

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 220

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

1. The dismissal of Machine Operator J. Mims for alleged violation of Amtrak's Standards of Excellence and the General Code of Operating Rules for M of W Employees was without just and sufficient cause and based on unproven charges (Carrier's File BMW-460D).
2. Machine Operator J. Mims shall be restored to service with all rights unimpaired and made whole."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a Machine Operator at its Chicago Maintenance Terminal.

By letter dated October 28, 2002, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant allegedly violated the Carrier's Standards of Excellence governing professional and personal conduct, as well as the General Code of Operating Rules for M of W Employees, when he refused to follow instructions from Supervisor Rodney Pena and verbally threatened to kill his supervisor, and others, with a gun. After a postponement, the investigation was conducted on November 7, 2002. By letter dated November 15, 2002, the Claimant was notified that he had been found guilty of the charges, 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 based upon unproven charges. The Carrier denied the claim.

The Carrier initially contends that the record establishes that the Claimant is guilty as charged. The Carrier asserts that although there is no evidence in the record that establishes the assertion that the Claimant's brother had passed away shortly before the incidents at issue, the Carrier nevertheless asserts that if the Claimant was having trouble with this and other family issues, then Supervisor Pena appropriately advised the Claimant to contact the Employee Assistance counselor. The Carrier maintains that it was at this point that the Claimant verbally threatened Pena. The Carrier emphasizes that if the Claimant was unable to perform the duties assigned to him because of the death of his brother, the Claimant should have reported off work on bereavement leave, but the Claimant did not do so. The Carrier further maintains that the Claimant is obligated to follow his supervisor's instructions; if he feels that he is being mistreated, he should grieve later.

The Carrier goes on to argue that although the Organization asserted that twenty or more people were at the meeting during which the Claimant threatened Pena but no one overheard the threat, two witnesses confirmed that the Claimant and Pena had a heated discussion. The Carrier emphasizes that Goodrich testified that he saw the Claimant point

his finger in Pena's face, in a threatening motion, and that the Claimant was trying to harass Pena. Augle testified that he saw the Claimant with his finger up and that the discussion was heated. The Carrier contends that the Claimant obviously spoke to Pena in a soft voice because he did not want the other employees at the meeting to hear his conversation with Pena; the Claimant obviously did not want anyone to hear him verbally threaten his supervisor, so he took steps to ensure that they did not.

The Carrier emphasizes that the Claimant is charged with refusal to follow his supervisor's instructions and threatening to kill his supervisor and others; he has not been charged with making threatening gestures. The Carrier asserts that the record demonstrates that the Claimant was instructed to flag for contractors, but he refused to do so and also refused to go into his supervisor's office as instructed. Witness testimony regarding the Claimant's heated conversation with Pena lends credibility to Pena's testimony that the Claimant threatened him. The Carrier points out that this matter centers on credibility, and this Board may not substitute its judgment for that of the Hearing Officer in making credibility determinations. The Carrier emphasizes that the Hearing Officer was present when testimony was given and therefore the Hearing Officer was in a much better position to observe the testimony and demeanor of the witnesses. The Carrier points out that the Hearing Officer found that the testimony of Goodrich, Augle and Pena was more credible than the Claimant's denials of any wrongdoing.

The Carrier further asserts that there is no support for the Organization's

contention that the discipline at issue was in retaliation for harassment charges that the Claimant had filed against Pena and Goodrich. The Carrier points out that the Claimant did file a harassment complaint against Goodrich, and appropriate action was taken on that complaint. The Carrier emphasizes that there was no harassment complaint against Pena, and there is no support for the Claimant's assertion that Pena was retaliating against him. The Carrier points out that the Organization failed to show how any of Pena's actions was a retaliatory effort, or even what Pena may have been retaliating for, and there is no basis for overturning the Hearing Officer's determination that Pena's testimony was credible.

The Carrier contends that based upon the overwhelming testimony and evidence, the only possible conclusion is that the Claimant refused to follow his supervisor's instructions and that he threatened to shoot his supervisor and others. The Carrier argues that the Claimant's grossly inappropriate behavior was totally inconsistent with what the Carrier expects of its employees and was in violation of the Standards of Excellence and the General Code of Operating Rules for M of W Employees. The Carrier also points out that during his ten years of service with the Carrier, the Claimant compiled a lengthy disciplinary record. The Carrier emphasizes that it cannot tolerate any incidents in which an employee threatens to kill others on Carrier property; the Carrier has the right and the legal duty to take stern disciplinary action against conduct such as that exhibited by the Claimant.

The Carrier maintains that the record contains substantial evidence of the Claimant's guilt. This showing, when combined with the Claimant's continued unacceptable behavior and disciplinary history during a relatively short period of employment, demonstrates that the Claimant is unwilling or unable to modify his behavior. The Carrier argues that the seriousness of the proven charges and the Claimant's record is sufficient to support the Carrier's decision to terminate the Claimant's employment, particularly in light of the Claimant's history of violent behavior. The Carrier ultimately contends that the claim should be denied in its entirety.

The Organization contends that the Carrier bears the burden of providing sufficient probative evidence to prove a violation of each of the three rules cited in support of the Claimant's dismissal. The Organization argues, however, that the Carrier failed to present any evidence whatsoever to show, much less prove, that the Claimant's actions were a violation of any Carrier rule. The Organization maintains that the Hearing Officer's decision to dismiss the Claimant was not based on clear facts or evidence, but rather on his assessment of credibility. The Organization asserts that none of the Carrier's additional witnesses gave direct evidence in support of the charges against the Claimant. The Organization emphasizes that none of these witnesses was able to provide direct testimony about the conversation between the Claimant and Pena, so their testimony cannot be viewed as conclusive or as corroborating evidence of Pena's testimony. Instead, the testimony of these witnesses is speculative, at best, and the Organization

points out that the Carrier cannot discipline an employee based on nothing but speculation and conjecture.¹

The Organization asserts that only the Claimant and Pena have direct knowledge of their conversation. Because their testimony about this conversation is diametrically opposed, the Organization maintains that the Carrier was obligated to present corroborating evidence in support of its accusations. The Organization argues that there is no such evidence in the record here. The Organization therefore contends that the Carrier has failed to prove the charges leveled against the Claimant.

The Organization then points out that after the conversation between the Claimant and Pena concluded, Pena finished assigning duties to the employees who were present, and then returned to his office and reported the incident. The Organization emphasizes that Pena did not attempt to ascertain if anyone present at the meeting overheard the exchange between himself and the Claimant. Moreover, the Carrier did not question everyone who was present at the meeting. The Organization argues that the Carrier is responsible for developing all of the facts, particularly in connection with dismissal disputes, but it chose to dismiss the Claimant solely on his supervisor's word. The Organization contends that the Claimant's dismissal was without just and sufficient cause and based upon unproven charges, so the instant claim must be sustained.

The parties being unable to resolve their dispute, this matter came before this Board.

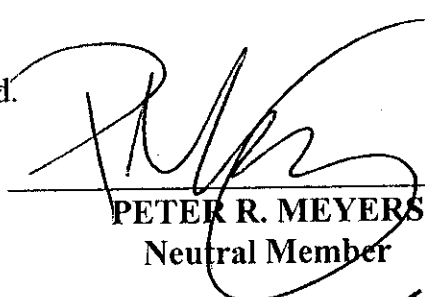
This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of verbally threatening to kill his supervisor and others with a gun.

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.

Given the seriousness of the offense here, coupled with the previous disciplinary record of the Claimant, which includes previous dismissals for excessive absenteeism and discipline for failing to comply with his supervisor's instructions, this Board cannot find that the action taken by the Carrier in terminating this 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: January 2, 2004


CARRIER MEMBER

DATED: 12/23/03