

BEFORE PUBLIC LAW BOARD NO. 7007

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

Case No. 26

STATEMENT OF CLAIM:

Carrier's dismissal of Claimant M. Tolson 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 the Claimant should be immediately returned to work and compensated for all lost wages and benefits.

FINDINGS:

By letter dated December 3, 2008, the Claimant was directed to appear at a formal investigation on charges that the Claimant allegedly was dishonest in that he falsified a verbal and written statement by asserting that, while working as Foreman, he did not allow the L-90 Volvo Loader to foul Track #2. The notice further alleged that the Claimant had authorized this movement across both Tracks #1 and #2, which was an unsafe and unnecessary act that resulted in a "close call" when Train 456 made its scheduled arrival on Track #2. The notice also alleged that the Claimant failed to provide the proper RWP Job Briefing, failed to complete the RWP Job Briefing Form, and failed to submit the RWP Job Briefing Form to the Engineering Department for review. After two postponements, the investigation was conducted on February 23, 2009. By letter dated March 4, 2009, 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 addresses the Organization's position that the Carrier violated the thirty-calendar-day rule by issuing charges outside of the time limits. The Carrier emphasizes the hearing officer's finding that actual knowledge of the events did not occur until December 3, 2008, when the Safety Department issued its findings, and not on October 17 or October 27 as alleged. The Carrier maintains that it was at this point that the Carrier was able to determine that the Claimant had engaged in deception to conceal his true role in the events of October 17, 2008. The Carrier points out that charges were promptly issued on the same date.

The Carrier asserts that the hearing officer's conclusions were appropriate with respect to both the facts of the case and the procedural issues. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the record demonstrates that Carrier Supervisor Rodrigues admittedly first was notified of the incident on October 17, 2008. The Organization asserts that the record makes very clear that October 17, 2008, was the first date that the Carrier had actual knowledge of the alleged events.

The Organization argues that during his October 29, 2008, interview by the Carrier's Director of Safety and Security and its Safety Advisor, the Claimant was told that he would be attending remedial RWP training. The Organization insists that at this point, the Carrier obviously knew the outcome of its investigation revealed a rules violation as it advised the Claimant that he would be attending remedial RWP training.

The Organization submits that it is apparent that the Carrier had actual knowledge

of the alleged incident in October 2008. The Carrier's Notice of Investigation is dated December 3, 2008, far outside the thirty-calendar-day limit set forth in Rule 15 of the parties' Agreement. The Organization emphasizes that pursuant to Rule 15, no charge shall be made that involves any offense of which the Carrier had actual knowledge for thirty days or more.

The Organization points out that the Claimant has an outstanding disciplinary record with only one minor infraction. The Claimant is a loyal and dependable employee who does not deserve this harsh punishment.

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 procedural arguments raised by the Organization, and we find them to be without merit. This Board finds that the Claimant was guaranteed all of his due process rights throughout the proceedings.

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 falsifying a verbal and written statement to both the MBCR and the FRA when he advised them that while working as a foreman in Lincoln, Massachusetts, he did not allow a L-90 Volvo Loader working under his direction to foul Track #2. The record reveals that the Claimant failed to complete the RWP job briefing form as well as failing to submit the RWP job briefing form to the Engineering Department for review. All of

the Claimant's actions violated several Carrier rules.

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 originally terminated for his actions. Subsequently, this Board agreed to have the Claimant returned to work in July of 2009. The Claimant has since returned to work. This Board has determined that the action taken by the Carrier in terminating the Claimant was unreasonable. We hereby order that the Claimant be returned to work but without back pay. The period that the Claimant was off work shall be considered a lengthy disciplinary suspension in response to the Claimant's wrongdoing.

AWARD:

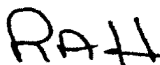
The claim is sustained in part and denied in part. The Claimant shall be returned to service, but without back pay. The period of time that the Claimant was off shall be considered a lengthy disciplinary suspension in response to the Claimant's wrongful actions.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 12/8/09

DATED: 12-08-09