

7

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

**NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK) - NORTHEAST CORRIDOR**

Case No. 215

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of ET Lineman W.A. Konecny, III for alleged violation of Amtrak's 'Standards of Excellence', Amtrak's Electrical Operating Instruction Rules 2.201, 2.205, 6.201, 6.202, 6.308 and 6.309, Amtrak's Electric Traction Standard Operating Instruction No. 11, Amtrak's Safety Rules and Instructions for Maintenance of Way employees, Rule 4562, on January 10, 2002 was based upon unproven charges, without just and sufficient cause and excessive (System File NEC-BMWE-SD-4156D).
2. The Claimant shall be restored to the Carrier's service with all seniority rights and benefits unimpaired, his record shall be cleared of the incident and he shall be paid for all wage losses suffered from March 28, 2002 until he is restored to active service."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as an Electric Traction (ET) Lineman, headquartered at the Carrier's Sunnyside Yard facility and working at Penn Station in New York City.

By letter dated January 28, 2002, and corrected on January 30, 2002, the Claimant was notified to appear for a formal investigation and hearing on charges that he allegedly violated the Carrier's Standards of Excellence, Electrical Operating Instruction Rules, Electric Traction Standard Operating Instructions, Safety Rules, and Instructions for

Maintenance of Way employees on January 10, 2002, when he grounded an energized wire, with the result that the Claimant sustained a personal injury. After a postponement, the investigation was conducted on February 20, March 13, and March 14, 2002. By letter dated March 28, 2002, the Claimant was notified that he had been found guilty of the charges, and that he was dismissed from the Carrier's service in all capacities.

The Organization filed a claim on the Claimant's behalf, challenging his dismissal as based upon unproven charges, without just and sufficient cause, and excessive. The Carrier denied the claim.

The Carrier contends that the record contains substantial evidence of probative value to support the finding that the Claimant is guilty of the charges. The Carrier emphasizes that the hearing transcript contains testimony that establishes that the Claimant, while engaged in the process of applying a grounding device to the line, was required to comply with rules that specify that all circuits must be considered energized unless and until verified to be de-energized, and that employees must maintain a safe distance between themselves, their tools, and any energized circuits. The Carrier emphasizes that the testimony adduced at the hearing regarding the physical evidence at the scene overwhelmingly demonstrates that the incident at issue occurred because something came into contact with the energized wire and went to ground. Several Carrier witnesses indicated that a grounding stick caused the accident.

The Carrier goes on to argue that the evidence further shows that the crew that

worked in this location, the 3137 switch, on the evening prior to the incident at issue had safely grounded the line in connection with their assignment. Moreover, this other crew removed the grounding stick upon completion of their work, and then secured it in the lower corner of the platform cage. The Carrier maintains that even if someone bumped into the grounding stick in this secured location, the stick would not move.

The Carrier argues that its Rules set forth the steps necessary for the safe performance of work, including the vital requirement that employees keep themselves and all tools away from energized circuits. Moreover, the evidence shows that the 3137 switch had been safely operated the night before the incident at issue, under virtually identical circumstances. The Carrier asserts that on the night in question, the record demonstrates that the Claimant admittedly operated the wrong switch. In addition, it is apparent that the Claimant, having assumed that he operated the proper switch, attempted to apply a grounding device to a still-energized wire, which resulted in the accident and his own injury. The Carrier maintains that this conclusion is consistent with the physical evidence at the scene. The Carrier maintains that the only possible conclusion is that the Claimant utterly ignored the requirements of the Rules and that his gross negligence resulted in his own injury.

The Carrier goes on to emphasize that the Claimant's testimony about bumping into the grounding stick, and thereby causing it to come into contact with the wire, is only a self-serving attempt to hide his obvious guilt. The Carrier maintains that the grounding

stick had been safely secured to the side of the platform cage by the previous gang. The Carrier points out that even if persons unknown had moved the grounding stick to a position where it could have contacted the wire, the Claimant nevertheless was responsible for ensuring that it was a safe distance from energized circuits. Moreover, if the grounding stick was in a position that was consistent with the Claimant's assertion, then it would have been directly in front of the Claimant, completely contradicting his allegation that he never saw a grounding stick. As for any claim that poor lighting in the area contributed to the Claimant's inability to see the grounding stick, the Carrier emphasizes that the Claimant allegedly attempted a visual inspection of the 3137 switch. The Carrier maintains that if the area was sufficiently lit for a visual inspection of the switch, then it would enable the Claimant to see a bright yellow grounding stick immediately in front of him.

The Carrier goes on to maintain that the evidence demonstrates that if the Claimant's story is accurate, he would have had to bump the grounding stick with sufficient force to propel it at least one foot forward and with sufficient velocity to cause it to contact the energized wire before the rear end of the grounding stick would have fallen to the floor of the platform. The Carrier points out that because the grounding stick and the 4.0 gauge grounding wire attached to it weigh a combined twenty-two pounds, it is inconceivable that a "brush" or "bump" could have caused such a result. Instead, such minimal contact as the Claimant described would have resulted in the back end of the

grounding stick falling to the floor of the cage, well short of the energized wire.

The Carrier then argues that because the evidence clearly establishes the Claimant's violation of the Carrier's rules, there can be no question that the Claimant failed to fulfill his obligation to work safely, perform his duties properly, and comply with the applicable rules and instructions. The Claimant's gross negligence constitutes serious misconduct that justifies severe disciplinary action. The Carrier asserts that it cannot retain employees who so blatantly disregard safety rules and Electrical Operating Rules and Instructions. The Carrier maintains that the Claimant chose to ignore the basic rules governing the performance of his duties.

The Carrier asserts that even if it were possible to credit the Claimant's version of events with some shred of credibility, the Claimant's failure to look for or notice the grounding stick in proximity to the wire still constitutes gross negligence. The Carrier maintains that under the circumstances of this case, the penalty of dismissal is commensurate with the serious nature of the proven offense, particularly in light of the Claimant's prior discipline record. The Carrier argues that based upon established precedent and considering the Claimant's past record, there is no basis for viewing the discipline at issue as an abuse of the Carrier's discretion.

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

The Organization argues that the Claimant was the only witness to the grounding of an energized catenary wire at Switch 3137 on January 10, 2002. The Organization

contends that the Claimant testified that he complied with the Carrier's policies, procedures, rules, and instructions, and the Carrier attempted to refute this testimony with *ex post facto* conjecture, supposition, and surmise. The Organization maintains that there is no conclusive evidence in the record that proves that the Claimant's accidental bumping of the grounding stick did not occur.

The Organization asserts that the Claimant testified about accidentally bumping the grounding stick, that the stick came into contact with the tap, and this led to the outage. The Organization points out that the Carrier, however, already had determined that the Claimant was guilty of the charges, as demonstrated by the Carrier's argument that whether it was a mistake or an intentional grounding, the Claimant nevertheless violated the rules. The Organization contends that such blatant pre-judgment is inconsistent with the Agreement, which requires a fair and impartial trial.

The Organization goes on to argue that even if the Carrier's blatant pre-judgment of the Claimant's guilt may be considered insufficient to deny him his contractual right to due process, the instant claim nevertheless must be sustained because the Carrier failed to meet its burden of proof. The Organization emphasizes that the Claimant, who was not charged with either clumsiness or dishonesty, was the only witness in the immediate vicinity of the incident, and his testimony shows that he complied with all of the relevant rules. The Organization maintains that the Carrier apparently rendered a guilty verdict simply because an accident and injury occurred. The Organization emphasizes that

numerous Board Awards have held that the an accident/injury is not evidence of either negligence or a rule violation.

The Organization asserts that the charges against the Claimant remain unproven, despite reams of speculative testimony from witnesses were admittedly were not present at the scene of the accident. Because the charges are unproven, the Claimant's prior record cannot be considered. The Organization argues that any level of discipline, much less the supreme penalty of dismissal, is unwarranted and must be rescinded.

The Organization ultimately contends that instant claim should be sustained.

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. The Claimant was afforded all of his due process rights and his hearing met the requirements set forth in the parties' agreement.

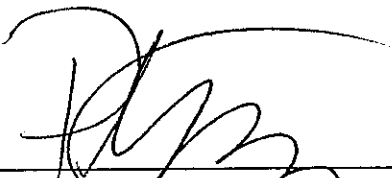
This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating the Carrier's rules and instructions on January 10, 2002, when he grounded an energized wire resulting in a personal injury to himself. The extensive record shows that the Claimant failed to abide by numerous safety rules that led to the accident which caused his personal injury. The Claimant's contention that he accidentally bumped the grounding stick is simply not supported by the evidence.

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 guilty of a very serious offense which could have had even greater negative consequences. In addition, the Claimant's record includes several reprimands, formal warnings, two ten-day suspensions, and a twenty-eight-day suspension for various rule infractions, including dishonesty, fighting, and sleeping on duty. Given the poor disciplinary record of the Claimant and the seriousness of the offense which resulted in this proceeding, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim will be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER
DATED: 5/23/03



CARRIER MEMBER
DATED: 5/23/03