

BEFORE PUBLIC LAW BOARD NO. 7007

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

Case No. 8

STATEMENT OF CLAIM:

- (a) Carrier's suspension of Claimant Dale Nickerson 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 Schedule Agreement.
- (b) Claimant Nickerson shall be compensated for all lost wages and benefits which would accrue to him as provided for in the Schedule Agreement and his record cleared of the charge.

FINDINGS:

By letter dated August 13, 2007, the Claimant was directed to appear at a formal investigation on charges that the Claimant allegedly had left his assigned worksite before his scheduled departure time on August 8, 2007, in violation of Carrier Rules. After a postponement, the investigation was conducted on October 30, 2007. By letter dated November 8, 2007, the Claimant was notified that as a result of the investigation, he had been found guilty as charged, and he was being suspended for ten working days. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to suspend him. The Carrier denied the claim.

The Carrier initially contends that there is no dispute that the Claimant left the worksite before his scheduled time of departure on August 8, 2007. The Carrier asserts that it was raining at the start of that workday, and the Production Supervisor and two

Foremen in charge of the gang had conferred and agreed to hold the bus and wait for the rain to stop before proceeding with a full day's work. The Carrier argues that this was in line with the weather report for the day which forecast that the rain would stop early in the morning.

The Carrier maintains that the testimony demonstrates that the Claimant clearly understood that he was expected to be present at the worksite for the entire work day. The Carrier points out that the Claimant protested the order to one of the foremen, who emphatically made it clear to the Claimant that he was expected to remain at the work site, even if he had to find something else to occupy his time. The Carrier emphasizes that except for the Claimant, and three other workers, all of the other members of the gang, which numbered about forty-one workers, remained on the bus. The Carrier argues that this should have alerted the Claimant to the fact that he needed to make further inquiries and seek specific permission to leave the worksite.

Addressing the Claimant's assertion that he did have permission to leave, the Carrier maintains that the Claimant corrected himself during his testimony, stating that he told one of the foremen that he was leaving; the foreman denied giving the Claimant permission to leave. The Carrier insists that telling your supervisor that you "ain't sitting on a f***** bus all day" cannot, by any reasonable measure, be considered a request to the supervisor for permission to leave the job. The Carrier contends that the Claimant never sought permission to leave the work site, and no such permission ever was given to him.

As for the Organization's point that no one specifically told the Claimant that he

could not leave the property, the Carrier asserts that this is irrelevant. The Carrier argues that the rules do not require supervisors to inform employees, who decide to quit the premises on their own accord, that they cannot leave. Instead, the burden is on the employee to seek and obtain supervisory permission before leaving.

The Carrier emphasizes that it is plain that the Claimant violated the Carrier's Code of Conduct. The Carrier points to the Organization's request that the discipline be reduced so as to be commensurate with the two other employees who were charged with the same offense and received a lesser punishment. The Carrier asserts that comparisons cannot be drawn with cases that were not appealed and otherwise resolved. The Carrier argues that the discipline imposed was, in fact, commensurate with the proven offense.

The Carrier further maintains that the Claimant received a full and fair investigation, and he was afforded all procedural due process to which he was entitled. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the allegations against the Claimant simply are not true. The Organization asserts that Foreman Morris testified that it was possible that the Claimant had informed him that he needed to go home on the date in question. Morris also confirmed that there have been past incidents in which employees have approached him with appointments or other reasons to leave, and Morris did not recall anyone being punished for doing this.

The Organization insists that the fact that Morris does not specifically remember the conversation does not mean that the conversation did not happen. The Organization maintains that the Claimant was very clear in stating that he told Morris that he would be

leaving, and that the Claimant was not denied the right to leave. The Organization argues that after speaking with Morris, the Claimant was not given any instructions that required him to stay. The Claimant therefore did not fail to follow instructions.

The Organization emphasizes that the Carrier's findings fail to mention the fact that the Claimant possibly might have, by chain of command, informed Foreman Morris that he needed to go home. The Claimant was attempting to obtain authorization. As Morris' testimony demonstrates, the Carrier's assertion that the Claimant was AWOL simply is not accurate.

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 Rule 2 of the MBCR Code of Conduct, but there is insufficient evidence that the Claimant was guilty of violating Rules 4 and 8 of the MBCR Code of Conduct. Therefore, this claim must be sustained in part and denied in part.

The record does reveal that Claimant Nickerson acted discourteously toward his supervisor when he used the "F" word and argued with his supervisor over having to remain on the bus all day during the rain. That behavior on the part of the Claimant clearly violated Rule 2, which requires courtesy and professional conduct on the part of the employees of the MBCR. Consequently, the hearing officer appropriately found that

the Claimant was guilty of that rule violation.

However, with respect to the AWOL charge, there is insufficient evidence to support the guilty finding. Production Supervisor Joe Rodrigues was not clear in his testimony that the plan was to wait until the rain stopped and then to proceed to work after that. When he was asked by the management representative, "Was this plan conveyed to the employees?," Rodrigues testified, "When I talked to their Foreman, I would imagine they conveyed to their . . . to the rest of the people." He also stated that to the best of his knowledge, Claimant Nickerson was informed of the plan.

Foreman Morris was also unclear in his testimony at the hearing when he was asked by the Organization representative:

Winter: On this particular date in question, did either Mr. Nickerson or Mr. Proulx come to you and say I have something that, I'm going to go home?

Morris: I don't remember.

Winter: Is it possible that one of them might have done that?

Morris: Possible, sure. I mean, like I say, the days run one to another and I wasn't paying that close of attention. They might have . . .

Mr. Morris went on to state that he never had any problems with either Mr. Proulx or Mr. Nickerson with them obeying instructions or directions that he might have given them.

It is fundamental that in discipline cases, the Carrier has the burden of proof of showing that the Claimant violated the rules in question. In the case of the AWOL and

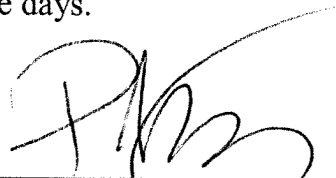
attendance violation, the Carrier has failed to meet that burden of proof.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding on the courtesy and professional conduct charge, 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.

Since the Claimant received a ten-day suspension for violations that included both the AWOL and attendance violation as well as the courtesy violation, and this Board has determined that there was no basis for the issuance of discipline for the attendance and AWOL violations, we find that it was unreasonable to issue a ten-day suspension to this Claimant. Therefore, we hereby order that the ten-day suspension be reduced to a five-day suspension and the Claimant be made whole for the additional five days.

AWARD:

The claim is sustained in part and denied in part. The ten-day suspension of the Claimant is hereby reduced to a five-day suspension, and the Claimant shall be made whole for the additional five days.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 2/5/09

DATED: February 5, 2009