

BEFORE PUBLIC LAW BOARD NO. 7007

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

and

MASSACHUSETTS BAY COMMUTER RAILROAD COMPANY

Case No. 1

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

1. The discipline [sixty (60) days suspension, disqualification as foreman in all classifications and requalification on the RWP Rules] imposed upon Mr. C. Bizzle under letter dated February 18, 2006 on charges of alleged violation of NORAC Rules 3 and 132, RWP Rules 313 and 315 and the Attending to Duties and Safety Sections of the MBCR Code of Conduct while assigned as track foreman on January 26, 2006 and in connection with an incident when the bucket loader operated by Mr. McInnis was struck by Train #759, was arbitrary, capricious, unwarranted, on the basis of unproven charges and in violation of the Agreement (Carrier's File MBCR-02D/0206 MBC).
2. As a consequence of the violation referred to in Part (1) above, Mr. C. Bizzle 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 foreman on Track Gang V-336.

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 allowed a bucket loader under his jurisdiction as foreman to foul Mainline #1 on the Dorchester Branch, resulting in Train #759 striking the bucket loader; that the Claimant had failed to conduct a proper RWP Job Briefing that day; and that the Claimant did not possess a working timepiece that day, which contributed to the incident. After a postponement, the

investigation was conducted on February 8, 2006. By letter dated February 18, 2006, the 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, was being disqualified as a foreman, and that he would have to requalify on the RWP 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 contends that the serious collision at issue occurred because the Claimant had failed to properly perform his duties as foreman of the crew. The Carrier asserts that the Claimant's actions exhibited gross negligence on his part as to the safety of his crew members, and it therefore warranted severe discipline. The Carrier argues that the record establishes beyond dispute that the Claimant failed to conduct a proper job briefing with all members of his crew before the work began.

The Carrier maintains that RWP Rule 315 clearly specifies what is required before any employee can foul a live track. The Carrier argues that these procedures were written to eliminate the kind of slip-shod, going-through-the-motions, ambiguous directions that the Claimant provided to his crew on the date in question. The Carrier emphasizes that the Claimant's so-called "job briefing" did not contain any of the fifteen items that this Rule establishes as being necessary to consider when conducting a job briefing under such circumstances. The Carrier insists that the cursory discussion between the Claimant and McInnis did not rise to the level of a "job briefing," nor did it satisfy Rule 315. The Carrier points out that the Claimant did not seek or receive an acknowledgement from McInnis that McInnis understood exactly what the on-track safety procedures would be. The primary responsibility of conducting a proper job briefing rested with the Claimant,

and no one else.

The Carrier goes on to argue that there can be no dispute that the Claimant also violated NORAC Rule 132. Under this Rule, McInnis was prohibited from getting his equipment afoul of the track without the Claimant's specific permission. The Carrier emphasizes that the Claimant was responsible for making sure that McInnis did not get into position until the Claimant had secured foul time and had specifically authorized McInnis to do so. The Carrier insists that the Claimant's explanation – that he assumed that McInnis was merely "getting in position" – is insufficient to explain the Claimant's actions, particularly in light of the fact that the Claimant knew that permission from the dispatcher had not been secured.

The Carrier then argues that the Claimant's failure to properly communicate with McInnis made the Claimant equally responsible for the violation of Rule 313. The Carrier maintains that the Claimant was responsible, under this Rule, for ascertaining that McInnis understood and was complying with all safety procedures before fouling a track. The Carrier asserts that the Claimant also violated the MBCR Code of Conduct in that the Claimant failed to follow the safe course of action when he failed to comply with all of the safety requirements related to his position. The Carrier insists that the Claimant utterly failed to fulfill the expectations and requirements of a Foreman by allowing the incident in question to occur.

The Carrier goes on to contend that the Claimant also violated Rule 3, admitting that he did not use a reliable watch, and that his cell phone, which he relied upon for the time, did not display the accurate time. The Carrier asserts that this failure played a significant role in the incident at issue, pointing to the Claimant's testimony that he did

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not know whether or not Train #759 already had passed. If the Claimant had realized that Train #759 had not yet passed, then the Claimant would have taken more time and deliberation in his actions.

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 Foreman, 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.

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

The Organization initially emphasizes that the Claimant held the position of foreman for more than six years, and there is no indication of any prior discipline. The Organization contends that the record establishes that on the date in question, the Claimant conducted a job/safety briefing with Machine Operator McInnis and his gang prior to departing from headquarters, and that the Claimant conducted another briefing with McInnis prior to commencing work at the scene. The record further confirms that the Claimant routinely conducts the required job/safety briefings. The Organization maintains that the evidentiary record clearly demonstrates that the Claimant did conduct a proper briefing on the date in question, as required by Carrier rules. The Organization asserts that the Carrier has not shown otherwise.

The Organization argues that McInnis misunderstood the Claimant's use of the common term "set to go" as confirmation that "foul time" had been obtained. The Organization acknowledges that the position of foreman carries considerable responsibility, but the Organization asserts that it is impossible and unreasonable to expect that a foreman can control all of the actions of the employees under his supervision, particularly where an employee has misunderstood or misinterpreted the supervisor's instructions. The Organization points out that this and other Boards have recognized that a foreman cannot be held responsible for each and every action of each employee under his charge.

The Organization insists that the Claimant did provide a proper job/safety briefing. The Claimant was not negligent, and he did not fail to perform the duties associated with

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his assignment as foreman. The Organization asserts that there is no evidence in the record that the Claimant violated the rules with which he was charged. The Organization argues that the Carrier has failed to meet its burden of proof in this matter, and the Carrier may not rely on mere speculation, assumption, or conjecture as a basis for the imposition of discipline. The Organization maintains that the evidentiary record fails to justify the discipline imposed upon 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 acted in violation of RWP Rules 313 and 315 and NORAC Rules 3 and 132 on January 26, 2006, when he allowed a bucket loader operated by an employee under his jurisdiction to foul the mainline without obtaining the proper authority to foul the track. In addition, there is sufficient evidence in the record to support the finding that the Claimant failed to conduct a proper RWP job briefing prior to performing the action and he did not possess a working timepiece on January 26, 2006, also in violation of the NORAC rules. This Board determines that the Claimant acted in violation of several Carrier rules and subjected himself to disciplinary action.

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 set of rule violations. Consequently, this Board finds that the Carrier had a right to act severely toward the Claimant in an effort to assist him in improving his conduct and teach him the importance of complying with the rules. This case involved a very serious collision between one of the Carrier's commuter trains and a piece of track equipment, and the Claimant was in part responsible for that action because of his rule violations. Consequently, this Board finds that the Carrier did not act unreasonably, arbitrarily, or capriciously when it issued the sixty-day suspension against the Claimant and disqualified him as foreman. It also did not act inappropriately when the Carrier required that he be re-qualified on the RWP rules. For all of the above reasons, the claim must be denied.

AWARD:

The claim is denied.


PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER


CARRIER MEMBER

DATED: 11/2/07

DATED: 11/02/07