

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 242

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

1. The dismissal of Foreman J. Johnson for alleged violation of Amtrak's "Standards of Excellence" was arbitrary, capricious and based on unproven charges (System File NEC-BMWE-SD-4397D).
2. The Claimant shall be reinstated to service with seniority and all other rights unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as an Engineer Work Equipment Operator, headquartered at Morrisville, Pennsylvania.

By letter dated July 31, 2003, 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 involving Trust and Honest, Attending to Duties, and Professional and Personal Conduct (Teamwork) when he fraudulently submitted a return-to-work medical certificate to verify his absence for the period from April 27 through May 5, 2003, when the document was physically altered and not an accurate and true replication of the original return-to-work certificate. After a couple of postponements,

the investigation was opened on January 27, 2004, recessed at the Organization's request because of the Claimant's absence, continued on February 24, 2004, but recessed again at the Organization's request because neither the Claimant nor his representative were present, and continued on May 4, 2004, with the Claimant participating via telephone. By letter dated May 19, 2004, the Claimant was notified that he had been found guilty of the charges, and he was being dismissed from the Carrier's service. 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 the record demonstrates that the return-to-work statement that the Claimant supplied to the Carrier clearly is different from the return-to-work certificate prepared by the Claimant's physician. The Carrier maintains that the overwhelming evidence shows that the return-to-work certificate that the Claimant submitted to verify the reason for his absence from April 27 through May 5, 2003, was physically altered and was not an accurate and true replication of the form prepared by his doctor. The Carrier insists that there can be no dispute that the Claimant's actions were dishonest and in violation of the Carrier's Standards of Excellence. The Claimant properly was found guilty of these violations, and the assessed discipline was appropriate.

The Carrier emphasizes that it long has been established that dishonesty in any form is grounds for dismissal because it breaks the necessary bond of trust between employer and employee. There have been numerous Awards on this property upholding

the Carrier's decision to discharge employees for dishonesty. The Carrier points out that the Standard of Excellence governing Trust and Honesty expressly states that the Carrier has no tolerance for employees who are dishonest. The Carrier insists that the Claimant was well aware of the Carrier's expectations. The Carrier asserts that although it is regrettable that an employee with so many years of service committed this offense, those years of service do not support a conclusion that the discipline imposed was an abuse of discretion. The Carrier contends that leniency is not a prerogative of the Board, and only the Carrier can grant leniency.

The Carrier argues that the record clearly supports the finding of guilt, and there are no mitigating circumstances that require a reduction or removal of the discipline of dismissal. The Claimant was afforded a fair and impartial investigation, and there is no evidence that the Carrier abused its discretion in this matter or acted in a manner that was prejudicial to the Claimant's rights. The Carrier asserts that there is no evidence that the Carrier was arbitrary, capricious, or unreasonable. Moreover, given the seriousness of the offense, the discipline assessed was not excessive. The Claimant was proven guilty as charged, and the discipline of dismissal was appropriate.

The Carrier then addresses the Organization's assertion that the subject document was faxed to the Carrier by the Vice Chairman, and not the Claimant. The Carrier emphasizes that the fax number on the document corresponds to the telephone number that the Claimant had while living in Laurel, Delaware. Moreover, the Claimant

acknowledged providing the doctor's note, even though it was alleged that the note was sent to the Claimant's representative. The Carrier therefore maintains that the evidence demonstrates that the Claimant was requested to provide documentation, and he submitted the doctor's note to be provided to the Carrier. The Carrier further points out that although the Vice Chairman acknowledged that he faxed the doctor's note provided by the Claimant to the Carrier, the Vice Chairman did not state that he altered the document. The Carrier contends that there can be no doubt that the Claimant provided and altered the return-to-work certificate.

The Carrier then emphasizes that there is no evidence to support the Organization's contention that the doctor's nurse added the dates to the return-to-work certificate. The Carrier maintains that if the nurse had changed the document, then a copy of the revised note would have been kept in the Claimant's file and would have been provided by the doctor's office when the Carrier sought verification of the note.

The Carrier additionally asserts that there is no evidence that the Claimant was not provided a fair and impartial hearing. The Carrier points out that if the Organization wanted the Claimant's physician to be present at the investigation, it could have requested the doctor's presence at the time that the Organization was provided a list of witnesses who would be present. The Carrier emphasizes that it cannot compel an individual who is not employed by the Carrier to attend an investigation, and the Organization's belated attempt to request the doctor's presence at the investigation must fail. In addition, the

Organization could have made its own arrangements for the doctor's presence at the investigation, if the Organization felt that his presence was pertinent to the Claimant's defense. The Carrier points out that the Claimant's representative initially stated that he did not think it was necessary for the Claimant's doctor to participate in the investigation. The Carrier argues that the absence of the Claimant's physician was not prejudicial to the Claimant's right to a fair and impartial investigation.

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

The Organization initially contends that the Carrier failed to meet its burden of proof in this matter. The Organization argues that the Carrier presented no evidence that the Claimant altered the return-to-work certificate at issue. There is no dispute that the suspect document was faxed to the Carrier by Vice Chairman Rochon, not the Claimant. The record shows that the Claimant sent the return-to-work slip to his representative, as a matter of practice, and the record contains no evidence that the Claimant authorized Vice Chairman Rochon to use that document in any manner. The Organization points out that the Carrier made the assumption that because the document provided by the Vice Chairman and the document received from the doctor's office were different, the Claimant made the changes.

The Organization emphasizes that the Board consistently has held that the burden of proof in discipline cases rests squarely on the Carrier, and the Carrier may not rely on

mere speculation, assumption, or conjecture as a basis on which to impose discipline. Moreover, in cases involving alleged dishonesty, that burden is even greater. The Organization insists that the Carrier must support such an accusation with clear and convincing evidence of misconduct, as the alleged offense implies an element of moral turpitude, if not criminal liability.

The Organization asserts that both of the documents in question indicate that the Claimant was released to return to work on May 5, 2003. The only difference between these forms is the dates of treatment. On this issue, the Organization points to the Claimant's testimony that he asked a nurse to change the return-to-work slip to reflect the days that he actually was off work sick and under the doctor's care, and the doctor's nurse did so. There is no evidence that the Claimant's testimony was not completely honest and candid. The Organization maintains that it is quite possible that the original return-to-work was placed in the Claimant's record at the doctor's office, and the nurse did not change the original document to reflect the changes that she made on the Claimant's copy. The Organization points out that the Carrier did not attempt to contact the doctor's office to verify the Claimant's testimony.

The Organization argues that the Carrier did not offer any evidence that the Claimant altered the subject document, or that he even was aware that the Vice Chairman provided that document to the Carrier. The Carrier also failed to obtain or consider evidence to verify or disprove the Claimant's testimony. The Organization therefore

asserts that the Carrier failed to prove the charges leveled against the Claimant, and it failed to provide the Claimant with due process and a fair and impartial investigation.

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 and impartial hearing and that all of his procedural rights were safeguarded throughout.

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 dishonest when he altered a doctor's note relating to the care that he was receiving from the doctor. A review of the documents included with the transcript in this case makes it clear that the Claimant submitted an altered document which indicated that he had been under the care of his physician for the period April 27, 2003, through May 5, 2003, when, in fact, the original document made it clear that the Claimant had only been under the care of the doctor for one day, May 5, 2003. The Claimant states that he asked the nurse to change the return-to-work slip to reflect the days that he was actually off sick; but when the Carrier obtained a copy from the doctor's office, that copy did not contain the changes

that had been made to the one that was submitted by the Claimant. There is no evidence in the record that the nurse made the changes to the document. Hence, this Board must conclude that the Claimant was responsible for the alteration.

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.

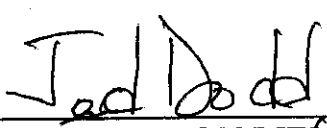
This Board has held on numerous occasions that dishonesty is a legitimate basis for discharge. The Claimant in this case had been disciplined in 1993, 1995, and 2001 for serious offenses. Despite the fact that the Claimant had been employed by the Carrier for thirteen years, his poor service record plus this very serious incident of wrongdoing involving dishonesty, justifies the Carrier's action in this case. This Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant. Therefore, the claim will be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER
DATED: 7/6/05



CARRIER MEMBER
DATED: 7/6/05