

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 224

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

1. The dismissal of Trackman M. Douglas for alleged violation of Amtrak's Standards of Excellence and Amtrak's Drug and Alcohol Policy, Section PERS-19 on Wednesday, May 29, 2002 for allegedly being unable to provide a sufficient urine sample for testing with no medical reason therefore, allegedly in further violation of a Rule G Waiver Agreement which he signed on August 17, 2001, was harsh, capricious, without just and sufficient cause and in violation of the Agreement (System File NEC-BMWE-SD-4279D).
2. Claimant Douglas shall be reinstated to full service with seniority unimpaired and be made whole in accordance with Rule 74 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, headquartered at Baltimore, Maryland.

By letter dated June 13, 2002, the Claimant was notified to appear for a formal investigation and hearing on charges that on May 29, 2002, the Claimant allegedly violated the Carrier's Standards of Excellence and its Drug and Alcohol Policy, Section PERS-19, when he allegedly failed to provide a sufficient urine sample for testing, with no medical reason therefore, also in violation of the Rule G Waiver Agreement he had signed in August 2001. After several postponements, the investigation was conducted on

July 3, 2003. By letter dated July 15, 2003, the Claimant was notified that he had been found guilty of the charges, and that he was dismissed from the Carrier's service. The Organization filed a claim on the Claimant's behalf, challenging his dismissal. The Carrier denied the claim.

The Carrier initially contends that there is no evidence that the Carrier abused its discretion in handling the instant matter. The Carrier maintains that it did not violate the Claimant's right to a fair and impartial investigation, and there is substantial evidence to support the Hearing Officer's finding that the Claimant was guilty as charged.

The Carrier emphasizes that under the Alcohol and Drug Waiver Agreement that the Claimant signed on August 17, 2001, the Claimant was subject to drug and alcohol testing at least four times a year during the first two years after his return to duty under this Waiver Agreement. Accordingly, the Claimant was scheduled for follow-up drug and alcohol testing on May 29, 2002. The record demonstrates that the Claimant was unable to produce a sufficient urine sample for this test, and the Claimant was instructed to appear for a medical evaluation the following morning. The Carrier maintains that because of the Claimant's failure to produce a sufficient urine sample and the fact that no medical reason could be found for this inability to provide a urine sample, the result of the Claimant's May 29th test was reported as a refusal to test, in violation of the Carrier's Standards of Excellence and the Drug and Alcohol Waiver that the Claimant signed in August 2001.

The Carrier maintains that the evidence demonstrates that the Claimant's inability to produce a sufficient urine sample constituted a refusal to submit to testing, and the Claimant therefore was subject to the same consequences as testing positive for drugs. The Claimant was guilty as charged, and he violated the conditions of the August 2001 Waiver Agreement, wherein he acknowledged that a future positive test would subject him to dismissal. The Carrier points out that the Claimant was well aware of the consequences of failing to submit a urine specimen for testing, in that he previously had left the premises of a medical facility before completing a drug screen and after submitting a cold urine specimen; this prior incident resulted in the August 2001 Waiver Agreement. The Carrier maintains that the Claimant clearly was on notice that the Carrier prohibits drug and alcohol use, and that there would be serious disciplinary consequences for violating that policy. The Carrier contends that the Claimant failed to comply with the Drug and Alcohol Testing Policy, the Standards of Excellence, and the August 2001 Waiver Agreement that accompanied the Claimant's conditional reinstatement when he failed to produce a sufficient urine sample for testing. The record therefore establishes that the Claimant is guilty as charged.

The Carrier goes on to assert that there is no merit to the Organization's argument that the Claimant did everything he was instructed to do and should not be disciplined for his inability to urinate at the time of the test. An independent doctor examined the Claimant and determined that there was no medical reason for the Claimant's failure to

produce a urine sample. Moreover, the Organization's assertions do not diminish the seriousness of the Claimant's actions, which constitute a refusal to submit to mandated testing. The Organization's allegations are merely an attempt to mitigate the Claimant's guilt.

The Carrier further argues that the discipline assessed was consistent with the terms of the Waiver Agreement, in which the Claimant agreed that he would be dismissed if he failed to adhere to the conditions set forth therein. The Claimant's dismissal was self-executing under the provisions of that Waiver Agreement. The Carrier maintains that numerous Board awards have upheld dismissal in cases involving failure to comply with the provisions of an Alcohol and Drug Waiver Agreement.

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

The Organization initially contends that the Claimant fully complied with instructions concerning the May 29th drug test, and he did not refuse to submit to testing. The Organization emphasizes that the Carrier bears the burden of proof in this discipline case, and it bears an additional burden here because of the stigmatizing charges relating to drug use that are involved. The Organization maintains that there is conflicting testimony concerning the urine provided by the Claimant, and conflicting testimony is insufficient to show that the Claimant was guilty of the charges because no valid credibility determination was possible.

The Organization maintains that Cherry's telephone testimony during the hearing precluded the possibility of evaluating his demeanor and therefore invalidated any necessary credibility determinations relating to his testimony. The Organization emphasizes that an employee's right to a fair and impartial hearing includes the right to confront his accuser. The Carrier's failure to have Cherry, who worked for the testing company, appear at the hearing deprived the Claimant of the contractual right to confront the person who turned out to be his sole accuser. Moreover, the hearing officer failed to respond to the Organization's well-reasoned objections to allowing Cherry to testify by telephone; the hearing officer's decision to allow Cherry's telephone testimony was a serious error and denied the Claimant's due process rights.

The Organization maintains that the Claimant's case hinged upon Cherry's lack of credibility. The Organization asserts that it was both relevant and critical to cross-examine Cherry on such subjects as his dismissal from the testing company only one week after the events at issue, yet the hearing officer refused to permit the Organization to pursue such questioning, denying the Claimant the right to cross-examine the "star" witness against him. The Organization emphasizes that denying the right of cross examination is fatal to subsequent disciplinary action.

The Organization then points out that the hearing initially was scheduled to commence thirty-two days after the Carrier had knowledge of the Claimant's involvement in an alleged violation of the Waiver Agreement, clearly outside the thirty-day limit

mandated in Rule 71(a). The subject trial clearly violated the time limit requirement, so the discipline assessed must be set aside.

The Organization goes on to argue that the evidence shows that the Claimant provided what he believed to be a sufficient amount of urine for testing on May 29th, as he testified during the hearing. The Organization points out that Carrier witnesses testified that they were under the impression, after speaking with Cherry, that the Claimant had failed to provide enough urine for testing, indicating that he had provided some quantity. The Organization emphasizes that this testimony contradicts Cherry's statement that the Claimant had provided no urine whatsoever. Because Cherry's telephone testimony prevented the hearing officer from making the necessary credibility determination to resolve this conflict, and because there was an obvious conflict in testimony, the Organization maintains that it must be concluded that the Carrier prejudged the Claimant. The Organization argues that the record therefore demonstrates that the Carrier failed to meet its burden of proof in this matter.

The Organization then asserts that the Carrier failed to follow its own policy in connection with the testing at issue. The Organization emphasizes that the PERS-19 policy requires the tester to break open a new testing container after advising the employee that the three-hour window for producing a sufficient sample had expired, allowing for one last attempt to provide such a sample. The evidence demonstrates that this did not occur in the Claimant's case, so the Claimant was not given the full amount of

time allowed by the policy to produce the necessary sample. The Organization maintains that where, as here, the Carrier has failed to follow its own policy, discipline consistently has been rescinded.

The Organization argues that an objective analysis and evaluation of the transcript reveals that the evidence 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.

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 failing to provide a sufficient urine sample in a required drug test on May 29, 2002. The record reveals that in August of 2001, the Claimant signed an Alcohol and Drug Waiver Agreement following his failure to follow a written directive requiring him to undergo a drug screening urinalysis when he left the premises of the medical facility before completing the examination. In that agreement, the Claimant agreed to submit to and pass a drug and alcohol test at least four times a year for the following two years after his return to duty. This May 29, 2002, follow-up test was taking place in conjunction

with his return-to-work agreement.

The record reveals that the Claimant was guilty of failing to provide the required sample for that drug test. That action on the part of the Claimant put him in violation of the August 17, 2001, agreement and subjected him to dismissal pursuant to that same agreement.

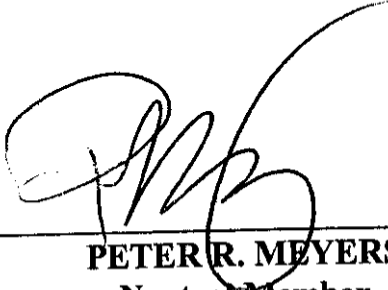
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary,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

Given the fact that the Claimant had previously failed to submit to a urinalysis in May of 2001 and agreed that he would submit when required, this Board cannot find that the Carrier's action in terminating the Claimant's employment in conjunction with that written agreement was unreasonable, arbitrary, or capricious. The Claimant received an opportunity to save his job and he failed to live up to the requirements of the agreement.

For all of the above reasons, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: October 12, 2004


CARRIER MEMBER

DATED: 10/12/04