

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 219

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

1. The dismissal of Trackman P.A. Downs for alleged insubordination and violation of Amtrak's Standard of Excellence on April 12, 2000 was harsh, capricious, without just and sufficient cause and in violation of the Agreement (System File NEC-BMWE-SD-4218D).
2. Claimant Downs shall be reinstated to full service with seniority unimpaired and she shall be made whole for all losses 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 Trackman, with headquarters at Penn Station, New York.

By letter dated April 12, 2000, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant was insubordinate and violated Amtrak's Standards of Excellence when she refused to comply with instructions from Supervisor Luis Colon to remain at her headquarters until she could be escorted to the hospital for medical evaluation on April 12, 2000. Following several postponements, the investigation commenced on June 20, 2002, but was recessed because of the absence of Organization representation. The investigation reconvened on September 18, 2002. By letter dated October 3, 2002, the Claimant was notified that she had been found guilty of

the charges, and that she was dismissed from the Carrier's service in all capacities.

The Organization filed a claim on the Claimant's behalf, challenging her dismissal as without just and sufficient cause and in violation of the Agreement. The Carrier denied the claim.

The Carrier initially contends that the Claimant was given proper notice of the investigation in that the notice was mailed to the Claimant's address of record by certified mail on May 3, 2000. The Carrier points out that several attempts were made to deliver this notice, but the letter was returned to the Carrier when the Claimant failed to pick up the letter from the post office. The Carrier emphasizes that the Claimant has acknowledged that she received the subsequent notices rescheduling the investigation. The Carrier maintains that if the Claimant was unsure of the charges or had any questions, she should have made an attempt to contact the Carrier or her Organization representative. The Carrier argues that it cannot be held responsible for the Claimant's failure to accept delivery of the certified letter.

As for the Organization's assertion that the Carrier did not give a copy of the trial transcript to the Claimant and the Organization, as required by Rule 72 of the Agreement, the Carrier argues that Rule 72 does not establish any timeframe within which such copy must be provided. The Carrier contends that if the Organization had notified Carrier that it had not received a copy of the transcript prior to the appeal hearing, then a copy would have been provided at that time. The Carrier asserts that it properly supplied a copy at the

appeal hearing, when it first became aware that a copy had not been provided previously. There is no evidence that the Carrier intentionally denied the Organization and the Claimant access to a copy of the trial transcript or an opportunity to properly prepare their appeal; the Carrier offered to reschedule the appeal hearing if the Claimant and the Organization needed additional time to review the transcript, but they declined this offer.

Turning to the merits of this dispute, the Carrier contends that the record establishes that the Claimant sustained a personal injury on April 12, 2000, and that Supervisor Luis Colon instructed her to remain at headquarters until she could be escorted to the hospital for medical evaluation and for drug and alcohol testing. The record further shows that the Claimant refused to comply with this instruction, and she left the headquarters.

The Carrier asserts that the Claimant clearly was insubordinate when she disobeyed her supervisor's instructions. The Carrier argues that the Claimant's actions cannot be condoned, and she was obligated to comply with her supervisor's directive and then grieve later if she felt that she had been mistreated or her rights were violated. The Carrier maintains that there is no support for any argument that the Claimant had suffered only a minor injury and the Carrier merely wanted to test the Claimant for drugs and alcohol in retaliation for her previous injury, which resulted in a FELA lawsuit. The Carrier points out that the injury at issue caused the Claimant to be absent from work for about eighteen months, so it cannot be considered "minor." The Claimant further stated

that she left the premises because she "had to get medical attention." The Carrier argues that it had the right and obligation to try to determine the extent and nature of the Claimant's injury and to determine whether her acts or omissions contributed to the occurrence or severity of the injury. In cases of alleged on-duty injuries, the Carrier has a substantial interest in seeing that its employees are properly treated, and that its own interests, including future liability, are thoroughly protected. The Carrier contends that it reasonably required the Claimant to submit to a medical examination, and there is no proof that this was in retaliation for her previous injury. The Carrier further points out that employees who sustain on-duty injuries are required, by Carrier policy, to under a medical evaluation that includes drug and alcohol testing.

The Carrier maintains that the record leaves no doubt that Supervisor Colon instructed the Claimant to remain at headquarters until she could be escorted to the hospital for this medical evaluation. The Carrier points out that the Claimant requested Organization representation, and she was told that a representative would be available at 7:00 a.m. to escort her to the hospital. The Claimant was obligated to follow her supervisor's instructions and grieve later if she felt she had been mistreated. The Carrier emphasizes that despite the Claimant's assertion that she left headquarters to obtain medical treatment, the Claimant repeatedly refused the medical treatment offered by the Carrier. The Carrier suggests that the Claimant actually left the premises in order to prevent the Carrier from obtaining a medical determination of the extent of her alleged

injury and possibly to avoid the drug and alcohol test.

The Carrier argues that it cannot condone or tolerate such clearly insubordinate conduct, and insubordination in any form is grounds for dismissal. The Carrier emphasizes that the Claimant must bear responsibility for her predicament, because she consciously chose to directly disobey orders. The Carrier contends that the seriousness of the charges against the Claimant, her relatively short period of employment, and the overwhelming testimony contained in the transcript all support the discipline of dismissal. The Carrier ultimately contends that the claim should be denied in its entirety.

The Organization contends that the Carrier committed several violations of the Claimant's due process rights. The Organization asserts that the Carrier failed to demonstrate that it gave Claimant five days' advance written notice of the exact charges against her, as required by Rule 71. The Carrier further violated the Claimant's rights when the hearing officer added a charge during the investigation and decided to dismiss the Claimant based upon her alleged guilt of this additional charge. The Organization maintains that the record additionally shows that the Carrier failed to provide a copy of the transcript, as required by Rule 72. The Organization asserts that when viewed collectively, these violations demonstrate that the Carrier's disciplinary determination was fatally flawed.

The Organization goes on to argue that the Claimant was dismissed for allegedly failing to wait for Supervisor Falkenstein and for allegedly refusing a medical exam and a

drug and alcohol test. The Organization points out, however, that Supervisor Colon's instructions to the Claimant were less than clear. Moreover, there is no evidence that the Claimant was deliberately defiant here; the Organization argues that there was no insubordination shown in this case. The Organization argues that the record shows that the Claimant acted reasonably and responsibly by cooperating with her supervisor, complying with all instructions, and waiting several hours, until her quitting time, for Falkenstein, who simply did not show up. The Organization asserts that there was no reasonable basis to charge the Claimant, much less to find her guilty of insubordination. The Organization contends that the Carrier's decision to dismiss the Claimant should be overturned, and the claim should be sustained.

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 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 insubordination when she refused to comply with the instructions from her supervisor. The record is clear that the Claimant was given a direct order and she did not follow it.

Once this Board has determined that there is sufficient evidence in the record to

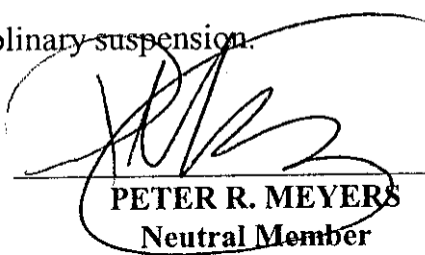
support the guilty finding, we next turn our attention to the type of discipline imposed.

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 Claimant was guilty of a very serious offense. However, given her previous record, which includes more than six years of blemish-free service, this Board must find that the Carrier's action in terminating the Claimant's employment was unreasonable and arbitrary. This Board finds that the Claimant shall be reinstated to service, but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.

AWARD:

The claim is sustained in part and denied in part. The Claimant shall be reinstated to service, but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.


PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: January 2, 2004


CARRIER MEMBER

DATED: 12/23/03