

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 229

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

1. The dismissal of Electric Traction (ET) Lineman A. DeMaio for alleged violation of Amtrak's Standards of Excellence, specifically the parts entitled TRUST AND HONESTY and ATTENDING TO DUTIES, was based on unproven charges, harsh, capricious and in violation of the Agreement (System File NEC-BMWE-SD-4318D).
2. Mr. DeMaio should be reinstated to medical leave of absence until such time as it is determined that Mr. DeMaio can return to full duty with the Carrier with full rights and seniority restored and unimpaired."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as an Electric Traction Lineman, headquartered at Penn Station.

By letter dated January 8, 2002, the Claimant was notified to appear for a formal investigation and hearing on charges alleging that Claimant violated the Carrier's Standards of Excellence regarding Trust and Honesty and Attending to Duties when he allegedly accepted an overtime assignment on December 10, 2001, left the property before completing his assignment and without notice to or permission from supervision, and then submitted a time card on December 21, 2001, that falsely indicated that the Claimant had worked from 6:30 a.m. to 7:00 p.m. on December 10th. After several

postponements, the investigation was opened on July 29, 2003, but recessed due to Claimant's inability to appear. The investigation was rescheduled to September 4, 2003, and the proceeding continued on October 7 and October 27, 2003. By letter dated November 10, 2003, the Claimant was notified that as a result of the investigation, 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 the Claimant's dismissal. The Carrier denied the claim.

The Carrier initially contends that there is no merit to the Organization's assertion that the discipline at issue should be overturned on procedural grounds. The Carrier maintains that none of its actions prevented the Claimant from receiving a fair and impartial investigation. The Carrier acknowledges that there was significant delay in holding the investigation, but asserts that both parties contributed to that delay. Moreover, because there is no evidence demonstrating that the delay prevented the Claimant from receiving a fair and impartial investigation, the delay cannot be viewed as prejudicial to the Claimant's rights.

The Carrier then argues that the overwhelming evidence in the record proves the Claimant's guilt. The Carrier emphasizes that the documentary evidence clearly demonstrates the Claimant's submission of a fraudulent timecard for four hours' overtime pay on December 10, 2001, and his submission of a doctor's note attesting to the fact that he was at the Hospital at 5:13 p.m. on December 10, 2001, and could not have performed the overtime hours claimed. The Carrier asserts that the Claimant did not notify or receive permission from his supervisors to leave the property on December 10th. The

Claimant readily admitted to leaving the property before the completion of assignment and to signing the timecard claiming four hours of overtime on December 10th.

The Carrier maintains that there can be no dispute that the Claimant's actions clearly were dishonest and in violation of the Standards of Excellence governing Trust and Honesty and Attending to Duties. The Claimant was properly found guilty of those violations, and the assessed discipline was appropriate. The Carrier emphasizes that dishonesty long has been held to be grounds for dismissal, and the Carrier has no tolerance for dishonest employees. The Carrier argues that although it is regrettable that an employee with Claimant's years of service committed such an offense, those years of service do not support a conclusion that the discipline was an abuse of discretion. The Carrier points out that leniency is not a prerogative of the Board; only the Carrier may grant leniency.

The Carrier goes on to assert that there are no mitigating circumstances that require a reduction or removal of the discipline of dismissal in the Claimant's case. The Claimant's prior discipline record shows not only a lack of respect for the Carrier's expectations, but a complete disregard for them. The Carrier argues that such conduct warrants dismissal, particularly because previous discipline had no positive effect on the Claimant's willingness to change his behavior. There is no evidence that the Carrier was arbitrary, capricious or unreasonable in its actions. Considering the Claimant's prior discipline record, particularly with regard to similar dishonest actions, the discipline assessed was not excessive. The evidence proves that the Claimant is guilty as charged, and the discipline of dismissal was appropriate.

The Carrier additionally maintains that the Organization's assertions regarding the correction of the Claimant's timecard and the alleged signing of blank timecards are irrelevant. The Carrier emphasizes that Claimant was well aware that he did not work the overtime hours on December 10th, and he even submitted a doctor's note attesting to this fact. The Claimant nevertheless fraudulently chose to submit and sign a timecard for payment of four overtime hours that he admittedly did not work. The Organization's assertions do not justify the Claimant's actions.

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

The Organization initially contends that the Carrier failed to prove the Claimant guilty of the charges, and the undue delay in holding the investigation clearly violated the Agreement and deprived the Claimant of due process. The Organization points out that the investigation initially was scheduled for January 17, 2002, but the Carrier requested a postponement. The Carrier's next attempt to hold the investigation was not until June 13, 2002. The Organization argues that there was no reason for the Carrier not to hold the investigation within a reasonable time after the initially scheduled date. Moreover, when the June 13th date had to be postponed, the Carrier waited over one year to reschedule and hold the investigation. The Organization asserts that such a delay is intolerable.

The Organization maintains that the ill consequences of such a delay are evidenced by the memory lapse experienced by the Carrier's two main witnesses. For example, Supervisor Kemery could not remember if he ever told the Claimant of the reduction in hours he authorized when he instructed Foreman Owens to submit the first

corrected time card; Foreman Owens could not remember if he bothered to check his records or simply relied on the Claimant's recollection of hours worked when resubmitting what the Claimant thought was a shortage in his pay. The Organization asserts that if these witnesses could not recall such details, then their recollection of other details might also be suspect. For instance, Owens and Kemery denied the practice of ET employees signing blank time cards, but the Claimant's testimony, as well as that of other Organization witnesses, clearly establishes that such a practice existed.

The Organization points out that the Carrier bears the burden of proof in all discipline cases, but the Carrier's burden should be considerably heavier in cases where, as here, alleged dishonesty is involved. The Organization contends that the Carrier failed to prove that the Claimant was guilty of performing any act of dishonesty. The Organization argues that it was a simple oversight on the Claimant's part that caused him to seek pay until 7:00 p.m. on December 10th, while also providing information that he was being treated for a personal injury at the hospital at 5:13 p.m. on that same date. The Organization asserts that if the Claimant is guilty of anything, it could be only of not properly maintaining his personal records concerning his work hours. The Organization emphasizes, however, that the Carrier's record-keeping is no better or else Foreman Owens would have been able to remind the Claimant of the reason his pay seemed short. Moreover, Supervisor Kemery simply could have brought this matter to the Claimant's attention, thereby avoiding this whole unfortunate incident. The Organization asserts that Supervisor Kemery's initiation of charges against the Claimant amounts to pure entrapment.

The Organization then asserts that the second charge at issue, that Claimant failed to properly attend to his duties, was not seriously addressed during the investigation. The Organization maintains that Claimant notified a co-worker and Power Director Riley that he was leaving to seek medical attention. The Organization points out that there is no evidence as to whether this was the proper method to absent himself from duty, or to establish what the proper method was. The Organization contends that the discipline must be set aside because the Claimant did not commit either of the alleged offenses.

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.

With respect to the procedural arguments raised by the Organization, we find them to be without merit. The record reveals that there were delays caused by both sides and we find that the fact that the hearing was not held for a number of months did not prejudice the Claimant's rights in any manner.

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 the Carrier's standards of excellence involving trust and honesty and attending to duties when he left the Carrier's property without permission before completing his assignment and then signed and submitted a time card which falsely asserted that he was entitled to overtime pay for the period 3 p.m. to 7 p.m. on December 10, 2001. The time cards are clear and they were executed by the Claimant. The records

reveal that the Claimant was actually seeing a doctor at 5:13 p.m. on the afternoon that the Claimant sought overtime pay for the four hours between 3 p.m. and 7 p.m. The Claimant admitted that he did leave work at 3 p.m. on December 10 and subsequently sought pay for the four hours after that time.

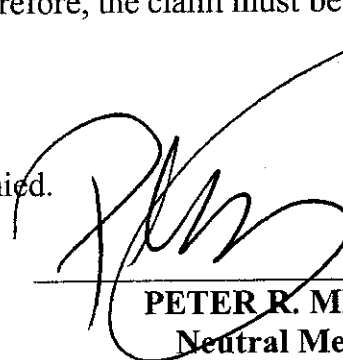
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary,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

This Board recognizes that the Claimant in this case has served the Carrier since 1976. However, that does not change the fact that in May of 1998, he was disciplined for claiming more time on his time card than he actually worked on March 28, 1998. His discipline at that time was a ninety-day suspension and repayment of compensation received for the time not worked. More importantly, the Claimant was placed on probation for one year from that date; and if he were to be found guilty of any significant violation of safety, operating rules, or standards of excellence, he would be immediately dismissed. This Board recognizes that that probation has ended. However, the Claimant was clearly placed on notice back in 1998 that if he engaged in dishonesty, he could be severely punished. Despite that clear warning and previous discipline and requirement of repayment, the Claimant once again filed false documents seeking pay for time that he clearly did not work. That is significant dishonesty which justifies the Carriers' imposition of discharge. This Board has written on numerous occasions in the past that when employees are not honest, the Carrier has a right to be concerned that they were not

honest in the past and they will not be honest again in the future. That was obviously the Carrier's thought when it issued the ninety-day suspension and probationary period in 1998. Dishonesty is often a terminable offense. It is very difficult to uphold the termination of such a long-term employee. However, given the background of this Claimant and his clear-cut wrongdoing in this case, this Board cannot find that the Carrier acted unreasonably arbitrarily or capriciously when it terminated the Claimant's employment here. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: _____

3/14/05



CARRIER MEMBER

DATED: _____

3/3/05