

NATIONAL MEDIATION BOARD, ADMINISTRATOR
SPECIAL BOARD OF ADJUSTMENT NO. 957

In the Matter of the Arbitration

-between-

Brotherhood of Maintenance of
Way Employes

-and-

Southeastern Pennsylvania
Transportation Authority

SUPPLEMENTAL OPINION AND AWARD
Award No. 258

In accordance with the September 26, 1999 agreement in effect between the above-named parties, the Undersigned was designated as the Chairman and Neutral Member of the SEPTA-BMWE Public Law Board (the Board) to hear and decide a dispute that arose in connection with a prior Opinion and Award concerning the parties with respect to the Claimant, Track General Helper E. Patterson.

BACKGROUND

The Claimant, a senior employee, and the Carrier had an ongoing disagreement about the proper approach to resolve the scheduling needs of the Claimant that arose as a result of the Claimant's religious practices and obligations. After the parties failed to find an acceptable solution to the situation, the ongoing disagreement ultimately led to the decision by the Carrier to terminate the Claimant because of the Claimant's repeated decision to leave work earlier on Friday afternoons than the Carrier had found to be appropriate.

The prior Claim indicated:

1. The dismissal of Track General Helper E. Patterson

for his alleged insubordination on October 6 and November 3 and 17, 2000, his alleged unauthorized absence from work on November 3 and 17, 2000 and his alleged failure to follow a directive on November 17, 2000 was without just and sufficient cause and in violation of the Agreement (BMWEE Grievance 00-040-F14).

2. As a consequence of the violations referred to in Part (1), Track General Helper E. Patterson shall be returned to service with full back pay plus overtime lost and all other benefits commencing November 20, 2000 and continuing until he is returned to service.

During the prior hearing, the record included information about the Carrier's previous offer to permit the Claimant to work in a comparable and appropriate position on the day shift on Sundays through Thursdays with Fridays and Saturdays as the regular days off. After the Claimant testified that he would accept this option, the System Board of Adjustment rendered the prior Opinion and Award.

The prior Award provided:

The Claim is sustained in part and denied in part in accordance with the Opinion of the Board. The Carrier shall make the Award effective on or before 30 days following the date of this Award.

The accompanying Opinion to the prior Award specified, in pertinent part, that:

the Board hereby directs the Carrier to offer the Claimant an opportunity to obtain a comparable and appropriate position on the day shift on Sundays through Thursdays with Fridays and Saturdays as the regular days off. If the Claimant fails to act to accept such a position within 30 days after the Carrier notifies the Claimant, by certified mail return receipt requested, of the opportunity to return to work, the Claimant shall be deemed to have abandoned any claim

to be retained as an employee of the Carrier. The Claimant shall be required to satisfy any normal return to work physical examination. The Claimant shall retain his seniority and benefits, but shall not receive any monetary remedy for the period of time that he was not actively working for the Carrier. . . . The Board retains jurisdiction to resolve any dispute that may arise about the terms of this decision or about the implementation of this decision.

The Carrier sent a certified letter, dated January 18, 2002, to the Claimant. The letter conveyed the key points of the prior Opinion and Award and directed the Claimant to contact the Track Department Headquarters with the Claimant's response concerning his interest in returning to work under the conditions set forth in the prior Opinion and Award. (Organization Exhibit B-1.) The Carrier sent another letter, dated January 23, 2002, to the Claimant to confirm a telephone conversation between the Claimant and the Manager of Labor Relations on January 23, 2002 during which the Claimant accepted the terms of the reinstatement to employment. The letter reiterated the instruction to the Claimant during the telephone conversation that the Claimant was to report to the Medical Department on Tuesday, January 29, 2002 for his reinstatement physical examination. (Organization Exhibit B-2.) The Carrier sent to the Claimant another certified letter, dated February 15, 2002, which provided:

You were directed to report for work on Sunday, February 10, 2002 at 7:30 A.M. However, you failed to report as directed. Therefore, effective February 13, 2002, you were dropped from the rolls of the Authority for job abandonment and failing to comply with SBA 957 NMB #258.

(Organization Exhibit B-3.) In a letter dated February 22, 2002, the Organization appealed the Carrier's decision to drop the Claimant from the employment rolls. The Organization commented:

Mr. Patterson contacted the Jenkintown Track Department Headquarters and complied with the instructions to get a company physical and requalify on Roadway Worker Safety. Copy of SEPTA Medical Department Encounter Slip and Roadway Worker Qualification card enclosed. Please note that Mr. Patterson was well within the thirty-day time limit.

Furthermore it must also be noted that Mr. Patterson was in verbal contact with the Authority prior to Sunday, February 10, 2002 when he was instructed to report for work. Both he and his daughter spoke to Mr. Miller [sic] [Keller] at Jenkintown Track Headquarters on Friday, February 8, 2002. Mr. Patterson explained his disability. (see disability certificate dated February 11, 2002) which was also faxed to the Authority by this Organization.

Based on the facts and information contained herein it is the opinion of the Organization that Mr. Patterson was in full compliance with his return to work instruction letter dated January 18, 2002 and also in compliance with the provisions of the SBA 957 NMB# 258 arbitration award.

(Organization Exhibit B-4.)

The parties failed to resolve the matter during the grievance procedure so the matter returned to the System Board of Adjustment pursuant to the retention of jurisdiction provision contained in the prior Opinion and Award.

A hearing was held in Pittsburgh, Pennsylvania on May 30, 2002 at which time the Grievant and 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.

FINDINGS OF FACT AND OPINION OF THE BOARD

A careful review of the record indicates that the excuses offered by the Claimant at the hearing in the present matter contain information that the Claimant failed to provide to the Carrier in a timely manner immediately before or immediately after the Claimant's scheduled return to work on Sunday, February 10, 2002. The disability certificate, dated February 11, 2002, offered by the Claimant to justify his absence from work on Sunday, February 10, 2002 appears on the letterhead of a cardiovascular practice. Nothing in the document refers in any manner whatsoever to a purported problem with the Claimant's teeth. In contrast, another document merely indicates that the Claimant had an appointment at the University of Pennsylvania School of Dental Medicine on February 25, 2002. (Organization Exhibit B-4.) At other times the record suggests that the Claimant provided information that he had a fever on February 10, 2002. These documents therefore increase and perpetuate rather than clarify the confusion concerning the actual reason why the Claimant had failed to return to work on February 10, 2002 as directed.

A closer examination of the record reveals that the Claimant's version of the information that the Carrier had purportedly received from the Claimant's daughter and the

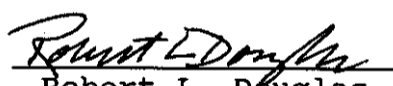
Claimant differ. In particular, the record fails to support the assertion that the Claimant's daughter had provided an actual explanation for the Claimant's possible inability to report to work on Sunday, February 10, 2002 as directed. The record also reflects that the Claimant failed to contact an appropriate person on Sunday, February 10, 2002 to provide the necessary information concerning his actual inability to report to work on Sunday, February 10, 2002 as directed. The record omits any persuasive evidence to explain exactly where the Claimant spent all of February 10, 2002 instead of reporting to work as directed. Furthermore, the medical documentation that the Claimant furnished after February 10, 2002 omits any specific reference to the alleged severe dental condition--which included the alleged extraction of four teeth and two skin grafts--that the Claimant offered at the hearing as the basis for his inability to report to work on February 10, 2002 as directed. The omission of such potentially critical information at an appropriate time provided the Carrier with a reasonable basis to be further concerned about the ultimate credibility of the Claimant's representations because the Claimant certainly would have mentioned this highly unusual information at the time of the events if the Claimant had a basis to substantiate the information.

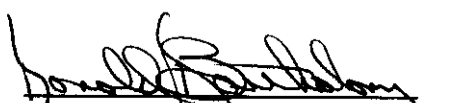
As a result, the Carrier had a legitimate right to conclude that the Claimant had failed to comply with his responsibility to report to work as directed or to contact an appropriate

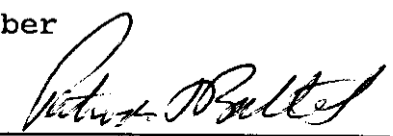
representative of the Carrier on Sunday, February 10, 2002. The Carrier had a further right to conclude that the Claimant's inaction demonstrated a continuing inability of the Claimant to meet the reasonable requirements of the Carrier for the Claimant to meet his responsibility to attend work as directed. Under these highly unusual circumstances, the Carrier proved that a reasonable basis existed for the Carrier to conclude that the Claimant had abandoned his job within the meaning of the prior Opinion and Award. The Supplemental Opinion and Award shall indicate that the present Claim for reinstatement is denied.

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

The Claim is denied.


Robert L. Douglas
Chairman and Neutral Member


Donald D. Bartholomay
Employee Member
Concurring/Dissenting


Patrick J. Battel
Carrier Member
Concurring/Dissenting

DATED: 10-14-02