

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 217

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

1. The dismissal of B&B Mechanic J.M. Boyle for verbal threats, boisterous conduct and a physical altercation at the B&B Shop headquarters in Wilmington, Delaware on January 21, 2002 was without just and sufficient cause and in violation of the Agreement. (System File NEC-BMWE-SD-4182D).
2. The Claimant shall be reinstated to the Carrier's service with seniority and afforded the remedy prescribed in the general provisions of Rule 74."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a B&B mechanic in its Mid-Atlantic Division.

By letter dated February 6, 2002, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant violated the Carrier's Standards of Excellence governing Professional and Personal Conduct, and the Carrier's Workplace Violence Policy, in connection with an incident that occurred on January 21, 2002. The investigation was conducted on February 13, April 17, and May 21, 2002. By letter dated June 4, 2002, the Claimant was notified that he had been found guilty of the charge, and that he was dismissed from the Carrier's service in all capacities.

The Organization filed a claim on the Claimant's behalf, challenging his dismissal

as without just and sufficient cause and in violation of the Agreement. The Carrier denied the claim.

The Carrier initially contends that there is no merit to the Organization's assertion that the Claimant did not receive a fair and impartial trial because the Carrier refused to postpone the investigation until after the Claimant's criminal charges in connection with this matter were resolved and, therefore, the Claimant could not testify in his own behalf during the Carrier's investigation. The Carrier emphasizes that it complied with Rules 68 and 71 by giving the Claimant adequate notice of the hearing, fully informing him of the charges, advising him of his right to representation by his duly accredited representative, and the right to produce witnesses in his behalf. The Carrier points out that it repeatedly offered the Claimant the opportunity to testify in his own behalf, but he chose not to do so. The Carrier emphasizes that the Claimant was advised that his refusal to testify would be at his own peril, and the Claimant acknowledged his understanding of this fact. The Carrier argues that the Claimant's choice not to testify due to pending criminal proceedings does not amount to a denial of due process. The Carrier's investigation was completely independent of the court proceedings. The Carrier further asserts that the fact that criminal charges against the Claimant ultimately were dropped has no bearing on this case. The Carrier maintains that the outcome of the criminal proceeding was merely a determination that the Claimant would not be criminally prosecuted, rather than a determination that the Claimant was not guilty. The Carrier argues that there is no basis

for finding that the Claimant was denied due process.

The Carrier then argues that the record demonstrates that the Claimant is guilty of the charges. The Carrier asserts that during a safety meeting on January 21, 2002, the Claimant verbally threatened to get a gun and kill everyone in the room. In addition, shortly after leaving the facility, the Claimant engaged in loud, boisterous conduct, used vulgarity and obscenities, and provoked a physical altercation with another employee in the lunch room. The Carrier emphasizes that the record shows that the Claimant admitted making a verbal threat about a gun and becoming involved in a physical altercation on the property; statements from several witnesses confirm these events. The Carrier asserts that based on the overwhelming testimony and evidence, it could only conclude that the Claimant was the aggressor in this incident, that he did threaten the employees at the safety meeting by stating that he would get a gun and kill everyone, and that he aggressively instigated a physical altercation.

The Carrier asserts that the Claimant's conduct cannot be viewed as merely "venting or letting off steam," nor is there any evidence demonstrating that the Claimant was provoked by a hostile work environment, illegal activity, and abuse directed towards him. The Carrier points out that the Claimant admitted that he never made any reports to management about any alleged illegal activities. The Carrier maintains that the Claimant's grossly inappropriate behavior was totally inconsistent with what the Carrier expects of its employees, and his conduct was in violation of the Standards of Excellence

regarding Professional and Personal Conduct, as well as the Carrier's policy prohibiting threats and violence in the workplace. The Carrier emphasizes that the Claimant was well aware of these standards and policies.

The Carrier goes on to point out that during his less than six years of service, the Claimant was counseled about his behavior in connection with several previous incidents. The Carrier asserts that it is legally responsible for ensuring a safe environment, free from any form of intimidation or threats against its employees. The Carrier argues that it cannot tolerate any incidents in which an employee threatens to get a gun and kill everyone on Carrier property. The Carrier maintains that it has both the right and the responsibility to take stern disciplinary action against conduct such as that exhibited by the Claimant. The Carrier points out that this Board previously has upheld the dismissal of employees found guilty of making such threats. The Carrier argues that the Claimant's record demonstrates that he is unwilling or unable to modify his behavior, and the Carrier cannot risk potential physical harm to its employees that could result from the Claimant's complete disregard of its policies.

The Carrier then addresses the Organization's assertion of disparate treatment. The Carrier maintains that the Organization failed to show that lesser discipline has been assessed under similar circumstances, including similarities in responsibility, guilt, and past record. The Carrier maintains that the seriousness of the offense and the overwhelming evidence supports the Claimant's dismissal. The Carrier ultimately

contends that the claim should be denied in its entirety.

The Organization contends that although the Claimant emotionally blurted out threats and scuffled with a co-worker, the Claimant clearly felt provoked and was merely venting frustrations. There was no reason to assume that the Claimant meant to follow through on his threats.

The Organization then asserts that the Carrier constructively denied the Claimant's rights to due process, in violation of Rule 68. The Organization argues that the Claimant's right to adduce testimony and make proofs and arguments vanished when the Carrier refused to postpone the investigation until the criminal charge against the Claimant was resolved. The Claimant had been advised by his attorney not to testify, so he was unable to present testimony that detailed his explanation of the events leading up to the incidents at issue. The Organization points out that the Carrier itself postponed the investigation for nearly four months, so the Carrier clearly would not have been prejudiced by an additional month's delay until the criminal charge was resolved, so that the Claimant could present testimony and fully participate in his defense. The Organization maintains that the Carrier's refusal to grant a postponement was a fatal procedural error that invalidated the discipline.

The Organization goes on to contend that the Carrier's decision to dismiss the Claimant from its service, for emotional threats and a brief scuffle with a co-worker who provoked him, constituted disparate discipline. The Organization maintains that the

Carrier's decision to impose the supreme penalty of discharge therefore must be rescinded. The Organization ultimately contends that the claim should be sustained in its entirety.

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 Carrier was under no obligation to postpone the hearing until after the Claimant's criminal trial. We have reviewed the hearing and we find that the Rule 68 standards for due process were met by the Carrier.

This Board has reviewed the evidence and testimony in this case and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of making verbal threats and engaging in a physical altercation utilizing boisterous conduct on January 21, 2002. The lengthy record is replete with testimony that the Claimant verbally threatened to get a gun and kill everyone in the room. He then aggressively instigated a physical altercation. All of that activity by the Claimant was clearly in violation of the Carrier rules.

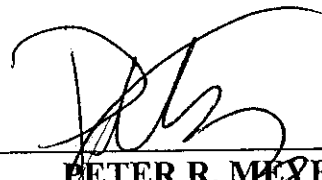
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was found guilty of engaging in very serious wrongful activity. Although the Organization has charged that the Claimant was the victim of disparate treatment, this Board cannot find any evidence that employees who acted in a similar fashion were not terminated. As a matter of fact, the Carrier has made it clear that this Board, as well as other Boards, have routinely upheld dismissals for employees who have engaged in this type of conduct.

For all of the above reasons, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 9/29/03



CARRIER MEMBER

DATED: 9/29/03