

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 240

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

1. The dismissal of ET employee K. Kucsmas for alleged theft of copper wire and other scrap material on March 19, 2004 was harsh, capricious, based on unproven charges and in violation of the Agreement (System Files NEC-BMWE-SD-4390D).
2. Claimant Kucsmas shall be reinstated to service with seniority and all other rights unimpaired and shall be made whole for all wage and benefit loss suffered as a result of the discipline."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as an Electrician, headquartered at Hunter Yard in Newark, New Jersey.

By letter dated April 1, 2004, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant violated the Carrier's Standards of Excellence involving Trust and Honesty, Attending to Duties, and Professional and Personal Conduct (Teamwork) as a result of his alleged acts of theft and/or dishonesty and conduct unbecoming an Amtrak employee, when he was arrested by the police for stealing Carrier property on Friday, March 19, 2004. The investigation was conducted as scheduled on April 16, 2004. By letter dated April 29, 2004, the Claimant was notified that as a result of the investigation, he had been found guilty of the charges, and he was

dismissed from the Carrier's service in all capacities. The Organization filed a claim on the Claimant's behalf, challenging his dismissal. The Carrier denied the claim.

The Carrier initially contends that the overwhelming evidence in the record demonstrates that the Claimant is guilty of the charges. The Claimant and the other employees involved in this matter were observed unloading copper wire and other scrap material from an Amtrak truck and placing this material into a personal vehicle owned by Claimant Brusic. The evidence further shows that after the Claimant and the other employees involved in this matter were arrested and read their rights, Claimant Brusic said, "We got caught. We were stupid." The Carrier emphasizes that there was no legitimate reason for the scrap material to be in the Claimant's personal vehicle.

The Carrier argues that based on the overwhelming evidence in the record, there can be no doubt that the Claimant was guilty of the charges. The Carrier maintains that such conduct irreparably damages the Claimant's relationship with the Carrier and with his fellow employees. The Carrier must have confidence that its property is not subject to theft by employees, and employees also must have trust in their co-workers in that their lives and livelihoods depend upon teamwork without doubts and concerns as to the reliability and honesty of their peers.

The Carrier points out that theft within the railroad industry is a very serious problem and a major offense. The Carrier asserts that if it were forced to retain dishonest employees, its operations would be seriously affected. The Carrier argues that its patrons, if in doubt about the honesty of Carrier's employees and the safety of their property, could decide to use an alternate method of transportation. The Carrier insists

that it must do all it can to protect itself against employee dishonesty, and it should not be asked to condone the actions of dishonest employees.

The Carrier emphasizes that an employee who steals from the Carrier is a betrayer of the trust that is inherent in and a cornerstone of the employer-employee relationship. Breaking that bond of trust is the cardinal offense, more important even than the amount of theft itself. The Carrier asserts that the discharge of such an employee is a proper and inevitable response, and numerous Board Awards have consistently upheld the Carrier's right to dismiss employees whose dishonest actions present a threat to the Carrier.

The Carrier maintains that the Claimant was provided a copy of the Standards of Excellence, which expressly state that "because honesty is so important to trust and our ability to work together as a team, Amtrak has no tolerance for employees who are dishonest." The Claimant was well aware of the Carrier's goals, values, and expectations. The Carrier points out that the Claimant's years of service do not support a conclusion that the discipline was an abuse of discretion. The Carrier argues that leniency is not a prerogative of the Board, and only the Carrier can grant leniency.

Addressing the Organization's assertion that the Claimant and the other employees involved were attempting to return stolen material back to the Carrier, the Carrier insists that this argument is not credible and represents only a self-serving effort to mitigate the Claimant's guilt. The employees' explanations as to the reason why Claimant Brusich had scrap copper wire in his personal vehicle simply are not plausible. The Carrier points out that if Claimant Brusich was in the process of returning the scrap copper wire and already had placed the wire in his personal vehicle by himself, then Claimant Brusich could have

returned the material to the Carrier on his own, without the assistance of the other employees involved in this matter.

The Carrier further asserts that there is no evidence to demonstrate that the Claimant was not given a fair or impartial trial. The Carrier emphasizes that Amtrak Police Officer Robbins was present at the investigation, and his testimony corroborated the Elizabeth police report. The Carrier points out that if the Organization felt it necessary for the Elizabeth police to attend the investigation, the Organization failed to request their presence at the time it received the Carrier's list of witnesses. Moreover, the Carrier cannot compel individuals who are not employed by the Carrier to attend an investigation, and the Organization's belated attempt to request their presence at the investigation must fail. The Organization also could have made its own arrangements for the presence of the Elizabeth police officers, but it failed to do so.

The Carrier additionally asserts that the Amtrak Police Report, as well as the testimony of the Carrier's witnesses, establishes that the Elizabeth police observed the Claimant and the other employees involved in this matter as they unloaded material from an Amtrak vehicle and loaded it into a personal vehicle. The Carrier argues that the absence of the Elizabeth police officers was not prejudicial to the Claimant's rights to a fair and impartial hearing. Moreover, the Organization's assertion that the criminal charges were dropped does not alleviate the Claimant's guilt of the charges in this case. The Carrier points out that the fact that the criminal charges were dropped merely was a determination that the Claimant and the others involved would not be criminally prosecuted; this was not a determination that the Claimant was not guilty.

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

The Organization initially contends that the record makes it abundantly clear that the Claimant was caught in the act of doing the right thing, recovering copper wire from a dump adjacent to Substation 40 and returning it to the Carrier's property. The Organization asserts that this scenario fits with the Claimant's record, which clearly earned him the benefit of any doubt. The Organization points out, however, that despite the Claimant's testimony, which was at odds with the Carrier's conclusions and which showed that the Claimant's actions had been misinterpreted and misconstrued, the Carrier chose to credit hearsay over direct testimony. The Organization insists that the Carrier made no effort to request the presence of witnesses critical to the corroboration of key testimony and/or to the resolution of conflicts between the testimony of Amtrak Police Officer Robbins and the testimony of the Claimant.

The Organization points out that because the charges against the Claimant involve alleged moral turpitude, the Carrier bears a higher standard of proof in this matter and is obligated to demonstrate clear and convincing evidence that the Claimant was guilty as charged. The Organization argues that the Carrier heavily relied upon Robbins' testimony, but Robbins did not witness any theft, he relied on hearsay from Elizabeth, New Jersey, police, and he misquoted Claimant Brusic. Moreover, the Carrier refused to make any effort to call any of the Elizabeth police officers to testify.

The Organization asserts that instead of meeting its higher standard of proof, the Carrier preferred to simply prejudge its loyal, dedicated, longtime employee guilty of

moral turpitude. The Organization emphasizes that the Elizabeth, New Jersey, police were uncertain whether they had sufficient grounds to arrest the Claimant and the other employees involved in this matter, and the civil charges were dropped, presumably for lack of proof. Moreover, while the Carrier dismissed the Claimant's version of events as too far-fetched to be believed, the Carrier's case lacks substance and falls short of the clear and convincing standard. The Organization maintains that the Carrier's decision to dismiss the Claimant therefore must be overturned. The Claimant was not stealing anything or doing anything wrong, and the Carrier failed to meet its burden of a higher standard of proof in this instance.

The Organization goes on to argue that the Carrier violated the Claimant's due process rights when it failed to develop evidence that tended to militate against the charges leveled against the Claimant. Among other problems, the Conducting Officer refused to even request the presence of the two Elizabeth, New Jersey, police officers who reported that the Claimant, together with the other employees involved in this matter, formed a chain gang to transfer scrap copper from the Carrier's gang truck into Claimant Brusic's personal vehicle. The Organization asserts that because these police officers simply told the Claimant and the others to leave the area, this strongly suggests that no apparent theft was perceived to be in progress. The Organization insists that the Carrier's refusal to even request the presence of these police officers was a fundamental due process error and denied the Claimant his contractual right to a fair and impartial investigation. The Organization argues that to the extent that Carrier's decision to dismiss the Claimant was based upon the police report and the comments allegedly made

to the police, the Carrier was required to make a reasonable effort to secure the police officers' presence as witnesses at the investigation.

The Organization emphasizes that the testimony introduced at the investigation neither justifies the discipline assessed against the Claimant nor supports the charges against him. 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. A thorough review of the transcript makes it clear that the Claimant was guaranteed all of his due process rights throughout the hearing. There is nothing that took place at that hearing that requires that the decision of the hearing officer be set aside.

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's Standards of Excellence relating to trust and honesty when he was arrested by the police for stealing Amtrak property on March 19, 2004. There is a great deal of evidence that the Claimant was at the location with other employees and they had loaded Amtrak property into a personal vehicle. Moreover, the excuse given by the Claimant for the activities simply makes no sense. We find that the Carrier proved its case of theft with clear and convincing evidence.

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 in this case had been a Carrier employee for nearly eleven years. However, this Board has held on numerous occasions in the past that despite lengthy seniority, theft is the type of offense that forms a legitimate basis for a just cause discharge, even on the first offense. The Carrier has a right to be concerned that if an employee has been found guilty of theft on this occasion, there might have been thefts in the past and may continue to be some in the future. Therefore, this Board and other Boards have held that theft, even of a small amount of property, constitutes a sufficient basis for discharge.

This Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim must be denied.

AWARD:

The claim is denied.


PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER


CARRIER MEMBER

DATED: 7/6/05

DATED: 7/6/05