

BEFORE PUBLIC LAW BOARD NO. 7007

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

Case No. 41

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. Carrier's dismissal of Claimant Thomas Rezendes 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.
2. Claimant Rezendes shall be reinstated to his position with the Company with his seniority unimpaired and be compensated for all lost wages and benefits which would accrue to him as provided for in the Scheduled Agreement and his record cleared of the charge."

FINDINGS:

By notice dated October 4, 2010, the Claimant was directed to attend a formal investigation and hearing on charges that he allegedly had been dishonest and misappropriated pay to which he was not entitled when he falsified his time document on various dates and engaged in other than Carrier business while on duty, and that he had utilized a Carrier vehicle for unauthorized purposes both during and after his scheduled duty hours on various dates. The investigation was conducted, after two postponements, on December 16, 2010. By letter dated December 23, 2010, the Claimant was informed that as a result of the hearing, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization filed the instant claim on behalf of the Claimant, challenging the Carrier's decision to discipline the Claimant. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because the Carrier proved that the Claimant was guilty of violating all of the cited rules as charged, because there are no circumstances that would serve to mitigate the Claimant's responsibility for these offenses, and because the discipline imposed was proportionate to the serious nature of the Claimant's violations. The Organization contends that the instant claim should be sustained in its entirety because the discrepancies in the Claimant's time card were due to the Claimant's not thinking clearly because of family medical circumstances, because the Claimant's long service with the Carrier and the extenuating circumstances mitigate against the harsh discipline imposed, and because the Claimant offered to pay full restitution and the Carrier took back what it felt the Claimant owed from the Claimant's vacation pay.

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 misappropriating Carrier monies and falsifying time documents on various dates in September of 2010. There is also sufficient evidence that the Claimant was guilty of using a Carrier vehicle for an unauthorized purpose.

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 Claimant in this case was guilty of a very serious offense. He had previously been found guilty of a similar serious offense of misappropriation of Carrier assets in 2008. The Claimant paid restitution in 2008 and the Carrier was able to obtain restitution from the Claimant in this matter as well. Theft or misappropriation of Carrier assets very often leads to the termination of an employee, even on the first offense. However, this Board recognizes this Claimant's thirty-five years of railroad experience, including eleven with this Carrier. The Claimant was also going through very trying circumstances with a wife who was seriously ill at the time of this incident. Consequently, this Board finds that the Carrier acted unreasonably and arbitrarily when it terminated the Claimant's employment. We order that the Claimant be reinstated to service but without back pay. The time that the Claimant was off work, which was more than one year, shall be considered a lengthy disciplinary suspension for his wrongdoing. The Claimant shall be reinstated on a last-chance basis and it should be made clear to the Claimant that any future infraction of Carrier rules will lead to his dismissal.

AWARD:

The claim is sustained in part and denied part. The Claimant shall be reinstated to service but without back pay. He is being reinstated on a last-chance basis in accordance

with the above decision.



PETER R. MEYERS
Neutral Member



CARRIER MEMBER

DATED: 10/25/11



ORGANIZATION MEMBER

DATED: 10/26/11

BEFORE PUBLIC LAW BOARD NO. 7007

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

Case No. 42

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. Carrier's dismissal of Claimant William Parziale 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.
2. Claimant Parziale shall be reinstated to his position with the Company with his seniority unimpaired and be compensated for all lost wages and benefits which would accrue to him as provided for in the Scheduled Agreement and his record cleared of the charge."

FINDINGS:

By notice dated December 14, 2010, the Claimant was directed to attend a formal investigation and hearing on charges that he allegedly had instructed an employee to foul the track and put a piece of equipment on the track at a location that was not covered by protection, that he allegedly had been a passenger in a vehicle that operated past a stop signal without requesting or receiving permission from the Train Dispatcher, and that he allegedly had falsified an official Carrier document that improperly listed the territory on which he was qualified. The investigation was conducted, after a postponement, on December 30, 2010. By letter dated January 7, 2011, the Claimant was informed that as a result of the hearing, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization filed the instant claim on behalf of the Claimant, challenging the Carrier's decision to discipline the Claimant. The Carrier denied the

claim.

The Carrier contends that the instant claim should be denied in its entirety because the Carrier proved that the Claimant was guilty of violating all of the cited rules as charged, because there are no circumstances that would serve to mitigate the Claimant's responsibility for these offenses, and because the discipline imposed was proportionate to the serious nature of the Claimant's violations. The Organization contends that the instant claim should be sustained in its entirety because the Carrier has failed to meet its burden of proving that the Claimant lied or misled anyone or that he falsified any document, because all that the Claimant did was to have a vehicle pass a red signal, because the normal discipline imposed for this offense is a thirty-day suspension, and because the discipline imposed was disparately harsh and was not based on the facts of this case.

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 several rule violations, including instructing an employee to foul a track and put a piece of equipment at a location that was not protected, occupying a vehicle that operated past a stop signal, and falsifying official Carrier documents when he bid for a position as a B&B foreman.

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.

Although fouling a track right through a stop signal might only lead to a thirty-day suspension, as the Organization argues, the Claimant in this case was guilty of a much more serious offense as well. When the Claimant bid for the foreman position, he told the Roadmaster that he was qualified everywhere on the North Side. On his bid sheet, the Claimant made the same representation. Obviously, if the Claimant had been fully qualified on the physical characteristics of the entire territory, he would have not allowed the track to be fouled as he did in this case. The Claimant's falsification of Carrier documents could have led to very serious results.

It is fundamental that an employee is required to be honest when filling out bid documents. In this case, the Claimant was less than that. Given the seriousness of that offense, as well as the other offenses of which the Claimant was properly found guilty, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated his employment. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS

Neutral Member


CARRIER MEMBER

DATED: 10/24/11


ORGANIZATION MEMBER

DATED: 10/26/11

BEFORE PUBLIC LAW BOARD NO. 7007

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

Case No. 45

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. Carrier's dismissal of Claimant Marvin Morgan 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.
2. Claimant Morgan shall be reinstated to his position with the Company with his seniority unimpaired and be compensated for all lost wages and benefits which would accrue to him as provided for in the Scheduled Agreement and his record cleared of the charge."

FINDINGS:

By notice dated March 21, 2011, the Claimant was directed to attend a formal investigation and hearing on charges that he allegedly had incurred a total of ten AWOLs during the period from January through March, 2011, in violation of the Carrier's Attendance Policy. The investigation was conducted, after a postponement, on April 4, 2011. By letter dated April 14, 2011, the Claimant was informed that as a result of the hearing, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization filed the instant claim on behalf of the Claimant, challenging the Carrier's decision to discipline the Claimant. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because the Carrier proved that the Claimant was guilty as charged of violating the Attendance Policy, because the Claimant demonstrated a clear pattern of being AWOL from work,

because the alleged mitigating circumstances did not prevent the Claimant from calling in, and because the discipline imposed was proportionate to the serious nature of the Claimant's violations. The Organization contends that the instant claim should be sustained in its entirety because the Claimant was unable to call until after the starting time due to circumstances beyond his control, because the Claimant was not AWOL in that he did call in as soon as he was able to, and because the Claimant complied with Rule 16 of the Schedule Agreement.

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 not following the Carrier's attendance policy when he was absent without leave on ten separate occasions between January 25, 2011, and March 18, 2011. All ten dates have been shown in the Carrier records as "AWOL - No call, No show."

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 reveals that the Claimant had attendance problems in the past and that in April of 2010, the Claimant signed a waiver document containing a "final warning." That document includes the following language:

In accordance with Step #4 of the Discipline Progression contained in the

Attendance Policy for attendance-related offenses, this will constitute a "Final Warning" for you to directly modify your heretofore unacceptable habits as they apply to your attendance at work. Another proven offense committed within a 9-month period could result in your dismissal from service. Conversely, 2 years of active services with a discipline-free record will allow you to revert to Step #1 of the Discipline Progression. You are hereby instructed to review the MBCR Attendance Policy and the applicable rules from the MBCR Code of Conduct as they apply to your attendance.

Given that previous history, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant after ten AWOLs in less than a two-month period after signing the waiver containing the warning. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



CARRIER MEMBER

DATED: 10/25/11



ORGANIZATION MEMBER

DATED: 10/26/11