence of impairment on the Claimant's part. The Organization submits that impairment cannot be quantified or inferred from a positive test.

The Organization additionally argues that there is no evidence that the stop lights on the back of the Anchor Squeezer actually worked. Moreover, the fact that an employee raised his hand once does not, by itself, indicate that a specific signal was being given. The Organization also contends that although it has not asserted that the brakes did not work, it does question the machine's ability to stop on slippery rail while it is towing the tool cart. The Organization points out that this is not the first incident involving the stopping ability of the People Mover while pulling the tool cart.

The Organization insists that the Carrier is wrong in its decision to discharge the Claimant. 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 serious rule violations which eventually led to a serious accident involving the People Mover that he was operating. In addition, when the Claimant was drug tested because of the accident, he tested positive for cocaine.

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.

The Carrier has proven with sufficient evidence that the Claimant engaged in serious rule violations which led to the accident. Consequently, once the Claimant tested positive for cocaine, the Carrier was not under any obligation to offer the Claimant a Rule G waiver. The Claimant engaged in very serious behavior by not properly operating his equipment and by using cocaine in such a quantity that he tested positive when he came to work. It is fundamental that employees cannot be using drugs before they come to work to operate Carrier equipment. This Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 11/10/09

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