

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

Case No. 247

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

1. The dismissal of Mr. R. Snavely for allegedly operating Nordco Spike Puller No. A22923 without an inspection or a safety check or a log book and without wearing the seat belt with which it was equipped and causing it to derail while traveling West on Track #1 at Paoli Interlocking on February 10, 2004, was arbitrary, capricious, exceedingly harsh and in violation of the Agreement (System File NEC-BMWE-SD-4481D).
2. The Claimant shall be reinstated to service with all seniority and all other rights unimpaired and he shall be made whole 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 a Trackman.

By letter dated March 4, 2005, the Claimant was notified to appear for a formal investigation and hearing to develop the facts and place responsibility, if any, in connection with the Claimant's alleged operation of a spike puller in a careless and negligent manner, including the Claimant's alleged failure to operate the spike puller in accordance with the operating instructions, the Claimant's alleged failure to wear the seatbelt while operating the spike puller, the Claimant's alleged failure to inspect the spike puller to determine if it was in safe operating condition, and the Claimant's alleged failure to have the RMM logs aboard the spike puller. After a postponement, the

investigation was conducted on March 29 and April 19, 2005. By letter dated May 4, 2005, the Claimant was informed that as a result of the investigation, he had been found guilty as charged, and he was being dismissed from the Carrier's service. The Organization filed a claim challenging the Carrier's decision, and the Carrier denied the claim.

The Carrier initially contends that the Claimant was responsible for the movement, safety, and care of the track cars in his charge. Moreover, the Claimant was required to perform a visual inspection of the machine before operating it. The Carrier maintains that the Claimant failed to perform such an inspection prior to moving the machine. Moreover, if the inspection had been conducted, then it would have been determined that the lever was not in the right position.

The Carrier further argues that the Claimant was required to wear the seat belt with which the machine was equipped, and he was not permitted to stand in moving equipment that has seating. The Carrier maintains that the record demonstrates that the Claimant also failed to have the required Roadway Maintenance Machine (RMM) log on board the machine, as required. The Claimant acknowledged that the machine did not have the RMM manual on board, and he also acknowledged that he was standing while operating the machine in a reverse movement. The Carrier points out that the Claimant further acknowledged his awareness of the rules requiring him to wear the seat belt and remain seated. The Carrier insists that the machine is designed so that the operator can be seated when the machine is operating in reverse. The Carrier maintains that although it may be common for operators to operate in a standing position, such a practice is not

proper and not in accordance with the rules; the Carrier does not condone such a practice.

The Carrier argues that based on the overwhelming testimony, the Claimant was guilty as charged. The Carrier asserts that the Claimant's violation of critical safety and operating rules should not be taken lightly, especially in light of the fact that these rules are most important to the safety of the Carrier's employees, customers, and the public. The Carrier insists that it possesses the managerial right and responsibility to establish and enforce rules for the safe conduct of its operations. Violation of these rules places the Carrier at risk and jeopardizes the safety of its employees. The Carrier argues that it must make clear, through disciplinary action, that safety should be of utmost concern.

The Carrier then asserts that the discipline of dismissal cannot be viewed as excessive in this case, particularly in light of the Claimant's previous discipline record, which includes an April 2005 Alcohol and Drug Waiver Agreement, which the Claimant signed after testing positive for marijuana metabolites. The Claimant's record also includes a number of suspensions and other disciplinary measures for other infractions, including violation of safety and operating rules. The Carrier contends that the Claimant's previous discipline record demonstrates his continued failure to make safety his first priority and his total disregard for the Carrier's policies and procedures. The Carrier insists that it cannot condone the Claimant's attitude, and it cannot be expected to retain an employee who demonstrates an admitted lack of concern regarding safety.

The Carrier emphasizes that there can be no dispute that the Claimant carelessly and negligently operated the spike puller on the date in question, in violation of the Standards of Excellence, and the safety and operating rules. The Carrier argues that there

is no reason to amend the discipline imposed in this case in that the record supports the finding of guilt and there are no mitigating circumstances that require a reduction or removal of the discipline of dismissal.

Rebutting the Organization's arguments, the Carrier maintains that the testimony of Carrier witnesses established that there were no reported complaints about the hydraulics and actual operation of the machine's turntable prior to the incident in question. Moreover, there were no defects or problems found upon inspection of the machine. The Carrier asserts that the operators' complaints about the turntable had no validity, and these complaints came only after the accident in question. The Carrier maintains that the Organization's arguments are merely a self-serving effort to mitigate the Claimant's guilt.

The Carrier additionally argues that even if it somehow is determined that discipline is not appropriate in this case, no payment is due the Claimant. The Carrier points out that the Claimant was medically disqualified from service because he tested positive for marijuana metabolites as part of the post-accident/injury drug test as a result of this incident. Accordingly, the Claimant is not entitled to any lost wages.

The Carrier further asserts that the Claimant was afforded a fair and impartial hearing, and there is no evidence that the Carrier abused its discretion or acted in a manner that was prejudicial to the Claimant's rights. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier improperly dismissed the Claimant for suffering an injury following the derailment of the troublesome spike puller.

The Organization argues that the fact that an injury occurred is not proof of negligence or of a rule violation.

The Organization asserts that nothing in the record disputes the Claimant's testimony that he performed a walk-around inspection of the machine before it was taken out to the work site. Moreover, although the Claimant admitted that he was standing and not wearing his seat belt at the time of the derailment, the Organization insists that this was a practical necessity and not an uncommon practice for operators "traveling" this spike puller in reverse mode.

The Organization goes on to assert that the spike puller was mechanically defective, and the Claimant brought this to the attention of Carrier supervision both before and after the incident at issue. In addition, four other long-time machine operators who had actually operated the machine in question corroborated the Claimant's assessment of the machine's mechanical condition. The Organization further asserts that the Carrier plainly failed to accord the same credibility to the testimony of its veteran machine operators as it did to the testimony of its supervisors. In fact, the Carrier based its decision on the report of a "committee" none of whose members witnessed the derailment or the Claimant's conversation with Supervisor Jennifer about the missing log book. The Organization maintains that speculation is not proof or a valid substitute therefor. The Organization contends that the Claimant was doing his job as safely as possible and to the best of his ability when the mechanically defective machine derailed.

The Organization goes on to assert that absent substantial proof, the Carrier cannot validly consider the Claimant's prior discipline, much less assess the exceedingly harsh

penalty of dismissal. 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 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 several Carrier safety rules when he improperly operated the spike puller on February 10, 2004. The extensive record proves with sufficient evidence that the Claimant did not wear a seatbelt, he did not do the walk-around inspection, and he was standing during the operation when he was supposed to have been sitting. All of those actions on the part of the Claimant violated different Carrier safety rules.

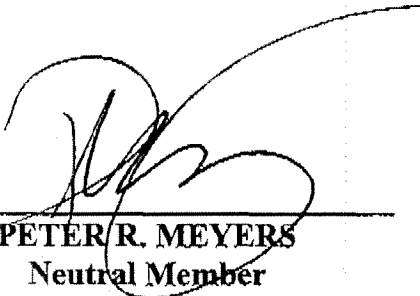
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary,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

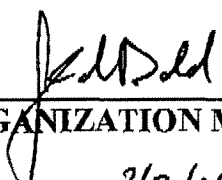
The Claimant in this case had sustained a personal injury in 1994 when he failed to properly brace himself and received a waiver/reprimand and remedial safety training. Also in 1994, the Claimant was suspended and disqualified as an engineer and required to re-qualify. In February of 2004, the Claimant was assessed a thirty-day suspension (fifteen days to be held in abeyance for one year) for insubordination. Finally, the Claimant tested positive for marijuana metabolites as part of the Company post-accident/injury drug testing event after the accident in this case on February 10, 2004.

Given that poor service record, coupled with the serious safety violations that the Claimant was found guilty of in this matter, this Board cannot find that the action taken by the Carrier in terminating his employment was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER**DATED:** 3/3/06

CARRIER MEMBER**DATED:** 3/3/06