

Special Board of Adjustment No. 986

Parties to the Dispute

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION – IBT RAIL CONFERENCE

V.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) –
NORTHEAST CORRIDOR

Claimant: Wayne White
Award No. 278

Organization's Statement of Claim

The Brotherhood of Maintenance of Way Employees ("BMWE" or the "Organization") appealed the discipline of dismissal assessed on Maintenance of Way Repairman Wayne White (the "Claimant") on charges that were set forth in the Carrier's Notice of Investigation, dated November 5, 2008. The Organization claims that the Claimant was unjustly dismissed from his employment with the National Railroad Passenger Corporation ("Amtrak" or the "Carrier"). As a remedy, the Union asked for the Claimant to be made whole for all wages, benefits, and seniority lost from the date of his dismissal to his reinstatement, and that the discipline assessed is expunged from his record.

Background of the Case

The Claimant was hired by Carrier on May 24, 1999. By letter dated November 5, 2008, the Claimant was charged with failing to obey a direct order on October 8,

2008 when Manager Kirt Flowers directed the Claimant to submit and update the Annual Violation and Review Record for CDL/CMV drivers and the Claimant refused to do so; and additionally he was charged with failing to control an Amtrak vehicle, resulting in a collision with the bay door that caused extensive damage. As a result of these actions, the Carrier charged him with violating Amtrak's Standards of Excellence involving Safety, Attending to Duties, Teamwork, Professional and Personal Conduct, Maintenance of Way Safety Rules and Instructions as well as insubordination and/or dereliction of duty. An investigation was postponed twice at the behest of the Organization. On April 30, 2009 an investigative hearing was held. At such hearing certain charges were dropped. By Notice of Discipline dated May 13, 2009, Claimant was found guilty of the above-cited charges and the Carrier assessed a penalty of dismissal. All appeals on the property were unsuccessful and the parties agreed to bring the case to this Board for final adjudication.

Opinion of the Board

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the BMW and Carrier.

After hearing upon the whole record and all the evidence, as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has

jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing hereon. The Claimant, Wayne White, was present at the Board's hearing, was ably represented by the Organization, and was afforded an opportunity to make a statement on his own behalf.

The Carrier contended that its actions in this case were justified and supported by substantial evidence. It argued the record demonstrated that the Claimant was afforded a fair and impartial hearing and it contended that there was no abuse of discretion or prejudice evidenced in such proceeding. It also argued that it did not violate Rule 71, requiring prior written notice of the charges being brought against an employee. At the hearing the hearing officer dropped certain of the charges, leaving some in place. That charges were dropped certainly did not prejudice the Claimant in any manner what-so-ever, the Carrier contended. Accordingly, Carrier argued that the Claimant was not denied a fair and impartial hearing.

As to the merit of the charges, the Carrier asserted that the record demonstrated that the Claimant was guilty of insubordination in refusing a direct order to submit a completed Annual Violation and Review Form as directed and in failing to control a Carrier truck on another occasion, resulting in extensive damages to a bay door. While the Organization argued the Claimant had attempted to give up his CDL/CMV license but the manager wouldn't sign the form to alleviate the requirement, the Carrier posited there was ample testimony offered that federal

regulations required that the Claimant complete the form to account for his past year's activities and he was advised as much. While the Carrier agreed with the Organization that Repairmen did not need a CDL/CMV licenses, it maintained that utilizing the Claimant to operate CDL/CMV vehicles for repair and testing purposes did not violate an agreement between the parties. Finally the Carrier contended there was no evidence to support the Organization's contention that the garage door was defected. His actions on the date in question demonstrated a lack of awareness of his surroundings when he backed an Amtrak truck into the bay door, causing damage. The Carrier maintained that the Claimant was proven guilty of two serious infractions and dismissal can not be viewed as arbitrary or capricious so as to constitute an abuse of its discretion..

The Organization argued at the outset that the Claimant did not receive a fair and impartial hearing. It maintained that the Claimant was singled out for discipline. Additionally, the changing of charges against the Claimant during the hearing created confusion and denied the Claimant due process. Finally the Carrier violated Rule 71. Such rule states:

"An employee who is accused of an offense and who is directed to report for a trial therefore shall be given five (5) days advance notice in writing of the exact charge on which he is to be tried and the time, date and place of the trial..."

The Carrier, in changing the charges and dropping charges during the hearing, did not comply with the "advance written notice of the exact charge."

Further the Claimant was not insubordinate. He testified that he was never given a direct order to fill out an Annual Review Form, and examination of the testimony on this point, according to the Organization, supports its position. As to the accident that occurred on October 22, 2008. It was just that – an accident. While the Carrier claimed the Claimant did not need to move the truck; that is hypothetical. The Claimant testified that he wanted to do so because of the fumes starting the vehicle would cause in the garage. His actions were not reckless or malevolent. Under these circumstances, the Organization argued, the charges should not be sustained or alternatively, the discipline assessed should be modified as exceedingly harsh.

Upon a careful review of the entire record, the Board finds that the Carrier's determination herein was appropriate. First of all the Board must reject the Organization's contention that the Claimant was denied a fair and impartial hearing. Examination of the record simply fails to support such contention. The Board also does not agree with the contention that Rule 71 was violated. The purpose of Rule 71 is to insure that an employee is given written advanced notice of the charges so that he can prepare to defend against them. In the matter before the Board, the Claimant had such notice. That some charges were dropped at the hearing in no way defeated the purpose and intent of such provision.

As to the charges, the Board finds there to be substantial evidence establishing that the Claimant failed to obey a direct order to submit an Annual Violation and Review Record for the prior year in conjunction with CDL/CMV requirements; and that, on another occasion, he failed to properly control his truck, resulting in extensive damages to a bay door. As to his failure to obey a direct order, the record established that he was aware of the requirement and had submitted such form in the past. It was explained to him that it was needed for the past year's activities. That he elected not to comply was done at his own peril. As to the October 22, 2008 incident, the Claimant had a responsibility to be aware of his surroundings. His actions exhibited a total lack of awareness of his surroundings. If he could not judge the bay door clearance by utilizing his mirrors, he should have gotten out of the vehicle to assess the situation. This is failed to do.

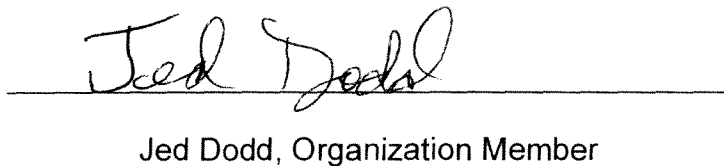
However, based on the total circumstances herein, the penalty is modified to a suspension for time served together with a final warning. The Claimant should be disabused of any notion that future misconduct will be accorded similar leniency. Should he digress again from the standards of conduct employees are expected to adhere to, his employment with the Carrier will come to an end. The Claimant is being given an opportunity to prove he values his employment and can become a productive employee. The Board hopes he takes advantage of the opportunity.

Award

The claim is partially sustained. The record, taken in its entirety, established that the Claimant is guilty as charged. The discipline of dismissal is modified to a suspension for time served. The Carrier is direct to reinstate the Claimant to service. The Claimant's restoration to service is on a last chance basis without back pay. All time he was held out service shall be considered a disciplinary suspension.

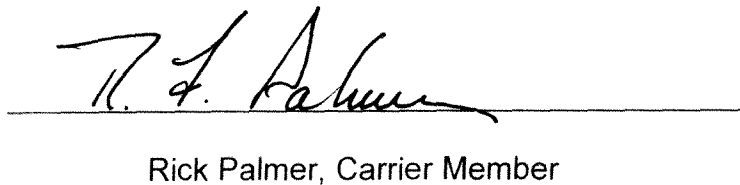


Gayle A. Gavin, Chair & Neutral Member



Jed Dodd, Organization Member

Dated: 10/14/09



Rick Palmer, Carrier Member

Dated: 10/14/09