

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 221

STATEMENT OF CLAIM:

Appeal of the sixty-day suspension issued to Claimant B. Collins as a result of an investigation conducted on January 24 and March 18, 2003.

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier and assigned to work as a Stabilizer Operator at the Carrier's Odenton, Maryland, M/W Base.

By letter dated August 16, 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, safety, and attention to duties; NORAC Rule E; and the Carrier's Workplace Violence Policy, when he allegedly engaged in a profane and threatening verbal altercation with Foreman Thomas Newman on August 9, 2002, with the verbal argument escalating into physical violence between the two. After several postponements, the investigation was conducted on January 24 and March 18, 2003. By letter dated April 2, 2003, the Claimant was notified that he had been found guilty of the charges, and that he was assessed a sixty-day

suspension effective April 3, 2003.

The Organization filed a claim on the Claimant's behalf, challenging his suspension as without just and sufficient cause and based upon unproven charges. 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 five days' advance written notice of the investigation. The Carrier points out that the Claimant properly was notified of the charges and the investigation in a letter dated August 16, 2002, that was sent by certified mail more than five days in advance of the scheduled August 27th hearing. Moreover, the Claimant's signature serves as evidence that he received this notice on August 20th, and the Carrier sent notice of each postponement more than five days in advance of the rescheduled hearing. The Claimant signed for each of these notices with one exception; one notice, referring to the rescheduling of the hearing for January 14, 2003, was forwarded to a post office box that the Claimant apparently used as his mailing address for about six months. The Carrier asserts that it cannot be held responsible for the Claimant's failure to pick up his mail from the post office box. The Carrier argues that the Organization nevertheless was aware of the rescheduled hearing, and the Claimant and his representative both were present at the investigation.

As for the Organization's contention that the Claimant did not receive fifteen days' notice of the effective date of the discipline and was not granted a stay of the suspension

until after he was given a hearing, the Carrier maintains that these allegations also are without merit. The Carrier emphasizes that Rule 73 provides that discipline may be made effective at any time without advance notice. In addition, Rule 74(a)(1) provides that an appeal shall stay a suspension until after the hearing except in the case of a major offense. The Carrier contends that the Claimant was charged with major offenses, for which the Claimant could have been assessed discipline up to and including discharge. The Carrier therefore asserts that the discipline at issue could be made effective at any time, and the appeal would not act as a stay.

The Carrier then maintains that the record demonstrates that the Claimant was guilty of the charges. The Carrier argues that the Claimant's conduct clearly violates its Standards of Excellence, rules, and policies. The Carrier asserts that it cannot afford to tolerate the behavior exhibited by the Claimant towards a person in authority. The Carrier points out that it has not only the right, but the legal duty to take stern disciplinary action with regard to such conduct.

The Carrier goes on to argue that there is no basis for the Organization's assertion of bias on the part of the hearing officer. The Organization did not submit any evidence to support its allegations of bias. In connection with the Organization's complaint that the hearing officer placed more value on Newman's testimony because he was a foreman, the Carrier emphasizes that the hearing officer must make credibility determinations, and the Board may not substitute its judgment for that of the hearing officer with regard to such

determinations. The hearing officer found Newman's testimony to be more credible than the Claimant's denial of wrongdoing, and there is no evidence that this decision was based on the fact that Newman was a foreman. Newman was honest and forthright in his testimony, and he previously had admitted guilt for his own wrongdoing.

The Carrier further asserts that there is no merit to the Organization's arguments that the discipline at issue was harsh, arbitrary, and capricious, and that the Claimant was treated in a disparately harsh manner. The Carrier points out that the Claimant and Newman both were offered an opportunity to waive their right to an investigation and accept a forty-five-day suspension; Newman accepted this offer, and the Claimant did not. Newman's suspension subsequently was reduced to thirty days's duration based upon the Organization's intervention on his behalf. The Carrier emphasizes that the Claimant was offered an amended waiver of thirty days' actual suspension, with fifteen days held in abeyance, but the Claimant chose to leave the property instead of signing the offered amended waiver. The Carrier maintains that during the hearing, the Claimant refused to accept any guilt in this matter, although he admitted to using profanity. The Carrier argues that Newman's inappropriate behavior does not excuse the Claimant's conduct or relieve his guilt; the Claimant, in fact, grabbed Newman first, and he provoked and intimidated Newman. The Claimant freely admitted to his behavior, but he continues to refuse to accept any responsibility for this conduct. The Carrier therefore asserts that it was justified in assessing a sixty-day suspension for the Claimant's admitted behavior,

and there is no evidence of disparate treatment. The Carrier maintains that the record supports its finding of guilt, and there are no mitigating circumstances that require a reduction or removal of the sixty days' suspension that was imposed in this case.

The Carrier then argues that if the Board nevertheless finds that a reduction in the disciplinary penalty is warranted, the Claimant would not be entitled to any payment for lost time from May 27 to June 2, 2003, because the Claimant was medically disqualified as a result of testing positive for marijuana during a return-to-duty examination.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that except for piecing together the various version of the events given by Newman, there is no evidence that the Claimant is guilty of any wrongdoing. The Organization argues that all circumstantial and corroborating evidence supports the Claimant's assertion that he is not guilty of violating the rules. The Organization points out such evidence as Supervisor Goldinger's testimony that Amtrak police told him that the Claimant could press assault charges against Newman, the lack of any testimony that the Claimant did anything to harm or assault Newman, and major conflicts in Newman's different statements about the incidents at issue. The Organization asserts that Newman cannot tell a straight story.

The Organization maintains that a careful reading of the Claimant's original statement and his hearing testimony demonstrates that he did not give conflicting

statements. The Claimant's hearing testimony supplements his initial statement, and the Organization emphasizes that there is no conflict between the Claimant's statements. Instead, Newman is the one who gave conflicting statements about the incidents at issue.

The Organization then addresses the question of credibility. The Organization contends that the Claimant's version of events is supported by the statements of the police officer, and the Claimant's original statement is supported by his own hearing testimony and, at times, Newman's testimony. The Organization points out that Newman's statement and hearing testimony contain contradictions. Moreover, Newman barely avoided dismissal for his own actions, is obviously bitter, and he wants to punish the Claimant to the extent that he can. The Organization argues that Newman cannot tell the same story twice, but the Carrier nevertheless used his testimony to find the Claimant guilty.

The Organization ultimately contends that the instant 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. We find that the Claimant was afforded a fair and impartial hearing, and he received sufficient notice and his due process rights were protected.

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 engaging in a profane, threatening, and verbal altercation with his Foreman that eventually escalated into physical violence. There is no question that there is sufficient evidence that both the Claimant and his Foreman acted improperly during the entire encounter. The record reveals that the Foreman, Mr. Newman, had authority over the Claimant on the date in question. However, it is clear that both the Claimant and his supervisor used threatening language and physical violence towards each other. The record makes it clear that the Claimant played a more aggressive role in the altercation. The Claimant admits that he used foul and profane language and there is no question from this record that a physical altercation directly resulted from his actions.


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 in this case reveals that the Claimant and the supervisor were originally offered forty-five day suspensions and a waiver and subsequently thirty-day suspensions and a waiver. The supervisor accepted the thirty-day suspension. The Claimant continued on in his attempt to dispute the discipline. Given the seriousness of the actions engaged in by the Claimant, this Board cannot find that the sixty-day suspension issued to

the Claimant was unreasonable, arbitrary, or capricious. The Organization points to the Claimant's seniority of over a quarter of a century with no previous discipline. It is apparently that lengthy seniority that led the Carrier to retain the Claimant in its employment, even after he engaged in what can easily be considered a dischargeable offense. Given the facts as they were developed at the hearing in this matter, this Board cannot find that the Carrier's action in issuing the Claimant a sixty-day suspension for his serious wrongdoing in this case was unreasonable, arbitrary, or capricious. We find that there was no disparate treatment of the Claimant. Therefore, the claim will be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: October 12, 2004



CARRIER MEMBER

DATED: 10/13/04