

**PUBLIC LAW BOARD NO. 7035
CASE NO. 4**

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(and
(
(National Railroad Passenger Corporation
(Amtrak

STATEMENT OF CLAIM:

- (1) Carrier's 30 day suspension of Claimant Eugene Wilsey 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 Scheduled Agreement.
- (2) Claimant Wilsey shall have his record cleared of the discipline and be compensated for all lost wages and benefits which would accrue to him as provided for in the Scheduled Agreement.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

On August 7, 2006, Claimant Eugene Wilsey was assigned to perform tie replacement on the south end of Track #4 in the Rensselaer Mechanical Facility Yard. While pulling spikes with a claw bar, the claw bar slipped off the head of the spike resulting in an injury to Claimant's shoulder and neck from the sudden jolt. According to the Carrier, had Claimant complied with Amtrak's safety rules, he would not have been injured. In addition, the Carrier contends that Claimant is injury prone as he has had an injury rate that is 163% higher than that of his co-workers.

By letter dated August 26, 2006, the Carrier notified Claimant that he was to attend a formal Investigation on August 31, 2006. The Investigation took place on May 3, 2007, addressing the following charges and specification:

Charges:

1) Your negligence and failure to exercise proper care and caution while performing your duties ... in that while pulling spikes with a clawbar for tie replacement ... your clawbar slipped off the head of the spike and caused your shoulder and neck area to be injured This was a violation of Amtrak's Standards of Excellence pertaining to Safety and Attending to Duties. ...

* * * *

4) Your continued injury proneness, as demonstrated by this latest reportable, lost-time injury on August 7, 2006, in that you have sustained six (6) injuries in the twelve years that you have been employed by Amtrak, since May of 1994. This is a substantially higher rate of accident frequency than other employees at this location and suggests that you are not working in a safe manner or that you are accident-prone.

Specification:

As reported by Mr. Wilsey, on Monday, August 7, 2006, at approximately 9:00 a.m., while working as a Machine Operator on the south end of Track #4 in the Rensselaer Mechanical Facility Yard ... Mr. Wilsey's clawbar slipped from under the head of the spike causing injury to his shoulder and neck from the sudden jolt. ... The resulting investigation of the injury determined that Mr. Wilsey's own negligent actions were the cause of his reported injury. ...

In a letter dated May 11, 2007, Claimant was notified that he was assessed a 30-day Suspension for violating Amtrak's Standards of Excellence pertaining to Safety and Attending to Duties.

By letter dated May 18, 2007, the Organization appealed the decision indicating that the Carrier did not meet its burden of proof and that the discipline assessed in the case was unwarranted and excessive. In addition, the Organization contended that Claimant was undergoing marital difficulties and was in the process of applying for an FMLA Leave, which was subsequently approved on August 3, 2006. On June 22, 2007, the appeal was denied by Carrier Representative Carmina Barron. On July 16, 2007, the Organization further appealed the matter. On August 6, 2007, Labor Relations Director Richard Palmer denied the appeal.

The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. The

Organization claims that the Carrier has been arbitrary and capricious in its treatment of Claimant, that the Carrier has abused its discretion and that the Carrier's determination to discipline Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. In addition, the Organization asserts that Claimant was not accident prone and should not be disciplined for said violation. The Organization asserts that the Carrier should now be required to overturn the discipline and make Claimant whole for all losses.

Conversely, the Carrier takes the position that it has met its burden of proof. Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes it clear that Claimant was guilty as charged. In addition, the Carrier claims that Claimant has sustained significantly more injuries than similarly situated co-workers. Based on the instant offenses and Claimant's prior record, a 30-day Suspension is an appropriate penalty.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166)

This Board has found substantial evidence in the record to sustain the Carrier's position in whole. The Carrier has proven that Claimant did violate Amtrak's Standards of Excellence. Based on the transcript of the Hearing, this Board cannot find that the Hearing Officer's determination was arbitrary or capricious and this Board will not overturn said determination. In addition, the Carrier has proven that Claimant did sustain substantially more injuries than did similarly situated co-workers. It is not improper for the Carrier to discipline an employee who is accident prone. *See* PLB No. 6478, Award 102 (Referee Zusman), PLB No. 6865, Award 8 (Referee Johnson).

This Board finds that the discipline of the 30-day Suspension was not unreasonable based on both the offense and Claimant's past record, and we will not disturb it. *See* PLB 6044 Awards No. 15, 24 and 26 (Zusman). *See Also* PLB 2945 Award 24) (Blackwell).

The claim is without merit. It will be denied.

Claim denied.

AWARD

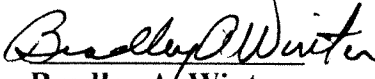
Claim denied.



Steven M. Bierig
Chairperson and Neutral Member



Rachelle Miele
Carrier Member



Bradley A. Winter
Organization Member

Dated at Chicago, Illinois this 13th day of Jan. 2009.