

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 216

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

1. The dismissal of B&B Mechanic L. Daniel for alleged violation of Amtrak's Standards of Excellence, specifically part entitled TRUST AND HONESTY was based on unproven charges, harsh and capricious. (System File NEC-BMWE-SD-4172D).
2. The Claimant should be reinstated to full service with seniority unimpaired and made whole for all loss resulting from the discipline."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a mechanic in the Bridge and Building (B&B) Department, working at Penn Station in New York City.

By letter dated December 12, 2001, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant violated the Carrier's Standards of Excellence, particularly the section entitled "Trust and Honesty," when he allegedly committed an act of dishonesty when he fraudulently asserted that he sustained a disabling injury on July 23, 2001, due to a physical altercation with another employee. After two postponements, the investigation was conducted on January 22, March 7, and April 18, 2002. By letter dated May 2, 2002, the Claimant was notified that he had been

found guilty of the charge, and that he was dismissed from the Carrier's service in all capacities.

The Organization filed a claim on the Claimant's behalf, challenging his dismissal as based upon unproven charges. The Organization also claimed that the punishment was unduly harsh. The Carrier denied the claim.

The Carrier initially contends that the Organization's procedural contentions are without merit. The Carrier points out that Rule 71 provides that employees are entitled to be represented at trial by a "duly accredited representative," which Rule 83 defines as a representative or System Officer of the Organization. The Carrier maintains that it complied with this clear and unambiguous language in the Claimant's case, so there is no basis on which to conclude that the Carrier denied the Claimant's rights. The Carrier emphasizes that the Claimant was afforded a fair and impartial hearing, and there was no violation of the Carrier's obligations or the Claimant's rights under the Agreement.

The Carrier goes on to argue that the record demonstrates that the Claimant is guilty of the charge. The Carrier points out that after the altercation at issue, the Claimant was examined at Bellevue Hospital, and nothing was found to be wrong with him. The Claimant subsequently advised the Carrier that he was at NYU Hospital, but NYU Hospital had no record of the Claimant's being at that facility. The Carrier maintains that the Claimant thereafter sought money through the Claims Department by asserting that he had damaged a nerve, but Claims Department Representative Emde testified that the

Claimant twice dropped a letter from his doctor while in her presence, and he picked it up both times without any signs of physical difficulty or pain. Emde arranged for further investigation of the case because the Claimant's actions were inconsistent with his alleged injuries.

The Carrier then asserts that surveillance of the Claimant during early October 2001 showed that he engaged in a number of physical activities, including the performance of construction work that contradicted the Claimant's assertions of total disability for the period of July 23 through November 20, 2001. The Carrier argues that the Claimant's allegations at trial and the solicited testimony of Dr. Folk are inconsistent with the documented facts of this case. Contradicting the Claimant's and Dr. Folk's assertions that the Claimant was released to return to duty on September 29, 2001, for example, the billing summary demonstrates that Dr. Folk saw the Claimant on September 29, but the Claimant had not reached maximum medical improvement and would be seen again on October 29. The Carrier contends that the Claimant clearly was dishonest. The Carrier contends that the Claimant was attempting to defraud the Carrier by obtaining compensation through an injury claim for a period of time during which the Claimant was not disabled.

The Carrier argues that the Claimant properly was found guilty of the charge. The Carrier further asserts that under the circumstances, the disciplinary penalty of dismissal was commensurate with the serious nature of the proven offense. The Carrier maintains

that dishonesty in any form is grounds for dismissal. The Carrier asserts that the Claimant's conduct was such that it severely impaired the relationship between the Claimant and the Carrier, and between the Claimant and his fellow employees. The Carrier should not be asked to condone the actions of a dishonest employee. The Claimant's conduct has been inconsistent with his ties to the Carrier, and his discharge was the proper and inevitable response.

The Carrier further asserts that the Claimant's years of service do not support a conclusion that the discipline at issue was an abuse of discretion. The Carrier maintains that leniency is not a prerogative of the Board, and only the Carrier can grant leniency. The Carrier argues that in light of the serious nature of the offense, the discipline of dismissal was not an abuse of the Carrier's discretion. The Carrier ultimately contends that the claim should be denied in its entirety.

The Organization contends that the Carrier failed to sustain its burden of proof in this matter, and the standard of proof here must be higher than in other disciplinary cases because the instant matter involves a charge of dishonesty. The Organization argues that the Carrier did not deny or otherwise challenge Dr. Folk's diagnosis or prognosis contained in his July 25, 2001, letter. Because undenied statements must be accepted as fact, the Organization asserts that it is clear that the Claimant sustained the described injuries on July 23, 2001, and the only conclusion that may be reached is that the Claimant was not dishonest in claiming that he was injured.

The Organization then argues that the Carrier's challenge to the extent and severity of those injuries was prompted by Claim Agent Emde's observation that the Claimant exhibited body motions on September 10, 2001, that were inconsistent with the physician's diagnosis. The Organization points out that there is no credible evidence that Emde was medically qualified to make such observations; what Emde perceived as conflicting body motions remains nothing more than opinion and speculation as to the Claimant's condition. The Organization emphasizes that it is well established that a Carrier's decision to impose discipline must rest on substantially more than speculation and conjecture.¹ An employee should not be disciplined unless probative evidence supports the charges specified against the employee.

The Organization then maintains that the evidence obtained during the surveillance of the Claimant during October and November 2001 is the only probative evidence that the Carrier presented, and the Organization does not challenge it. The Organization asserts, however, that this evidence cannot stand as proof that the Claimant submitted a fraudulent injury claim because the testimony demonstrates that the Claimant had been released for full duty on September 29, 2001, two days before the earliest surveillance. The Organization argues that although the Carrier may not accept or condone Dr. Folk's reasons for not providing a release letter on September 29th, the Carrier has not presented any proof that Dr. Folk did not release the Claimant on that date. The Organization therefore contends that any surveillance conducted after September 29th is irrelevant to

this dispute.

The Organization ultimately contends that the claim should be sustained, and the Claimant reinstated to full service with unimpaired seniority and made whole for all losses resulting from the discipline.

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. This Board has reviewed the lengthy record in this case, and we find that the Claimant was guaranteed all of his due process rights and the hearing was fair. We see no violation of Rule 71, as the Claimant was entitled to be represented by a duly accredited representative as defined in Rule 83.

This Board has reviewed the evidence and testimony this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of dishonesty when he fraudulently asserted that he was suffering from a disabling injury and stayed off work from July 23, 2001, until November 2001.

To refute the charges, the Organization relies in large part on a January 10, 2002, letter from the Claimant's doctor, Dr. Frank S. Folk, who states:

Patient was unable to work as of July 23, 2001. The patient has been under treatment from that time.

The doctor later goes on in that January 10, 2002, letter to state that:

On November 19, 2001, the patient was seen in the office and requested a letter of

clearance to return to work since he was advised by his job that his suspension was lifted. At that time, I reiterated to Mr. Daniel that he is physically able to return to work on full duty since September 29, 2001.

The Organization takes the position that since the Carrier relies in large part on the surveillance of the Claimant, which took place in October 2001, that surveillance actually took place after the Claimant had already been found physically able to return to work by Dr. Folk on September 29, 2001. This Board, however, finds that the record really has insufficient evidence that the Claimant had been found physically able to return to work before November of 2001.

The evidentiary record also contains a letter from Dr. Folk dated November 20, 2001. That letter states the following:

TO WHOM IT MAY CONCERN:

This is to inform you that the above-named patient was totally disabled since July 23, 2001, because of severe pains of the neck, back, right shoulder.

He was examined by me on November 19, 2001, and it was noted he can return to work with no restrictions on November 21, 2001.

The above letter dated November 20, 2001, clearly indicates to this Board that this Claimant and his doctor were still taking the position in November of 2001 that the Claimant was totally disabled and had been so since July 23, 2001. Hence, the October 2001 surveillances performed by the Carrier are relevant to this case because, in October, the Claimant was still off work contending that he was disabled.

The Organization then goes on to rely on the testimony of Dr. Folk at the hearing

in this case. The hearing officer obviously rejected most of that testimony and, after thoroughly reviewing the lengthy testimony, this Board can understand why the hearing officer gave very little weight to Dr. Folk's testimony. Dr. Folk takes the position in his testimony that, although the Claimant had been released to work on September 29 and was no longer totally disabled, he did not actually give the Claimant a letter to that effect because the Claimant was unable to pay the doctor fifteen dollars for the letter. Dr. Folk also admits that the Claimant did not pay Dr. Folk for the letter dated November 20, 2001, but Dr. Folk let the Claimant have that letter for nothing. Dr. Folk states, in part, the following:

I said—like I said before: That letter there says he was cleared for duty and the date that he selected to attempt to return to work was on November 29. Now the previous time—the previous time that he attempted to return to work was on September 29, 2001, on which he asked for a letter and he charged it; I did not know he did not have any money. And so my rule is the charge is there, I'm not gonna write.

Dr. Folk went on to state later:

I told him, I said: It cost me \$3,500 to come to one of these things. I said, but under the circumstances—under the circumstances—I'm gonna charge you \$1,000. Now, when I came in this morning, I asked him for my \$1,000. He says: I don't have it. So, therefore, I decided to come on up and do it. Do my part to help Mr. Daniel out because he just does not have—he did not have any money. He's been pleading on me for months that he does not have any money.

Dr. Folk later stated:

I ain't gonna forego no \$1,000. I'm gonna get my \$1,000, I'll promise you that.

Needless to say, most of Dr. Folk's other testimony is similarly as peculiar as the

above. The documents in the record make it clear to this Board that the Claimant was not formally released to work by Dr. Folk until November 20, 2001. Despite Dr. Folk's confusing testimony, the other documents in the record, many of which were drafted by Dr. Folk, tend to support the Carrier's position that there was no previous release to work in September. Since the Claimant was still off work on total disability in October of 2001, when he was observed by the Carrier surveillance team to be performing many tasks which could not be performed by a totally disabled person, this Board has no choice but to find that there is sufficient evidence in the record to support the Carrier's position and the hearing officer's finding that the Claimant was guilty of dishonesty.

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.

Given the seriousness of the charges against the Claimant, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim will be denied.

AWARD:

The claim is denied.

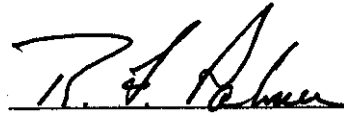


PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 9/29/03



CARRIER MEMBER

DATED: 9/29/03