

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: Giselda Zeno
Award No. 263

Organization's Statement of Claim

The Brotherhood of Maintenance of Way Employees ("BMWE" or the "Organization") appealed the discipline of dismissal assessed on Substation Electrician Giselda Zeno (the "Claimant") on charges that were set forth in the Carrier's Notice of Investigation, dated June 1, 2007. The Organization claimed that the Claimant's termination from her employment with the National Railroad Passenger Corporation ("Amtrak" or the "Carrier") was arbitrary, capricious and exceedingly harsh in violation of the parties' agreement. As a remedy, the Union asked for the Claimant to be reinstated and made whole for all wages, benefits, and seniority lost from the time of her dismissal.

Background of the Case

Carrier hired the Claimant on November 7, 1988. She was assigned as a Substation Electrician on Gang 114 at Substation No. 40 on the date of the incident.

On May 15, 2007, Claimant was involved in an incident that resulted in injury to a coworker's finger while attempting to join PVC fitting onto a PVC pipe while using a sledge hammer. She was charged with violating the Carrier's Standards of Excellence governing Safety and Attending to Duties and violation of Maintenance of Way Safety Rules and Instructions. The Carrier claimed the Claimant was negligent and failed to exercise proper care and caution on the date in question. A Notice of Investigation was served upon Claimant on June 1, 2007 and an investigation was conducted on June 12, 2007. Claimant was found guilty of the charges excepting one that was withdrawn by the charging officer. The Carrier dismissed Claimant on June 25, 2007 based upon those charges and her prior disciplinary record. 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 BMWWE 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 thereon. The Claimant, Giselda Zeno, was present at the

Board's hearing, was afforded an opportunity to make a statement on her behalf and was represented by the Organization.

The Carrier contended that its actions in this case were justified and well supported by substantial evidence. The record established, according to the Carrier, that on May 15, 2007, Claimant was assigned to install PVC as a conduit for power cables in a two foot trench being dug with a backhoe alongside the track. Two other workers, one being a Gang Foreman, were also involved with this assignment. They applied the glue to the conduit. When the Claimant whose back was toward the workers indicated she was going to hit the pipe before the glue dried, the one worker told her to wait. The Claimant struck the worker's finger with the mallet. The Claimant was standing on top of the trench and striking backwards with a backhand. Her failure to exercise proper care in facing backwards while utilizing a sledge hammer resulted in injury. Clearly the Claimant had a responsibility to be aware of her work area and to remain alert to her duties at all times. She had the responsibility to ensure that safety was of the utmost importance in the discharge of her duties and to exercise constant care to guard against personal injury, loss of life or damage to property. Her negligent actions resulted in injury to a coworker. Based on her previous discipline record and the severity of this incident, the discipline of dismissal can not be viewed as excessive, the Carrier argued.

The Organization argued that the Carrier failed to prove the charges. It argued that the Claimant did not hear the worker ask her to wait prior to his moving his finger into harm's way. The incident was thoroughly investigated and the root cause/contributing factor was determined to be a "lack of communication." Yet, the Claimant was the only one charged. The Claimant on that date in question was not the employee in charge and wasn't designated to issue commands. Yet, she was the only one charged. The only reasonable conclusion one could draw, according to the Organization, was that the Carrier prejudged the Claimant's guilt. Additionally the record clearly demonstrated that the Claimant did not deliberately strike her coworker. There was no evidence of negligence or that she was reckless. It was an accident. It may have been preventable but for a failure to communicate, according to the Organization. However she alone was not responsible and yet she alone was disciplined and dismissed. Under these facts and circumstances, argued the Organization, the claim should be allowed.

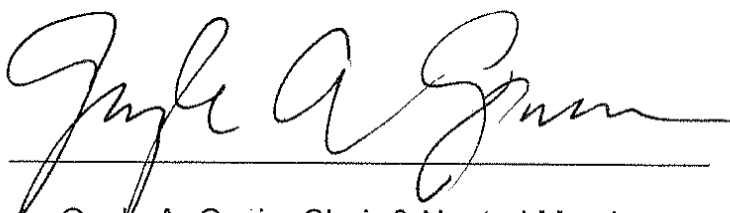
Upon a review of the entire record, the Board finds that the Carrier's determination herein was appropriate. The Carrier demonstrated by substantial evidence that the Claimant violated the Carrier's Standards of Excellence and Maintenance of Way Safety Rules regarding the May 15, 2007 incident. The evidence established the culpability of the Claimant of the charges. Claimant failed to exercise caution in attending to her duties.

The Carrier's Standards of Excellence establish rules of conduct that are expected of all its employees. Clearly the Carrier has a right to expect its employees to perform their duties in a safe manner, strictly adhering to the attendant safety rules. Failure to do so endangers the lives of Carriers' employees and could endanger the riding public. In the instant matter the Claimant had an obligation to follow the prescripts of the Carrier's standards of conduct and the record demonstrated that she failed to do so.

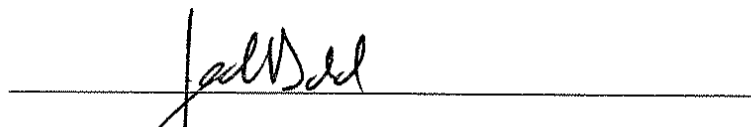
That being said, what was particularly troubling to this Board was the fact that three workers were involved in the incident. The Claimant was not the gang foreman for the assignment. The Carrier's internal investigation found the root cause to be a failure to communicate, not a failure of only the Claimant to communicate. Yet the Claimant alone was charged. Under such circumstances this Board finds that the Carrier's actions were unjust as to the disciplined assessed and believes that a modification of the penalty to be appropriate. The Claimant should not take this new lease on employment as a stamp of approval regarding her past misdeeds. She should clearly understand that her reinstatement was predicated on the specific circumstances herein. Any future missteps by the Claimant shall be dealt with severely. Either the Claimant adheres to accepted rules of conduct or she will no longer be an employee with the Carrier.

Award


The Claim is partially sustained. The record, taken in its entirety, established that the grievant is guilty as charged. The discipline of dismissal is modified to a suspension for time served. The Carrier is directed to restore the Claimant to service as soon as possible. The Claimant's restoration to service is without back pay. All time she was held out of service shall be considered a disciplinary suspension.



Gayle A. Gavin, Chair & Neutral Member



Jed Dodd, Organization Member
Dated: April 20, 2008



Rick Palmer, Carrier Member
Dated: 4/20/08