

BEFORE PUBLIC LAW BOARD NO. 7007

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

Case No. 25

STATEMENT OF CLAIM:

Carrier's dismissal of Claimant L. Jackson was arbitrary, extremely harsh, and not based on the facts developed at the hearing. The Claimant's record should be cleared of the charges, immediately returned to work, and compensated for all lost wages and benefits.

FINDINGS:

By letter dated November 17, 2008, the Claimant was directed to appear at a formal investigation on charges that the Claimant allegedly had demonstrated poor judgment, brought discredit upon the Carrier, and subjected the Carrier to criticism and loss of good will when he caused and/or contributed to a physical and verbal altercation, which escalated from pushing and shoving to the introduction of weapons, with a youth who had attempted to cross the tracks after the gates had been activated, with this altercation resulting in the Claimant's arrest. After a postponement, the investigation was conducted on December 8, 2008. By letter dated December 17, 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. 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 although the Organization objected to the

statements obtained from the police officer and another witness to the incident as being hearsay, the Carrier does not have subpoena power over these individuals, who were not available at the hearing. The Carrier asserts that the testimony of Employee Edward Butler is consistent with the statement of the police officer. The Carrier argues that a study of the record allows the conclusion that the incident occurred as reported by the police officer and as witnessed by Butler. The Carrier points out that the Claimant did not deny that the altercation occurred. The Claimant asserted only that he lost his patience as the youth defied his instructions, and he thereafter acted only to protect himself from what he deemed was a looming assault.

The Carrier maintains that Butler's statement and testimony lends support to the finding that the Claimant was aggressive and uncooperative with the police. The Carrier emphasizes that it is evident that the events occurred as others reported and described, not as the Claimant set forth in his testimony and embellished statement.

The Carrier acknowledges that the youth's actions should not be downplayed, and that the Claimant initially may have acted in good faith, but the Carrier insists that the Claimant did not have the presence of mind to facilitate a safe outcome. The Carrier points out that there is no evidence that the youth lunged at or went after the Claimant. Moreover, the Claimant had a resource as soon as the police arrived, yet the Claimant challenged the police, too. The Carrier asserts that the Claimant was held accountable for assault with a dangerous weapon.

The Carrier maintains that the Claimant's behavior was inflammatory, contrary to the Code of Conduct, and criminal in nature. Moreover, the Claimant's own testimony

confirmed that as of this incident, he barely had commenced service with the Carrier, having begun employment on August 25, 2008. The Carrier asserts that the Claimant put his short term of service in jeopardy, and there is no history of otherwise dutiful service that would warrant reconsideration of the Carrier's decision to discharge the Claimant.

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

The Organization initially contends that the Carrier's decision to discharge the Claimant was arbitrary, extremely harsh, and not based on the facts that were developed at the hearing. The Organization asserts that the Claimant was not afforded a fair and impartial hearing, in violation of Rule 15 of the Agreement, in that two witnesses listed on the Carrier's original notice, Mr. J. Hogan and a police officer, never appeared at the hearing. Instead, the Carrier submitted written statements from these individuals. The Organization argues that it never was given the opportunity to cross-examine these alleged witnesses. In addition, a statement from another individual who was not mentioned in the notice also was submitted into evidence.

The Organization points out that the record contains conflicting testimony from witnesses present at the hearing to testify and those who submitted only written statements. The Organization reiterates that it was not given the opportunity to clarify the events surrounding this matter by cross-examining the alleged witnesses who did not appear at the hearing.

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 bringing discredit upon the Carrier and subjecting the Carrier to criticism and loss of goodwill when he engaged in a physical altercation with a youth who had attempted to cross the tracks when the gates were down. That altercation resulted in the Claimant's arrest.

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 record is clear that the Claimant was a very short-term employee and he engaged in conduct that showed a severe lack of judgment on his part. The Claimant attempted to use a broom handle as a weapon; and even when the police came and told the Claimant to drop the club, they had to take him to the ground in order to obtain his compliance. That is not appropriate behavior and this Board finds that the Carrier did not act unreasonably, arbitrarily, or capriciously when it terminated this short-term employee's employment as a result of this incident. Therefore, the claim must be denied.

AWARD:

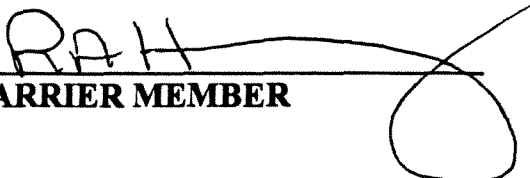
The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 11/10/09

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