

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

and

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

Case No. 222

STATEMENT OF CLAIM:

Appeal of the ten-day suspension and disqualification as foreman, pending requalification on MW 1000 and completion of Foreman school, assessed Claimant R. Booker as a result of an investigation conducted on January 13, 2003.

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a foreman, working at Penn Station in New York.

By letter dated October 14, 2002, the Claimant was notified to appear for a formal investigation and hearing on charges that on October 10, 2002, the Claimant allegedly returned a track to service with insufficient ballast section and with no protective speed restriction, in violation of Carrier's MW 1000, Track Buckling Countermeasures, and NORAC Operating Rules. After a couple of postponements, the investigation was conducted on January 13, 2003. As a result of the investigation, the charge relating to returning the track to service with obstructions that could interfere with the safe passage of trains in violation of NORAC Operating Rule 132 was dropped, but the Claimant was found guilty of the remaining charges. By letter dated January 28, 2003, the Claimant was notified that he had been found guilty of the charges, and that he was assessed a ten-day suspension and was disqualified as foreman, pending requalification on Amtrak's

MW 1000 and completion of Amtrak Foreman school. The Organization filed a claim on the Claimant's behalf, challenging the assessed discipline. The Carrier denied the claim.

The Carrier initially contends that the Organization's procedural assertions are without merit. In connection with the Organization's complaint that the Carrier did not provide a trial transcript until the appeal hearing, the Carrier maintains that Rule 72 does not contain any language that specifies a timeframe in which a copy of the transcript must be provided to a claimant and the Organization. Moreover, if the Organization and the Claimant had made the Carrier aware of the fact that they had not received a copy of the transcript prior to the appeal hearing, a copy would have been provided at that time; the Carrier points out that it sent a copy by overnight express mail when it first became aware that a copy previously had not been provided. In addition, the Carrier allowed the Organization an opportunity to reschedule the appeal hearing if it needed additional time to review the transcript, and the parties agreed to reschedule the appeal hearing. The Carrier maintains that because there is no evidence that the Carrier intentionally denied the Organization and the Claimant access to a copy of the transcript, the Organization's objections are without merit.

The Organization's assertion that the Carrier failed to provide the Claimant with written notice of the assessed discipline within fifteen days of the conclusion of the hearing also is without merit. The Carrier points out that the hearing was concluded on January 13, 2003, the hearing officer rendered his decision on January 27, 2003, and the

Carrier issued a notice of discipline, via Federal Express, to the Claimant on January 28, 2003. The Carrier emphasizes that the notice was returned to the Claimant with the notation that it had been "refused by recipient." The Carrier maintains that it met its obligations under the Agreement, and it cannot be held responsible for the Claimant's refusal to accept delivery of his mail.

The Carrier then asserts that the record demonstrates that the Claimant is guilty of the charges. The record shows that when the Claimant completed his assigned work on October 10, 2002, he moved equipment under his control from Track 1 to another track, and he returned Track 1 to service with insufficient ballast section and no protective speed restriction. Testimony at the hearing established that the track did not meet MW standards to be placed back in service without a protective speed restriction in that the whole shoulder had been completely removed; the lack of shoulder could cause buckled track. The Carrier emphasizes that the Claimant admitted that he gave the track back at regular speed, as well as that the ballast was out of compliance even after additional ballast was dropped subsequent to October 10th.

The Carrier points out that because it is a passenger operation, it cannot tolerate the risk of buckled track. The Carrier emphasizes that any work that disturbs the track structure, including the work in question, must be performed in accordance with the Track Buckling Countermeasures. In the situation at issue, MW 1000 required the Claimant to provide protection for any track that was considered unsatisfactory for the

safe passage of trains at the maximum permitted speed, with such protection including temporary speed restrictions and notification of the Block Station and/or Train Dispatcher. The Claimant admitted that the track did not have enough ballast, even after more stone was dropped on October 13, 2002. The Carrier maintains that this clearly is an admission that the track did not have sufficient ballast on October 10, 2002, when he improperly gave the track back without the required protective speed restriction. The Carrier maintains that it is evident that the Claimant is guilty of violating the Carrier's MW 1000 and Track Buckling Countermeasures.

The Carrier then argues that violation of these rules places the Carrier at risk and jeopardizes the safety of its employees and customers. The Carrier emphasizes that it must make clear, through disciplinary action, that the safety of the public and its employees should be of utmost concern. The Carrier asserts that the discipline at issue in this case cannot be viewed as excessive, given the Claimant's failure to abide by the rules contained in MW 1000. The Carrier maintains that the rules do not allow for "judgment calls" or "guesses," as alleged by Supervisors Colon and McGrady. Instead, employees must comply with the carefully researched rules that prevent accidents and injuries from occurring.

The Carrier contends that it determined what level of discipline to impose upon the Claimant after a good-faith consideration of all of the facts and circumstances. Because the Claimant's offenses clearly could have resulted in track buckling and injuries, the

discipline assessed was not excessive. The Carrier argues that the assessed discipline effectively impresses upon the Claimant the critical importance of performing his duties in a safe and proficient manner in accordance with established rules and regulations.

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

The Organization initially contends that the Carrier made several fatal procedural errors in handling this matter. The Organization asserts that the Carrier failed to provide the Claimant and the Organization with a copy of the hearing transcript, thereby violating Rule 72. The Organization also maintains that the Carrier failed to give written notice to the Claimant of the discipline within fifteen days of the conclusion of the trial, as required by Rule 73. The Organization also maintains that the hearing officer erred in giving more credit to the testimony of the Track Supervisor, who contradicted himself during his testimony and who did not know the scheduled speeds on the track in question, than to the witnesses who testified on behalf of the Claimant.

The Organization argues that the decision to place a slow order on the track was a "judgment call." In addition, stone was not available in Penn Station on the evening of October 10, 2002, making it impossible for the Claimant to have added to the ballast section of the track. The Organization further points out that there was insufficient ballast in several other areas. The Organization asserts that two supervisors who testified at the hearing supported the Claimant's actions and stated that they would have done the

same thing.

The Organization additionally argues that there was no need to place a 30 m.p.h. speed restriction on the track because the track speed in that area is 25 to 35 m.p.h., or 35 to 25 m.p.h., depending on the direction of travel. In either case, whether accelerating or decelerating, a train moving over this section of track normally would travel at about 30 m.p.h.

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.

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 violating Amtrak Safety Rules on October 10, 2002. The Claimant admitted that he gave the track back at regular speed. In addition, the pictures that the Claimant took show that even after the additional ballast was dropped, it was not at the required amount. The Claimant stated that he was new in the area, and it was clear from the record that the Claimant recognized that he had not performed his job properly.

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 was disciplined with a ten-day suspension and disqualification as a foreman pending re-qualification on the MW 1000 and completion of Foreman School. Given the admitted wrongdoing in this case and the Claimant's excuse that he had not had sufficient experience in the area, this Board cannot find that the Carrier's action in suspending the Claimant for ten days and disqualifying him pending re-qualification and completion of Foreman School was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER


CARRIER MEMBER

DATED: October 12, 2004

DATED: 10/13/04