

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 231

STATEMENT OF CLAIM:

Appeal of the thirty-day suspension issued to Track Foreman D. Davenport for alleged violation of Amtrak's Standard of Excellence, involving Safety and Professional and Personal Conduct, as well as NORAC Operating Rules D and T. (System File NEC-BMWE-SD-4351D).

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a Track Foreman, headquartered at Newark, Delaware.

By letter dated June 26, 2003, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant allegedly removed a watchman assigned to the south of the TLM and then allegedly left the work site near M.P. 41 without authorization, in violation of Amtrak's Standards of Excellence, involving Safety and Professional and Personal Conduct, as well as NORAC Operating Rules D and T. After several postponements, the investigation was commenced on October 14, 2003, and then recessed and completed on October 28, 2003. By letter dated November 12, 2003, the Claimant was notified that he had been found guilty of the charges, and he was assessed a thirty-day suspension. The Organization filed a claim on the Claimant's

behalf, challenging the assessed discipline. The Carrier denied the claim.

The Carrier initially contends that, contrary to the Organization's assertions, there has been no evidence demonstrating that the hearing officer was biased in his decision or failed to consider the testimony of the Organization's witnesses. The hearing officer is responsible for making credibility determinations, and he chose to believe the Carrier's witnesses and the Claimant's own responses during the investigation that demonstrated his guilt. The Carrier asserts that based on the Claimant's own testimony, there was no basis on which to conclude that the hearing officer was biased in his decision or that his credibility determinations should be overturned.

As for the Organization's argument that the Claimant removed the watchmen because of unsafe conditions, the Carrier asserts that if, in fact, Claimant removed the watchmen because of unsafe conditions, then Claimant was obligated to advise Assistant Supervisor Griffin that the conditions were unsafe to provide watchmen. Moreover, the Claimant would have advised Foreman Davis that he was pulling his men because of unsafe conditions. The Carrier emphasizes that the record demonstrates that Claimant did not so advise Griffin and Davis.

The Carrier maintains that the Claimant's assertions that he removed the watchmen from the track because of unsafe conditions are not credible, especially in light of the fact that Claimant did not advise Griffin or Davis of the alleged unsafe conditions or that he was removing the watchmen for that reason. The Carrier points out that Claimant's

testimony establishes that he was upset that Griffin asked him to transfer Track 1, which was out of service in his name, to Davis. The Carrier maintains that is obvious from Claimant's own testimony that he did not leave the watchmen as instructed by Assistant Supervisor Griffin because he was upset that he had to transfer the out-of-service track to Foreman Davis.

The Carrier then disputes the Organization's argument that Claimant's phone records demonstrate that he attempted to notify Supervisor Griffin. These records indicate that two calls were made to Griffin, and each was only one minute in duration. In addition, the Claimant testified that he did not notify Griffin that he was taking his men or that he was leaving; Griffin confirmed that he received no such notice, and he further testified that he had not received any message from Claimant. The Carrier argues that the Organization's assertions are merely a self-serving attempt to mitigate the Claimant's guilt.

In connection with the Organization's contention that the assessed discipline was disparate compared to discipline assessed to other employees, the Carrier emphasizes that cases involving allegedly similar incidents cannot be treated as identical because there are numerous factors taken into consideration when assessing discipline, including the charges at issue, the employee's years of service, and the employee's prior discipline record. The Organization failed to show any pattern of employees issued lesser discipline under similar circumstances, including similarities in responsibility, guilt, and past record.

The Carrier goes on to argue that contrary to the Claimant's assertions, the Carrier properly advised the Claimant of the thirty-day suspension to be served at Carrier's discretion, and the receipt proves that Claimant received this notice. As for the notice that the suspension would commence on January 6, 2004, and end on February 3, 2004, the Carrier emphasizes that the receipt shows that the notice was returned to the Carrier because the Claimant failed to pick up his mail from his post office box.

The Carrier then acknowledges that the Claimant inadvertently was not provided with a copy of the Carrier's decision regarding his suspension. The Carrier asserts, however, that it timely notified the Claimant's union representative of the decision, and the Claimant received a copy at the appeal hearing. Moreover, there is no evidence that the Claimant's failure to receive a copy prevented him from properly preparing his defense, or that this prejudiced or impaired Claimant's right to a fair hearing.

The Carrier argues that the overwhelming evidence demonstrates that Claimant disregarded instructions from Assistant Supervisor Griffin to provide two men to serve as watchmen, and that he left the job site without authorization. Claimant's actions constitute a clear case of insubordination and certainly cannot be condoned. There can be no dispute that Claimant's actions violated the Standards of Excellence governing safety and Professional and Personal Conduct, as well as NORAC Operating Rules T and D. The Carrier asserts that Claimant properly was found guilty. The Carrier points out that numerous Board Awards have upheld the Carrier's right to dismiss an employee for

failing to comply with instructions. The Claimant was assessed a thirty-day suspension, however, because of his length of service and work record.

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

The Organization initially contends that the suspension at issue was harsh, unusual, and capricious. The Organization argues that the hearing officer's decision is based solely on the testimony of the Carrier's witnesses. The hearing officer's decision does not even acknowledge that any of the Organization's witnesses were even present. The Organization therefore asserts that the Carrier violated Rule 68 of the Agreement by failing to provide the Claimant with a fair and impartial investigation. The hearing officer was biased in favor of the Carrier.

The Organization goes on to assert that on the date in question, the Claimant received a call from an employee who told the Claimant that because of the fog and rainy conditions, he could not see. The Claimant also stated that he was responsible, as the Gang Foreman, for removing employees from unsafe conditions. The Organization maintains that under the Safety Agreement, employees shall not work under unsafe conditions. The record demonstrates that it was foggy on the date in question, and the employees could not see as a result of the conditions. Moreover, the employees assigned to the Claimant did not leave the job without permission. The Organization emphasizes the Claimant's testimony that he did not disobey any order and was not insubordinate.

The Organization further points to the Claimant's phone records, which show that he made every effort to communicate with Supervisor Griffin. The Claimant further stated that he told Griffin that he had flagmen available, but that he was told that they no longer were needed.

The Organization argues that this is a case of miscommunication between Griffin and the Claimant. 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.

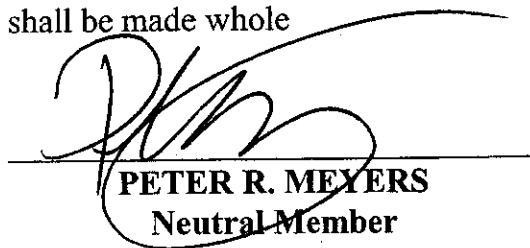
This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. We find that the Carrier provided the Claimant with a fair hearing which met the requirements of Rule 68.

This Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant acted insubordinately and in violation of the safety rules on June 19, 2003. The lengthy record does reveal poor communication between the Claimant and his supervisor. However, given the weather conditions and the amount of discretion that is allowed the Claimant as a track foreman, this Board cannot find that the Claimant acted improperly when he made personnel changes on his own. There is simply insufficient evidence in this record that the Claimant was given a direct order that he disobeyed.

The Claimant in this case has been employed by the Carrier since July of 1979. Given that lengthy seniority and his excellent prior service record, there is simply nothing in this file that supports the issuance of a thirty-day suspension to the Claimant. For all of the above reasons, the claim must be sustained.

AWARD:

The claim is sustained. The thirty-day suspension shall be removed from the Claimant's record and he shall be made whole


PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: 3/14/05


CARRIER MEMBER

DATED: 3/3/05

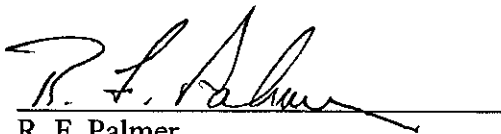
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In the instant case, the majority determined there was insufficient evidence that the Claimant was insubordinate and, chose to ignore the fact that he left the worksite without authorization. To reach this conclusion, the majority obviously overlooked the Claimant's admissions, in the record, that

- he was instructed by Supervisor Griffin to leave two men to serve as advance Watchmen,
- he did not leave the men as instructed, and
- he did not advise Supervisor Griffin that he was leaving the job site.

While the majority obviously credited the Claimant's belated contention that he removed the Watchmen and left the property based on "safety concerns", that credit is misplaced. Even if it was foggy on the date at issue, it was incumbent upon the claimant to notify his Supervisor of the "unsafe" condition, and seek instructions on how to proceed. The fog did not grant the claimant the authority to ignore the instructions of his Supervisor and arbitrarily make his own staffing decision to release the watchmen and leave the job site.

Clearly, the majority missed the call in this case and for this reason, I dissent to the decision.



R. F. Palmer
Carrier Member