

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 233

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

1. The dismissal of Mr. A. Cooper for allegedly testing positive for alcohol during a follow-up test on January 30, 2004 after having signed an Alcohol and Drug Waiver Agreement on June 16, 2003, was exceedingly harsh and excessive (System File BMW-500D).
2. The Claimant shall be reinstated to service with 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, headquartered at Chicago, Illinois.

By letter dated February 5, 2004, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant allegedly violated the conditions of the Alcohol and Drug Waiver Agreement that he had signed on June 16, 2003, when he tested positive for alcohol on January 30, 2004. After a postponement, the investigation was conducted on February 19, 2004. By letter dated February 24, 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 there is no evidence that its actions here were an abuse of the discretion vested in the Carrier. The Carrier emphasizes that the Claimant received a fair and impartial investigation, and there is substantial evidence to support the finding that the Claimant was guilty as charged.

The Carrier points out that the Claimant was subject to unannounced quarterly follow-up tests for drug and alcohol for a period of two years after testing positive for alcohol and cocaine during a reasonable-suspicion drug and alcohol test on June 9, 2003. The Claimant signed an Alcohol and Drug Waiver Agreement on June 16, 2003, wherein he agreed that if he tested positive in any future drug or alcohol test, he would be dismissed from service. The Claimant was directed to submit to follow-up testing on January 30, 2004, and the Claimant's breath sample was tested and confirmed positive for alcohol, in violation of the conditions of that Waiver Agreement. The Carrier asserts that the Claimant clearly did not comply with the conditions of the Waiver Agreement, and his dismissal was self-executing.

The Carrier maintains that there is substantial evidence of the Claimant's guilt. Both the initial and confirmation tests exceeded the acceptable level of less than .020% breath alcohol concentration. The Carrier argues that the Claimant's proven use of alcohol clearly was in violation of the Carrier's Standards of Excellence, the General Code of Operating Rules for Maintenance of Way Employees, and the Alcohol and Drug Waiver Agreement that the Claimant signed on June 16, 2003. The Carrier insists that the

Claimant was well aware that another confirmed positive test result for alcohol or drugs would subject him to dismissal. The Claimant failed to meet the requirements of the Waiver Agreement, and his dismissal was self-executing and consistent with the terms of the Waiver Agreement.

The Carrier points out that neither the Claimant nor the Organization denied the fact that the Claimant tested positive for alcohol on January 30, 2004, although the Organization requested leniency, asserting that the Claimant was having difficulty coping with the loss of his daughter. Although the Carrier is sympathetic to the Claimant's unfortunate loss of his daughter and his resulting grief, the Carrier nevertheless argues that such circumstances are not a valid reason for a positive alcohol test result. Under the terms of the Waiver Agreement, it was incumbent upon the Claimant to ensure that his system was free of prohibited substances and to seek the assistance of his EAP counselor.

The Carrier argues that to sustain the instant appeal would be giving the Claimant a license to interpret the rules as he sees fit; it would give the employee a means to avoid the consequences of testing positive for alcohol and/or drugs by merely asserting extenuating circumstances. The Carrier insists that extenuating circumstances do not diminish the seriousness of the Claimant's actions. The Carrier maintains that there are no mitigating circumstances that require a reduction or removal of the discipline of dismissal that was imposed. The Carrier asserts that the Organization's request for leniency is not a prerogative of the Board; only the Carrier can grant leniency.

The Carrier emphasizes that the Claimant was put on notice that there would be serious disciplinary consequences for disobeying the Carrier's policy prohibiting the use of alcohol and drugs. The Claimant's positive alcohol test on January 30, 2004, violated that policy, the Waiver Agreement that the Claimant signed, and the Carrier's Standards of Excellence. The discipline assessed was self-executing and consistent with the terms of the Waiver Agreement.

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

The Organization initially contends that there is no dispute as to the Carrier's observance of the correct protocols and procedures, or that the Claimant's test results showed positive for alcohol. The Organization maintains that this dispute focuses on the quantum of discipline imposed by the Carrier, and it asserts that dismissal was excessive and exceedingly harsh in this case.

The Organization points out that the Claimant had fifteen solid years of service with the Carrier until the death of his twenty-year-old daughter about eighteen months prior to the incident at issue. The Organization maintains that the NRAB has considered long, faithful service to be a mitigating factor whenever discipline is imposed. The Organization asserts, in addition, that the Claimant continued to be under extreme emotional stress following the untimely death of his daughter, and the NRAB also has recognized such severely stressful conditions as mitigating factors in otherwise automatic

dismissal situations.

The Organization argues that this is a rare case when justice would be better served by returning the Claimant to service, conditioned upon EAP approval and continuing support and assistance from the EAP. The Organization asserts that although the Claimant exercised poor judgment by trying to find solace in a bottle, the Carrier's decision to permanently dismiss him was excessive and should be rescinded.

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 failing to live up to the terms of the Alcohol and Drug Waiver Agreement that he signed on June 16, 2003. The parties agreed that there is no dispute in the facts. The Claimant had previously tested positive for alcohol in 2003. He was allowed to return to work after signing the Alcohol and Drug Waiver Agreement on June 16, 2003. That Agreement required that he be made available for drug screenings. On January 30, 2004, the Claimant again tested positive for alcohol.

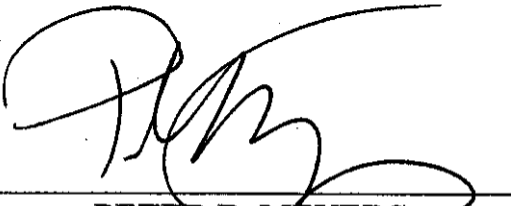
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed.

This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

In this case, the Claimant had previously tested positive for alcohol and agreed that if he ever tested positive in the future, he would be subject to discharge. This Board is not unmindful of the tragedy that the Claimant had undergone with the loss of his daughter, but it is fundamental that leniency decisions must be made by the Carrier, not by this Board. Consequently, this Board has no choice other than to find that the Carrier's action in this case was not unreasonable, arbitrary, or capricious and, therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER
DATED: 6-16-05



CARRIER MEMBER
DATED: 6-15-05