

BEFORE PUBLIC LAW BOARD 6378

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 2

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

1. The dismissal of Trackman J. McBride for threatening behavior was without just and sufficient cause and in violation of the Agreement (System File NEC-BMWE-SD-4151D).
2. The Claimant shall be reinstated to the Carrier's service with full seniority rights and benefits and paid for wage loss suffered, including overtime, from January 30, 2002, until he is returned to service.

FINDINGS:

At the time of the incident at issue, the Claimant was employed by the Carrier as a trackman, regularly assigned at South Hampton Yard, in Boston, Massachusetts.

On December 18, 2001, the Claimant was notified to appear for a formal investigation and hearing on charges that he had violated Amtrak's "Standards of Excellence" by engaging in boisterous conduct, fighting, rudeness, assault, intimidation, horseplay, and the use of profane and vulgar language on December 4, 2001. After a postponement, the investigation was conducted on January 16, 2002. As a result of the hearing, the Claimant was found guilty and dismissed from the Carrier's service on January 30, 2002.

The Organization filed a claim on Claimant's behalf, asserting that the Carrier's

decision to dismiss the Claimant was without just and sufficient cause and in violation of the Agreement. The Carrier denied the claim.

The Carrier contends that the Organization's procedural objections are without merit. The Carrier emphasizes that as to the Organization's assertion that the Claimant's disciplinary history was improperly included in the record, the hearing officer did not consider this prior disciplinary action in determining the Claimant's guilt or innocence in this case. In fact, the hearing officer expressly noted that the prior discipline was entered only for consideration as to the penalty to be imposed should there be a finding of guilt. The Carrier further asserts that the Organization acknowledges that the Carrier has the right to review prior discipline when issuing discipline. The Carrier maintains that the inclusion of the Claimant's disciplinary history in the record therefore was proper and was not prejudicial to the Claimant's rights.

The Carrier then asserts that there similarly is no merit to the Organization's arguments about inaccuracies in the record. The Carrier acknowledges that the transcript does contain some testimony where it appears that the witness is completing a question, but the Carrier emphasizes that it is unclear whether this is an accurate reflection of the proceedings or a transcription error because two participants were talking at the same time. The Carrier points out that such errors are not unusual in the transcription process. The Carrier maintains that the transcript is as true a record as possible, and it argues that there is no contention that there were significant omissions from the record that were

harmful to the Claimant. The Carrier contends that in the absence of such harmful errors, there is no basis on which to find that the proceedings were fatally flawed.

The Carrier goes on to contend that the testimony of several witnesses established that during the incident at issue, the Claimant made a verbal threat to go home, get a gun, and then come back and shoot the members of his crew. The Carrier maintains that the Claimant's assertion that he did not threaten to shoot everyone with a gun, but rather said that he would shoot everyone with a needle, as he shoots his insulin, is both self-serving and unsubstantiated, in light of the testimony of the other witnesses. The Carrier points out that the Claimant admitted to threatening his co-workers, and he acknowledged that he was aware that this violated the Carrier's Workplace Violence Policy.

The Carrier points out that the Claimant was counseled for threatening conduct and verbal abuse of other employees in August 1999. Moreover, as the result of a physical altercation in July 2000, the Claimant was suspended for forty-five days, required to attend anger management training, and notified that this was final warning and that future violations of this nature would result in dismissal. The Carrier maintains that the testimony at the hearing proves that the Claimant made intimidating and vulgar comments to his co-workers by threatening to get a gun and shoot them. This conduct was in direct violation of Amtrak's Standards of Excellence governing Professional and Personal Conduct.

The Carrier argues that the Claimant's grossly inappropriate behavior was totally

inconsistent with what the Carrier expects of its employees. The Carrier points out that it is obligated to ensure a safe work environment, free of any form of intimidation or threats against its employees. The Carrier asserts that it cannot tolerate any incidents in which an employee threatens to get a gun and kill everyone on Company property. The Carrier has not only the right, but the obligation to take stern disciplinary action against conduct such as that exhibited by the Claimant in the incident at issue. The Carrier cites several Board Awards that have upheld employee dismissals based upon threats, intimidation, and vulgar remarks.

The Carrier asserts that there is substantial evidence in the record proving that the Claimant is guilty as charged. The Carrier argues that this offense, coupled with the Claimant's short tenure and a disciplinary history that includes prior counseling and discipline for similar misconduct, demonstrates that the Claimant is unwilling or unable to modify his behavior. The Claimant ultimately contends that the claim should be denied in its entirety.

The Organization argues that the instant dispute centers on the Carrier's decision to dismiss the Claimant, a known diabetic, after he was provoked into making a verbal threat. The Organization asserts that although the Claimant admittedly blurted out a threat, he nevertheless successfully attended anger management therapy, and he continues to do so. The Claimant's therapist has concluded that there is no reason to assume that he meant to follow through with his threat, that he poses any harm to his co-workers, or that

he is likely to repeat any such threats.

The Organization goes on to maintain that the record demonstrates that the Carrier improperly considered a prior, unrelated discipline in determining the Claimant's guilt in this case. The Organization emphasizes that prior discipline may be used only to determine the quantum of discipline to be imposed, and not to determine guilt. The Carrier's decision to dismiss the Claimant, which plainly involved consideration of his prior discipline, must be rescinded.

The Organization then maintains that the Carrier compounded this procedural error by failing to provide the Claimant and his representatives with an accurate transcript. The Organization argues that a review of the transcript reveals that whole sentences, if not entire paragraphs, are missing. The Organization contends that these procedural errors are fatal to the Carrier's position in this matter.

The Organization further asserts that even if these procedural errors are considered to be insufficient to support a finding that the Claimant was denied his contractual due process rights, the instant claim nevertheless must be sustained because the Carrier failed to properly consider all of the documented mitigating circumstances. The Organization maintains that the Carrier glossed over the fact that the Claimant is diabetic, and that he therefore is susceptible to mood swings whenever his blood sugar levels become too high or too low. The Organization acknowledges that the Claimant admittedly directed over-the-top comments to Foreman McCormick on December 4, 2001, but the Claimant is

remorseful and has apologized for making these remarks. More importantly, the Claimant is working to control his emotions, even where, as here, those emotions may have been provoked. The Organization argues that the events of December 4, 2001, are confusing, at best, the Claimant testified that Foreman McCormick set the tone by yelling at him that morning. The Organization asserts that although yelling is fairly typical amid the din of machines and trucks, the Claimant felt that his dressing down was unjustified; the Claimant therefore was provoked into blurting out his ill-advised verbal threat. The Organization maintains that such provocation is a mitigating factor, and dismissal was excessive under the circumstances. The Organization ultimately contends that the 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 throughout the proceeding.

This Board has reviewed the evidence and testimony in this case, and we find there is sufficient evidence in the record to support the finding that the Claimant was guilty of threatening fellow employees with being shot. The Claimant admitted to making many of the statements that he was charged with making and offers a relatively unbelievable explanation for them. There is no question that the Claimant's statements violated Carrier

rules.

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 record reveals that the Claimant had previously been counseled in 1999 with respect to the Carrier's workplace violence policy. The Claimant was well aware that threatening another employee would not be tolerated and could lead to his dismissal.

Given the very serious nature of the Claimant's wrongdoing in this case, this Board cannot find that the Carrier's action in terminating the Claimant's employment was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: May 27, 2003


CARRIER MEMBER

DATED: 5/27/03