

BEFORE PUBLIC LAW BOARD NO. 7007

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

Case No. 22

STATEMENT OF CLAIM:

Carrier's assessment of discipline upon Claimant T. Soares, in the form of a formal reprimand and full restitution of a \$500.00 fine, was arbitrary, extremely harsh, and not based on the facts developed at the hearing. The Claimant's record should be cleared of the charges and of any formal reprimand, and the Claimant should be exempt from having to pay full restitution of the \$500.00 fine.

FINDINGS:

By letter dated March 10, 2008, the Claimant was directed to appear at a formal investigation on charges that the Claimant allegedly had violated Carrier Rules when he operated his Carrier vehicle through the South Boston Tunnel while carrying hazardous materials, resulting in the Claimant being stopped by police, who issued a summons with an associated \$500.00 fine. After a postponement, the investigation was conducted on April 11, 2008. By letter dated April 18, 2008, the Claimant was notified that as a result of the investigation, he had been found guilty as charged, and he was being issued a formal reprimand and was directed to pay full restitution of \$500.00 to the Carrier through payroll deductions. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier initially contends that during the incident at issue, the Claimant failed to observe several warning signs, and he illegally drove through the South Boston Tunnel while carrying hazardous materials. The Claimant was stopped by the police, who issued

a summons to the Carrier with a subsequent fine of \$500.00. The Carrier asserts that the Claimant was familiar with the Carrier's Code of Conduct and its policies regarding "prohibited acts" and "safety." The Carrier argues that the record conclusively establishes that the Claimant received copies of these items.

The Carrier maintains that there is no merit to the attempt to cast the Claimant as a novice driver of the hi-rail truck and its cargo. The Carrier points out that the truck was assigned to the Claimant's crew, and the Claimant admittedly was a frequent passenger. The Carrier emphasizes that the Claimant was so familiar and comfortable with the truck that he chose to use it to get to Cobble Hill, even though his personal vehicle was readily available. The Carrier submits that when the Claimant designated himself as the truck's driver, he assumed all of the responsibilities of its regular driver to operate the vehicle and its contents safely and within the boundaries of the law. The Claimant failed to fulfill his responsibilities when he drove through the South Boston Tunnel with a load of hazardous materials.

Addressing the written statements from other employees in support of the Claimant, the Carrier asserts that even if other drivers have violated the rules of the road, this does not absolve the Claimant of his responsibility to abide by the same. Moreover, as a regular occupant of the vehicle, the Claimant should have been familiar with the existing state of affairs. The Carrier points out that even if the Claimant did not know the state of the tanks on the vehicle, the Claimant should not have made the decision to drive a Carrier vehicle on a public highway loaded with tanks, the contents of which could range from mildly dangerous to highly explosive.

The Carrier then argues that there is no valid excuse for the Claimant's use of the tunnel in the more plausible event that the tanks were the usual cargo when the Claimant had been on the truck and the Claimant had knowledge of other driving using the tunnel while hauling the tanks. The Carrier points out that as a passenger in the vehicle, the Claimant usually was in a better position than the driver to see signs along the road, and the Claimant therefore should have recognized the signs and warned of the impending violations. Moreover, as a licensed driver for twenty years, the Claimant must be irrefutably presumed to be familiar with all the rules of the road, including highway signs. The Claimant acknowledged that he was responsible for following the rules of the road.

The Carrier goes on to assert that there were at least two warning signs about hazardous materials on each of the three available routes to Interstate 93. The Carrier insists that if the Claimant was unaware of these signs, this would be negligence. Moreover, if the Claimant simply did not pay attention to the highway signs, as his testimony suggested, then this would be gross negligence. The Carrier maintains that not only did the Claimant fail to observe the signs and warn drivers on the previous occasions, in direct violation of the Carrier's Safety Rules and Code of Conduct, but the Claimant compounded his liability by yet again overlooking the signs and driving the tanks through the tunnel himself.

The Carrier then emphasizes that although the Claimant was vague as to whether he had undergone Hazmat training, and was adamant that he had not gotten the more specialized training that is provided to oxygen and acetylene welders, the Claimant

admittedly knows the symbols for hazardous materials. The Carrier submits that it is incredible that the Claimant would not know the contents of the tanks that appeared to be a permanent feature of one of his work transport vehicles. The Carrier further points out that the Claimant admittedly knew that he was carrying oxygen and acetylene tanks, that they were explosive under certain conditions, and that they could cause significant damage in the tunnel, including loss of life. The Carrier insists that under any circumstances, these elements constitute the very definition of "hazardous."

As for the Carrier's assumption of full responsibility for this type of fine in a previous case, the Carrier maintains that this was influenced by the newness of the tunnel and improper signage at the time. The Carrier points out that these no longer were issues at the time of the incident in question.

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

The Organization initially contends that there is no evidence that the Claimant ever was instructed that oxygen and acetylene tanks are considered a hazardous cargo or commodity. As a Machine Operator, the use of acetylene and oxygen is not a part of the Claimant's daily duties. The Organization asserts that this would not be common knowledge among employees who have not been properly trained.

The Organization argues that the fact that the Carrier has failed to properly instruct its employees regarding hazardous commodities does not mean that the Carrier is exempt from any portion of the \$500.00 fine. The Organization points out that the Carrier admitted that there was a past incident, similar to the Claimant's case, where the Carrier

paid the entire fine and did not issue any formal reprimand. The Organization insists that the Carrier must take some responsibility in this matter, and it is not fair that the Claimant be treated any differently than past employees in similar situations.

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 Carrier rules and traffic laws when he operated a Carrier vehicle that was carrying hazardous materials through a south Boston tunnel. The Claimant's actions were in violation of Rule 8(m) and Rule 9(a) of the MBCR Code of Conduct.

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.

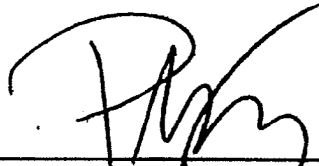
The Claimant in this case was issued a formal reprimand which this Board finds to be entirely appropriate. The Claimant admits that he is responsible to follow Carrier rules and he knew that he had a possibly explosive vehicle that he was operating through the tunnel. The Carrier also has required the payment of the \$500.00 fine for the traffic offense, which this Board also finds to be completely appropriate. The Claimant admitted that when he violates the law and receives a ticket, he is responsible for paying

that fine. Although the Organization contends that the Carrier is partially responsible for the Claimant's violation of the rule here, this Board does not agree. The Claimant, when he is doing his job, must be aware of all of the laws under which he is operating his vehicle and he must comply with them. If he fails to comply, he is responsible to pay the fine.

For all of the above reasons, this claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 12/8/09

DATED: 12-08-09