

SPECIAL BOARD OF ADJUSTMENT 957

In the Matter of Arbitration between:

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES, Commuter Railroad System Division**

Organization

and

**SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,**

Carrier.

(Claimant: Reginald L. Morrow)

Case 286

THE ORGANIZATION'S STATEMENT OF THE CLAIM

This Decision resolves the claim of the Brotherhood of Maintenance of Way Employees System Committee (BMWE or Organization) that:

1. The discipline (discharge) imposed upon Mr. R. Morrow on January 12, 2010 on charges of alleged violation of Rule 63 – Contributing to the cause of and accident, and 53-substandard job performance, in connection with an accident with Boom Truck OPS-5825 causing damage to overhead wires and private vehicles in Liberty Yard on December 16, 2009, was arbitrary, unwarranted and in violation of the Agreement (Carrier's Grievance No. 10-013-F10).
2. As a consequence of this violation referred to in Part 1 above, Claimant R. Morrow shall now be reinstated to service and compensated for all lost wages.

PROCEDURAL BACKGROUND OF THE CLAIM

Based on the record developed by the Organization and the Carrier, this Special Board of Adjustment (Board) finds the Parties herein to be a Carrier and Employees within the meaning of the Railway Labor Act, *as amended*, (Act), 45 USC § 151, *et seq.*, and that

this Board has jurisdiction over the Parties and the dispute.

This dispute is between the Brotherhood of Maintenance of Way Employes (BMWE or Organization) and Southeastern Pennsylvania Transportation Authority (SEPTA or Carrier) (collectively the Parties). The dispute arises out of the Carrier's January 12, 2010 discharge of Reginald L. Morrow (Morrow or Claimant), a BMWE equipment operator.

BMWE appealed the Claimant's discharge through the grievance steps of the *Agreement Between SEPTA and BMWE RRD, December 5, 2006* (CBA), Article IV, Section 401. Grievance Handling. The Parties were unable to resolve the dispute through the CBA grievance procedures. On April 8, 2010, the Parties agreed to list the dispute for resolution before this Board.

On July 21, 2010, a hearing was held by Special Board of Adjustment 957 (Board) at SEPTA's office, 1234 Market Street, Philadelphia, Pennsylvania. At hearing, BMWE was represented by Seán D. Gerie, General Chairman, Commuter Railroad System Division, Brotherhood of Maintenance of Way Employes. SEPTA was represented by Brian A. Casal, Esq., Buchanan, Ingersoll & Rooney, P.C. The Parties were each afforded a full opportunity to present testimony, documents and other evidence; to examine and cross-examine witnesses; and to challenge documents and other evidence offered by the other Party.

BMWE's witness was Reginald L. Morrow, the Claimant. The witness was sworn and not sequestered, and a transcript (Tr) was taken. The Parties had filed pre-hearing submission which include Union Exhibits (Ux) and Carrier Exhibits (Cx) which were offered and received into the record.

The Parties agree there are no issue of timeliness, grievability or arbitrability, and the dispute is ripe of an Award.

ISSUE

Whether the Carrier's discharge of the Claimant for just cause? If not, what shall be the remedy?

STATEMENT OF THE CASE

On December 16, 2009, SEPTA assigned the Claimant and an assistant to transport two cable reels from SEPTA's Wayne Junction to Liberty Yard. The Claimant picked up the reels at Wayne Junction with boom truck and transported them to Liberty Yard. At Liberty Yard, he raised the boom and store room employee removed the reels with a fork lift. The Claimant got into the boom truck and drove away without lowering the boom.

Once outside Liberty Yard, at the intersection of Windrum and Wayne Avenues, the raised boom snagged overhead electrical wires then pulled down the wires, a traffic signal and line poles. The falling cables and poles struck and damaged the boom truck and four parked cars. The Claimant reported the accident to the Carrier, but told his supervisors that the boom was down in its saddle and that the electrical wires must have been low.

Video taken by SEPTA's Liberty Yard surveillance camera established that the Claimant drove away with the boom up which caused the Claimant to change his story and apologize in writing. Morrow's written apology states:

I was rushing trying to my passenger back to Wayne Jct. my helper from the Store Rm. I had lost a dear friend who died his service was 6 p.m. Wed Eve thinking about him may have cause me not to be as sharp as I am normally when working with heavy equipment. I truly regret that this has happen. I'm still in a state of shock. I never wanted anything like this to happen to me our anybody.

Truely [sic] Sorry
Reginald Morrow (Cx 1)

The record establishes that this was not the Claimant's first accident. His disciplinary history includes: a documented verbal warning for failing to back-up a vehicle safely and damaging its bumper; a written warning for leaving the boom truck unattended; a one-day administrative suspension for sleeping on duty; a three-day suspension for backing a snow truck into a sign post; a discharge, reduced to a three-day suspension, for failing to follow supervisor's instruction; and a discharge, reduced to a suspension under a Last Chance Agreement, for carelessly damaging a boom truck.

The June 17, 2009 Last Chance Agreement (LCA) states, in pertinent part:

Pursuant to discussions between the Union and the Authority the parties

have agreed that employee R. Morrow will be reinstated under the last chance provision of the Labor Agreement. The terms and conditions of this reinstatement are as follows:

1. Mr. Morrow agrees to modify the objectionable performance and/or behave which resulted in his discharge. He further understands that he must bring his performance up to an acceptable level.
2. In lieu of discharge Mr. Morrow will be required to serve a one (1) day suspension without pay on _____, followed by a one (1) year worked probationary period, commencing from May 13, 2008.
3. While on last chance probation, should Mr. Morrow be charged with committing any infraction for which discipline is justified, he shall be subject to an immediate discharge.
4. Mr. Morrow is reminded that this last step of discipline remains on his record for 730 calendar days.
5. Mr. Morrow understands that he is eligible for only one last chance in his career.

The terms and conditions of this work resumption agreement resolve all of the issues surrounding the discharge of employee R. Morrow. It is final, binding, and does not set any precedent. This settlement is effected in accordance with Section 401(t)(iv) of the Labor Agreement. It will not be discussed in any other grievance, arbitration, or other forum except for one involving Reginald Morrow (#000779). (Cx 2).

On January 12, 2010, after an investigation of the December 16, 2009 incident, the Carrier discharged the Claimant for violations of work Rule 63 – Contributing to the cause of an accident and work Rule 53 – Substandard job performance. (Cx 4).

CONTENTIONS OF THE PARTIES

SEPTA contends as follows:

BMWWE does not contest the existence or the validity of the LCA or the Claimant's violation of SEPTA work rules. BMWWE argues that the Claimant merely made an innocent

mistake and discharge is too severe. This argument directly contradicts the LCA which provides that the Claimant is at the last step of discipline because this incident occurred well within 730 calendar days of the LCA. For these reasons alone, the Claimant's discharge is for just cause.

In addition, safety is paramount in the railroad industry, because any thoughtless or careless act may result in catastrophic loss. As a result of the Claimant's inattention, the boom snagged overhead-electrified lines, poles and traffic lights, and pulled them down and through an intersection. Initially, the Claimant lied about the boom being down until he learned of SEPTA's surveillance video. The Claimant's actions are severe enough to warrant termination and under the LCA, termination is required.

This is the case because, the last step of discipline can have only one meaning, which is the last step of progressive discipline or, in this case, discharge. Furthermore, Morrow admits the infraction. Accordingly, termination is required.

The BMW claims that the punishment does not fit the infraction which directly contradicts the CBA and the LCA and therefore, overturning SEPTA's discipline in this case is not justified.

For all of the reasons, SEPTA requests that the Board deny the grievance in its entirety and uphold the discharge.

BMW contends as follows:

The Carrier's discharge of the Claimant is arbitrary and unwarranted. Although there is no dispute regarding the fact, the ultimate penalty of dismissal is not warranted because the Claimant simply made a mistake.

There were mitigating factors which unfortunately contributed to the incident which the Claimant explained in his written statement. The explanation does not totally absolve the Claimant of responsibility but does shed light contributory factors. The Claimant's assistant could have easily observed that the boom was not cradled and advised the Claimant, but the assistant was not questioned by SEPTA.

BMW is not requesting that the Claimant be given another LCA, but the Organization is grieving the Carrier's dismissal on the basis it is arbitrary and excessive

because there is absolutely nothing in the CBA that requires a dismissal.

This incident admittedly was an accident and does not automatically require discharge. In particular, the Claimant was not under an LCA requiring automatic dismissal. If the Board determines that the Claimant has some responsibility for the accident, then the Board should find that the ultimate penalty of discharge is arbitrary, unjust and unwarranted.

DISCUSSION

The facts are not in dispute. It is the meaning of the facts on which the Carrier and the Organization cannot agree. In this regard, ultimately, the Claimant as well does not dispute the facts regarding his failure to lower the boom into its cradle which caused the damage to overhead wires, poles, SEPTA's boom truck and parked cars at Windrum and Wayne Avenues.

The Board's determination of the issue in this dispute turns on the interpretation of the LCA. The LCA contains two provisions material to future discipline of the Claimant.

Under the first provision at ¶ 3., the LCA places the Claimant on a one-year probationary period starting on May 13, 2008. During this probationary period, the Claimant was subject to an **immediate** discharge for any work rule infraction. Since the LCA is dated July 17, 2009, the probationary period had passed when the LCA was executed on June 17, 2009. (Cx1).

Under the second provision at ¶ 4., the Claimant was to remain at the last step of discipline for 730-calendar days. The facts establish that the incident forming the basis of this disciplinary action occurred well within 730-calendar days. Therefore, this second provision of the LCA applies to and constrains SEPTA's discipline of the Claimant.

CBA Article VI, Section 401(j)(i) describes the steps of progressive discipline as follows:

- Documented Verbal Warning
- Written Warning
- One-day administrative suspension
- Three-day suspension (2 days administrative and 1 day without pay)
- Discharge

Carriers and Organizations negotiate and execute agreements like the LCA in this case based on the give-and-take of settlement negotiations. Their agreements often evolve over many, many years of labor relations history between parties. Each party is entitled to the benefits and burdens reflected in the terms of the settlements like this LCA. In response to BMW's contentions, the Board finds no evidence in this record that SEPTA's adherence to the terms of the Claimant's July 17, 2009 LCA is unjust, arbitrary or unwarranted as argued by the Organization. Rather, SEPTA is carrying out its obligations under the terms of the LCA as agreed between the Parties.

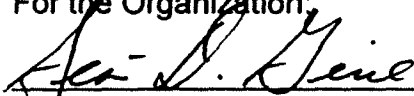
Based on the record developed by the Parties, the Board finds that the plain language of the CBA and the LCA establish that the last step of discipline is discharge. Moreover, the LCA at ¶5. provides for only one last chance. Therefore, the Board also finds that discipline of less than discharge in this case would vitiate the LCA and deny the Parties the benefits and burdens of the agreement to which they are entitled.

For all these reasons, the Board finds that the Carrier's discharge of the Claimant was for just cause.

AWARD

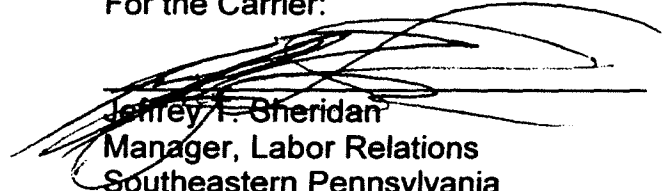
Based on the record, the claim is denied.

For the Organization:



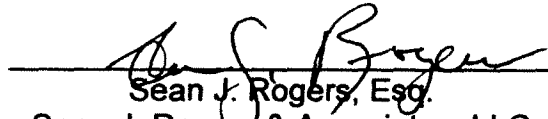
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August 24, 2010