

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

OPINION AND AWARD
Award No. 259

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 the following Claim:

1. The discharge of General Track Helper A. Freeman for alleged violation of NORAC Rule 30 and SEPTA RRD Rules 41 and 64 was unjust, unwarranted and based on unproven charges (SEPTA Grievance 00-048-F12).
2. Mr. Freeman shall be returned to service with full benefits and shall be compensated for all hours lost, both straight time and overtime, at his applicable rate and all reference to this incident should [sic] expunged from his record.

A hearing was held in Philadelphia, Pennsylvania on September 4, 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 Claimant, began working for the Carrier on October 2, 1989 and served as a Track General Helper. The Claimant signed a Return to Work Agreement, dated May 9, 2000 that indicated, in pertinent part, that:

1. The parties agree that as part of this settlement, the Union is requesting a modification of the discharge of the above named employee. Contained herein are the terms and conditions of the return to work agreement.

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- b. Mr. Freeman will be required to serve a two (2) year worked probationary period, commencing from his date of return to active employment.

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- d. While on probation, should Mr. Freeman be charged with committing any infraction for which discipline is justified, he shall be subject to an immediate discharge.

(Carrier Exhibit 15.) The Carrier terminated the Claimant as a result of an incident that had occurred on Saturday, January 27, 2001 at the Main Street crossing in Lansdale, Pennsylvania. In particular, the Carrier concluded that the Claimant had violated NORAC Operating Rule 30 by tampering with certain equipment, Rule 41 by failing to perform certain assigned tasks, and Rule 64 concerning defective equipment.

NORAC (Northeast Operating Rules Advisory Committee)

Operating Rule 30 provides:

30. Tampering with Appliances and Other Equipment

Employees are prohibited from breaking seals on interlocking appliances or other equipment, except when specifically authorized to do so. Employees are prohibited from altering, nullifying or in any manner restricting or interfering with the normal intended function of any device or equipment on engines, cars or other railroad property, except when specifically authorized to do so.

In case of failure, or where seals are found to be tampered with, broken, missing, or authorized to be removed, a report must be made immediately to the Dispatcher, Yardmaster, or Enginehouse Foreman in charge of the territory where the defect is discovered.

The Work Rules for Employees of the Line Maintenance Department provide, in pertinent part, that:

41. Refusal/Failure to Perform Assigned Work

Refusal and/or failure to perform assigned work is cause for disciplinary action up to and including discharge.

64. Defective Equipment

Employees shall not use defective ladders, machinery, equipment or tools. Defective equipment shall be reported immediately to one's supervisor.

Safety devices will not be modified, removed or made ineffective for any reason. No revision or additions to equipment, etc., shall be made without authorization by proper authority.

Personal protective equipment furnished to employees by the Authority, such as goggles, respirators, etc., shall be

worn when the employee is exposed to the hazards for which such equipment is intended.

A careful review of the record indicates that the Claimant violated these provisions. In particular, the record reflects that a train crew reported that the automatic crossing protection at the Main Street crossing had failed to come down in a timely manner. Maintenance Manager Mark A. Keller credibly testified that the report of the initial malfunction caused him to investigate the situation. The Maintenance Manager credibly explained that the crossing constitutes an especially busy intersection and that the presence of a constantly staffed crossing box enables manual operation of the gates in a way that disrupts traffic in the intersection for a shorter time than the automatic gates require. The Maintenance Manager credibly recalled that he had visited the Lansdale crossing box a short time after the report and had found the Claimant in the confined structure with a stick wedged in a vertical position into the foot pedal in a way that bypassed the automatic system and precluded the automatic gates from coming down. As a result, the Maintenance Manager credibly observed that the presence of the stick had the same effect as the manual operation of the foot pedal and therefore overrode the automatic operation of the gates.

The Claimant denied having any knowledge about the presence of the stick and the use of the stick as a wedge to override the automatic operation of the gates. As confirmed by certain

photographs introduced as evidence into the present proceeding, the Claimant's denial lacks credibility because of the extremely close confines of the crossing box and the integral role of the foot pedal in manually operating the gates. Although the Claimant had denied being trained in a way that involved the operation of the manual pedal and also had denied ever having seen the stick, the record reflects that the Claimant had received sufficient training to operate the relevant equipment.

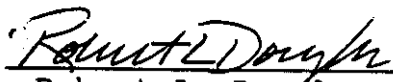
A careful examination of the actual stick revealed that the stick measured approximately seven inches long and one-half of an inch wide. (Carrier Exhibit 21.) The close proximity of the foot pedal only inches away from the feet of the operator of the crossing box constitutes conclusive evidence that the operator of the crossing box would have virtually no way to avoid being aware of the presence of the stick wedged in the vertical position. As a result, the record proves that the Claimant had to have known about the presence of the stick in the wedged position.

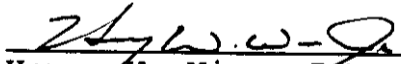
By permitting the stick to remain in the foot pedal to bypass the automatic gates, the Claimant permitted tampering with the equipment to occur in violation of NORAC Operating Rule 30; failed to perform the assigned work of operating the crossing box equipment in a proper manner in violation of Work Rule 41; and permitted the modification of the foot pedal in a way that made this safety device ineffective in violation of Work Rule 64. Under all of these unusual circumstances, the Carrier had justification to discipline the Claimant.

As previously mentioned, the Claimant had entered a Return to Work Agreement to avoid a prior discharge of the Claimant. Paragraph 1(d) of the Return to Work Agreement specifically authorized the Carrier to discharge the Claimant immediately for "committing any infraction for which discipline is justified." As a consequence, the Carrier proved by clear and convincing evidence that just cause existed to terminate the Claimant. In reaching this conclusion, the record omits any credible evidence that the discharge of the Claimant was unjust, unwarranted, and based on unproven charges. Any other arguments raised by the parties during this proceeding are not relevant to a proper determination of the present dispute. The Award shall indicate that the Claim 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 AWARD:

The Claim is denied.


Robert L. Douglas
Chairman and Neutral Member


Henry W. Wise, Jr.
Employee Member
Concurring/Dissenting

DATED: 12/3/02


Jeffrey T. Sheridan
Carrier Member
Concurring/Dissenting