

NATIONAL MEDIATION BOARD, ADMINISTRATOR  
SPECIAL BOARD OF ADJUSTMENT NO. 957  
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In the Matter of the Arbitration

-between-

Brotherhood of Maintenance of  
Way Employees

OPINION AND AWARD  
Award No. 278

-and-

Southeastern Pennsylvania  
Transportation Authority  
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In accordance with the agreement in effect between the above-named parties, the Undersigned was designated as the Chairman and Neutral Member of the SEPTA-BMWE Special Board of Adjustment (the Board) to hear and decide a dispute concerning the following Claim:

1. The dismissal of Mr. D. Logan for violation of ASR-7, ASR-3B and NORAC 4. Job Briefing for the incident occurring on August 1, 2008 is unjust, unwarranted and in violation of the Agreement (Carrier's File 08-113-F12).
2. As a consequence of the violation in Part (1) above, Mr. Logan shall be made whole in accordance with the terms and conditions of the Agreement.

A hearing was held at the offices of the Employer in Philadelphia, Pennsylvania on February 12, 2009 at which time the Claimant and the representatives of the parties appeared. All concerned were afforded a full opportunity to offer evidence and argument and to examine and cross-examine witnesses consistent with the relevant procedures that exist between the parties. The Arbitrator's Oath was waived. The Board met in Executive Session after the hearing.

PRELIMINARY FINDINGS OF FACT

The Claimant worked for the Employer as a Mechanic on a tie production gang. The record indicates that at approximately 12:30 a.m. on August 1, 2008 an incident occurred between Supervisor/Track Foreman Reginald B. Woods, Track Foreman of the Regional Rail Production Gang John R. Pivariunas, and the Claimant. The incident involved a verbal exchange about the work assignment for the Claimant and also an unsuccessful effort by the Track Foremen to have the Claimant attend a job briefing.

The Employer found that the Grievant had engaged in insubordination by failing to comply with three direct orders to speak with the Track Foreman about the work assignment and the Claimant's failure to attend the job briefing. The Employer subsequently terminated the Grievant.

The Union filed a grievance concerning the termination. The Employer denied the grievance. The parties failed to resolve the matter during the preliminary steps of the grievance procedure. The dispute proceeded to the Board for a final and binding determination.

RELEVANT PROVISIONS

NORAC OPERATING RULES  
GENERAL RULES  
(Northeast Operating Rules Advisory Committee)  
Effective April 6, 2008

Reporting for Duty

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4. Job Briefings

When reporting for duty, employees whose duties require

coordination with other employees must hold a job briefing to review operational and safety conditions. If these conditions change, employees must hold an additional job briefing to discuss the new conditions.

Job briefings should be conducted face to face. When not practical or possible to do so, radio or telephone communication will be adequate.

RAILROAD OPERATIONS DIVISION  
RULES MANUAL  
Authority Standard Rules

ASR-3 Knowledge of Rules and Special  
Instructions/Qualification

. . . .

B. Authority Discipline

Failure to comply with the rules, practices, procedures, policies, or other directives that affect the employee's duties may result in disciplinary action, up to and including discharge as outlined in the applicable labor agreement or in the Authority policy manual.

ASR-7 Personal Conduct

Employees are expected at all times to conduct themselves in a manner which does not jeopardize or otherwise disgrace the public image of the Authority. Any actions which are deemed to be insubordinate, uncivil, immoral, indecent, socially disapproved, or otherwise abusive to other employees, passengers or the general public will be considered as conduct unbecoming of an Authority employee, and may subject the offending employee to disciplinary action up to and including discharge and other civil penalties depending upon the severity of the offense.

CONTENTIONS OF THE EMPLOYER

The Carrier asserts that just cause existed to terminate the Claimant. The Carrier maintains that the Claimant refused three direct orders to discuss the work assignment of the Claimant and to attend a federally-mandated job briefing at the start of the shift. It is the position of the Carrier that the Claimant's behavior constituted insubordination that warranted the summary

dismissal of the Claimant. The Carrier observes that no basis exists for leniency because the Claimant recently had received a prior unpaid disciplinary suspension for sleeping while on duty. The Carrier urges that the grievance be denied.

#### CONTENTIONS OF THE UNION

The Union considers the Employer's decision to terminate the Claimant to be arbitrary, capricious, and unwarranted. The Union stresses that the purpose of discipline is to rehabilitate, correct, and guide employees rather than to punish employees. The Union declares that the Employer should have followed progressive discipline instead of terminating the Claimant.

The Union emphasizes that the Employer failed to prove that the Claimant had violated any applicable rules during the verbal exchange that had occurred between two foremen and the Claimant. The Union underscores that the Employer has the burden of proof in the present disciplinary matter. As a consequence, the Union requests that the grievance be granted.

#### FINDINGS OF FACT AND OPINION OF THE BOARD

This case involves discipline. The parties stipulated that the Employer has the burden to prove its case by clear and convincing evidence.

A careful review of the record and of the credible testimony of Track Foremen Woods and Pivariunas indicates that the Claimant failed to respond without justification in an appropriate manner on repeated occasions on August 1, 2008 to the Track Foremen about job-related matters. Consistent with Authority Standard

Rules 3(B) and 7 cited above, the Track Foremen had a clear right to discuss the Claimant's work assignment with the Claimant and had a further clear right to insist that the Claimant attend a routine job briefing to discuss relevant safety issues. For whatever reason or reasons, however, the Claimant decided to engage in self-help by refusing even to talk in a proper manner with the Track Foremen as directed. The record omits any justification whatsoever for the Claimant's inexcusable, misguided, and rude behavior. If the Claimant had a valid objection to a prior directive to change a tamper machine, the Claimant should have obeyed first and grieved later. The record omits any hint, indication, or suggestion that the prior direction to the Claimant to change the tamper machine or the subsequent decision by the Track Foremen to rescind the order to change the tamper machine constituted unsafe or illegal acts. In fact, the Claimant's perplexing, unexplained, and unilateral decision to disregard the effort of the Track Foremen to have the Claimant attend a NORAC-mandated job briefing to discuss safety issues exacerbated the Claimant's ongoing defiance of appropriate supervisory authority. In the absence of any valid basis for the Claimant to have repeatedly disregarded the clear and unequivocal directives of the Track Foremen, the record proves by clear and convincing evidence that the Claimant had engaged in repeated acts of insubordination that provided a basis for summary dismissal.

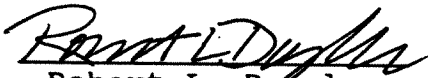
Under these highly unusual circumstances, the record omits

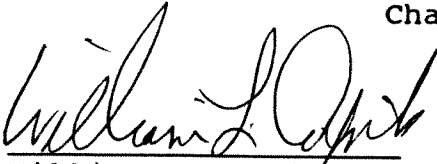
any basis to absolve, excuse, or relieve the Claimant from the obligation that existed for him to have complied with the clear, direct, and reasonable efforts of the Track Foremen to convey instructions about the Claimant's work assignment and about the mandated job briefing. In the context of the pertinent provisions referenced above and the further undisputed evidence that the Claimant had received an unpaid disciplinary suspension for sleeping while on duty on two occasions on April 8, 2008, no basis exists for the Special Board of Adjustment to change, disturb, or modify the determination of the Employer to have terminated the Claimant.

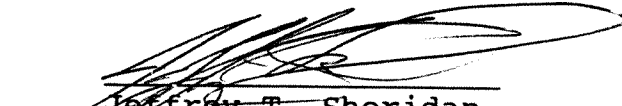
The Award shall indicate that the Claim is denied.

Accordingly, the Undersigned, duly designated as the Chairman and Neutral Member of the SEPTA-BMWE Special Board of Adjustment and having heard the proofs and allegations of the above-named parties, makes the following AWARD:

The Claim is denied in accordance with the Opinion of the Board.

  
Robert L. Douglas  
Chairman and Neutral Member

  
William L. Capik  
Employee Member  
Concurring/Dissenting

  
Jeffrey T. Sheridan  
Carrier Member  
Concurring/Dissenting

DATED: 2/27/09