

BEFORE PUBLIC LAW BOARD NO. 7007

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

Case No. 4

STATEMENT OF CLAIM:

- (a) Carrier's dismissal of Claimant Arthur Jodrey 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 Jodrey 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 Schedule Agreement and his record cleared of the charge.

FINDINGS:

By letter dated June 28, 2006, the Claimant was directed to attend a formal hearing and investigation in connection with charges that the Claimant had violated Carrier's Rules on June 22, 2006, by operating a people mover in a negligent manner that resulted in a collision that caused or contributed to a fatal injury to a fellow employee. After a postponement, the investigation was convened on September 18, 2006, and then completed on September 26, 2006. By letter dated October 5, 2006, the Claimant was informed that as a result of the investigation, he had been found guilty as charged, and that he was being dismissed from the Carrier's service in all capacities. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that the record establishes that the Claimant was

solely responsible for the circumstances that resulted in fatal injuries to a fellow employee. The Carrier asserts that there is no evidence to support the Organization's position that extenuating conditions beyond the Claimant's control materially impaired the Claimant from complying with the provisions of restricted speed and clearance requirements for on-track work equipment. The Carrier argues that the Claimant operated the People Mover in violation of procedures that were put in place to foster on-track vigilance and the protection of railroad workers. The Carrier emphasizes that there were no other direct witnesses to the incident, and the Claimant did not provide any information as to any other true contributing factors to the accident.

The Carrier points out that it conducted a rigorous post-accident investigation that supports the conclusion that the Claimant bore full responsibility for this tragic incident. The Company maintains that it provided the Claimant with a fair disciplinary hearing, and the record supports the guilty finding.

Addressing the Organization's arguments, the Carrier asserts that the accident reconstructions were either consistent with the industry norms or in excess of standards. The Carrier insists that it did not rush to assess blame against the Claimant. The evidence further establishes that it maintained the People Mover in accordance with the applicable standards, and there is no evidence that this machine was in service short of the established requirements. The Carrier points out that the People Mover's regular operator did not take any exception to the vehicle at any point during the days preceding the accident, and the Carrier's roadway mechanic and investigating officials took no exception to the People Mover's condition or brake functions.

The Carrier maintains that the Organization's assertion that the People Mover had been removed for a brake or other related malfunction after the accident was shown to be erroneous; the September 2006 examination relating to a "stall out" was due to a bad fuel line. There also is no support for the Organization's argument of a brake problem in June 2005. The Carrier insists that the evidence also dispels the Organization's theory that poor track conditions caused the People Mover's brakes to malfunction and/or contributed to the "sliding." The Carrier points out that eleven other machines passed over the area without incident.

As for the Organization's contention that the Carrier allows its employees to haphazardly familiarize themselves with equipment, the Carrier asserts that this is a hollow argument and inapposite with the Organization's other suggestion that the Claimant is a seasoned operator who never would commit this type of error outside of extenuating circumstances. The Carrier maintains that no other employees were assisting or operating equipment around the Claimant in a distracting way. Even if there were some imposing condition, the Claimant was required to pay due diligence to what he was doing. The Carrier argues that the evidence shows that the Claimant's actions were a sad departure from vigilance. There was too much straight track and a generally good sight line between the crossing and the Clipper to explain why the Claimant could not have effectively stopped the People Mover if he had been moving at a safe speed. The Carrier contends that to comply with restricted speed, the Claimant should have been prepared to stop within one-half the range of vision as he progressed towards the Clipper and the employees working around it.

The Carrier argues that it has satisfied the threshold of proof required in railroad discipline cases. The Carrier's decision to discharge the Claimant cannot be viewed as an abuse of discretion in that the Claimant demonstrated a lack of constant vigilance and adherence to safety protocols that are conditions of employment, and the Carrier points to prior Board Awards upholding discharge in other cases involving fatal incidents. The Carrier submits that there is no basis for modifying the discipline imposed in this case, so the discipline should not be disturbed.

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

The Organization initially contends that the Claimant is not guilty of the charges brought against him. The Organization asserts that the Claimant, a long-time employee, knows and understands the rules, and he never would have knowingly done anything to violate those rules. Something happened to cause these two machines to come together, and the Organization suggests that it was some unforeseen mechanical issue.

The Organization emphasizes that testimony at the hearing leads to speculation as to what might have happened. The Organization points out that the record establishes that someone moved the Clipper after the accident. Moreover, there is no way to tell how fast the People Mover was moving at the time of the incident, although testimony does establish that it was proceeding at a very slow rate of speed when it crossed over Stanwood Avenue. The Organization insists that there was no need to go any faster as there were only a couple of hundred more feet to travel to the other machines. The Organization contends that when the Claimant attempted to stop the machine, it

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continued to move. The Organization asserts that the Claimant applied the brakes in plenty of time to stop within the required distance from the Clipper, and it cannot be determined whether the brakes locked the wheels or the brakes failed. What is known is that the machine failed to stop, and the collision occurred.

The Organization points to the testimony of Mechanic Pettipas that there are instances when machines fail for an operator and subsequent tests find that nothing is wrong. The Organization argues that the instant situation must be one of those times. The Organization insists that the Claimant never would have done anything to place another person in such a situation.

The Organization goes on to assert that the record shows that the Claimant, as he was applying the brakes, could not find the small cord to blow the horn. The Claimant also testified that he was qualified on the Rules, and he was aware that he should not travel faster than ten miles per hour with this machine at any time. The Claimant applied the brakes in plenty of time, but the machine failed to stop. The Organization contends that oil on the tracks is a factor to be considered when stopping, as is the weight of the tool trailer.

The Organization further emphasizes that there was a prior incident in which this People Mover failed to stop. The Organization insists that this earlier incident was covered up by local supervision, and it was not mentioned until an employee belatedly claimed an injury.

The Organization then points out that although certain rules were presented into the record during the hearing, there is no evidence as to how, if at all, any of these rules

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may have been violated.

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The Organization insists that the Claimant is a very dependable employee. The Claimant had no previous discipline on his record. The Organization maintains that dismissing the Claimant will not bring back the employee who was killed in this accident, and the Claimant did not intentionally violate any Carrier rules. The Organization argues that the discipline at issue is extremely harsh and is not based in fact.

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 failing to abide by the Carrier's Operating Rules, as well as MBCR Policies, when he improperly operated the ballast regulator on June 22, 2006. The record reveals that the Claimant failed to control the movement of his equipment to permit stopping in time to avoid an accident and he also failed to maintain the appropriate clearance required by the rules. The Claimant's actions directly led to the accident which caused the death of another employee.

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.

An analysis of this record indicates that the Claimant established railroad seniority as a Trackman on October 1, 1979. He gained his Foreman seniority on August 1, 1985, and became a new employee of MBCR effective July 1, 2003. Given that lengthy seniority and good work record, this Board finds that the Carrier acted unreasonably, arbitrarily, and capriciously when it terminated the Claimant's employment. The Claimant was clearly deserving of discipline and, therefore, we order that the Claimant be reinstated to service, but without back pay. The period of time that the Claimant was off shall be considered a lengthy disciplinary suspension. This Board also orders that before the Claimant is to be put back into work, he is required to pass a physical examination, as well as go through retraining on the various equipment that he will be operating when he returns to work.

AWARD:

The claim is sustained in part and denied in part. The Claimant shall be reinstated to service, but without back pay. The period of time that the Claimant was off shall be considered a lengthy disciplinary suspension. In addition, the Claimant is required to pass a physical examination and be retrained and certified before he returns to work.


PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER


CARRIER MEMBER

DATED: 4/24/08

DATED: 04/24/08

Public Law Board 7007**Carrier's Dissent to finding in Award No. 4
Claimant: A. Jodrey**

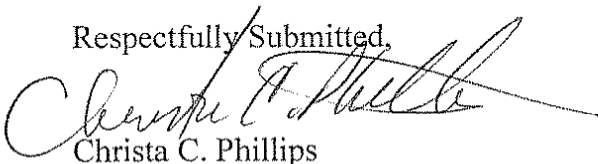
The Carrier vigorously dissents to the Board's decision to reinstate the Claimant. The case evolved from the most serious of tragedies, in that Claimant's proven failure to comply with rules and procedures regarding the safe operation of on-track equipment resulted in the death of a fellow employee on June 22, 2006. In fact, the Board unequivocally stated on page 6 of its opinion that "Claimant's actions led directly to the accident that resulted in the death of another employee." The record is quite clear that no other environmental condition, mechanical defect, or other distraction prohibited the Claimant from safely operating the "People Mover" track equipment in compliance with operating rules and procedures.

The Board based its reinstatement primarily on Claimant's "lengthy service and good work record" and finding that the "Carrier acted unreasonably, arbitrarily, and capriciously when it terminated the Claimant's employment." As noted in Carrier's Submission to the Board, Claimant had as recently as 2004 caused an on-track collision when he operated a machine into a parked piece of track equipment.

Aside from the above, there are certain offenses that transcend consideration of an employee's years of railroad service in determining the appropriate measure of discipline. The Carrier must act on every level to insure the on-track safety of its employees and cannot be expected to retain an employee whose lack of vigilance resulted in a loss of life. Indeed, Carrier's decision was *not* unreasonable, arbitrary or capricious.

For these reasons, it is the Carrier's position that the Board's decision poses an undue burden upon the Carrier's efforts to provide on-track safety; and foremost, that it should hold no precedent in any future case that is remotely similar in nature or involves a serious violation of operating and or safety rules.

Respectfully Submitted,



Christa C. Phillips
Manager, Labor Relations
MBCR