

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 234

STATEMENT OF CLAIM:

Appeal of the discipline, a ninety-day suspension, issued to Claimant M. Joyce (System File NEC-BMWE-SD-4392D).

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a Track Foreman, headquartered at Hunter Yard in Newark, New Jersey.

By letter dated October 22, 2003, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant violated Amtrak's Standards of Excellence relating to Professional and Personal Conduct and to Safety, as well as Amtrak's Workplace Violence Policy, when the Claimant, while on duty, allegedly displayed threatening, rude, boisterous, and disrespectful behavior, including the use of vulgar language, towards fellow employees and also intimidated and/or threatened fellow employees.. The investigation was commenced, as scheduled, on November 3, 2003, and thereafter was recessed and continued on November 26, 2003, and then recessed and continued to its conclusion on February 19, 2004. By letter dated March 5, 2004, the Claimant was notified that as a result of the investigation, he had been found guilty of the charges, and he was assessed a ninety-day suspension. The Organization filed a claim on

the Claimant's behalf, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier initially contends that the Organization's appeal of the discipline was not timely. Rule 74(a)(1) requires that appeals from discipline be made within fifteen days of the date of the discipline notice, but the Organization did not submit an appeal in this case to the proper Carrier officer until twenty-five days after the date of the notice of discipline. The Carrier therefore asserts that the instant claim is fatally and procedurally flawed, and it should be denied on that basis.

As for the Organization's assertions regarding the timeliness of the Carrier's decision, the Carrier acknowledges that the appeal hearing was held on April 12, 2004, not April 14, 2004, as set forth in Carrier's April 26, 2004, letter; the letter listed the incorrect date due to a typographical error. The Carrier maintains that its decision dated and postmarked on April 26, 2004, properly was rendered within fifteen days of the date of the April 12th appeal hearing. The Carrier emphasizes that the date the decision is postmarked governs in the application of time limits, not the date the decision is received by the Organization. The Carrier therefore contends that the Organization's assertions about the timeliness of the Carrier's decision are without merit.

The Carrier then argues that the instant claim is totally without merit. The Carrier insists that the Organization's fixation on Barney to be misplaced and an attempt to muddy the waters. The Carrier maintains that Barney was not charged and, to the Carrier's knowledge, he did not violate any Carrier rules. The Carrier asserts that the Organization's conduct toward Barney during the hearing was inappropriate, hostile, and

an obvious attempt to intimidate this witness, whose testimony was damaging to the Claimant. The Carrier also points out that, contrary to the Organization's argument, there was no valid reason why Barney could not have been step-rated to the foreman's position.

The Carrier then contends that Project Engineer Slimbock's investigation into the incident was in accordance with the procedures in the Carrier's Workplace Violence Policy. The Carrier asserts that the fact that Slimbock did not personally interview Gayle or the Claimant does not mitigate the Claimant's guilt. With regard to the Organization's assertions that neither Ahluwalia nor Pearson heard the Claimant curse, yell, or make threats, the Carrier emphasizes Ahluwalia's testimony establishing that the Claimant did yell, curse, and make threats. The Carrier further maintains that the fact that Pearson was not present when the Claimant threatened anyone does not alleviate the Claimant's guilt; the Carrier points out that it never alleged that Pearson was present when the Claimant made the threats. The Carrier maintains that Slimbock did question the employees involved in this incident, and he reported his findings to his supervisor and to the Amtrak police.

As for the Organization's assertion that the Claimant's behavior was the result of his bumping into the gang where "something" allegedly was wrong, the Carrier insists that this simply is incredulous. The Carrier points out that the record shows that the Claimant arrived about one hour late for work, and he almost immediately began a verbal tirade. The Carrier emphasizes that the Claimant proceeded to make threats, and Gayle's successful attempt to defuse the situation is the only reason that there was no physical

violence.

The Carrier then emphasizes Barney's testimony that he still was afraid of the Claimant and therefore concerned about testifying against the Claimant. The Carrier points out that the Hearing Officer has the responsibility to make credibility determinations, and the Hearing Officer determined that the Barney's testimony was credible. The Carrier insists that the Organization has not presented any evidence that demonstrates that Barney's testimony is not credible.

The Carrier further points out that it has the right to determine whether or not to hold an employee out of service, and any offer to restore the Claimant to service during the handling of this claim does not constitute a determination by the Carrier as to the Claimant's innocence. Moreover, the Carrier has the right, pursuant to the parties' Agreement, to hold the Claimant's suspension in abeyance until after the Claimant has been given a hearing. The Carrier also asserts that, contrary to the Organization's argument, the fact that the Claimant may not have had the proper equipment to perform his job does not give the Claimant the right to exhibit the unprofessional conduct that he displayed on the date in question.

The Carrier argues that the record demonstrates that the Claimant is guilty as charged. The assessment of a ninety-day suspension cannot be considered an abuse of discretion in this case, particularly in light of the Claimant's admissions and the seriousness of his proven violations.

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

The Organization initially argues that the Carrier's response to the Organization's appeal was untimely because the appeal hearing was held on April 12, 2004, and not on April 14 as indicated in the Carrier's April 26, 2004, letter, and because the Organization did not receive the Carrier's decision until April 28, 2004, after the fifteen-day period for issuing such a decision expired. As for the Carrier's assertion that the Organization's appeal was itself untimely, the Organization emphasizes that shortly before the instant matter arose, the Carrier made a change as to which of its officers was designated to receive and handle appeals. The Organization asserts that it mistakenly sent its appeal to the Carrier officer who handled such matters prior to this change.

The Organization goes on to argue that Project Engineer Slimbock failed to conduct a proper investigation into this matter. Slimbock did not question either Gayle or the Claimant. The Organization points out that Gayle was the only witness present during the incident between the Claimant and Barney, and Gayle had indicated that both employees raised their voices and Barney, not the Claimant, had to be restrained. The Organization emphasizes that the Carrier's witnesses testified that they did not hear the Claimant curse, yell, or make threats. The Organization then asserts that Barney was reluctant to answer questions during the hearing, which undermines his credibility.

The Organization additionally maintains that the incident at issue arose after the Claimant, who had bumped into the gang, informed the gang's members that he was going to stop their improper behavior. The Organization insists that the Carrier also failed to ensure that the Claimant had the proper equipment to perform his job. The Organization also argues that if the Claimant actually was such a threat, then the Carrier

would not have offered to restore the Claimant to service during the delay in holding the hearing.

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 time limit arguments raised by both parties, and we find them to be without merit. We find that the discipline was issued in a timely fashion, the appeal of this discipline was timely, and the Carrier's decision was issued in a timely manner.

With respect to the merits, 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 did act in a threatening, rude, and disrespectful manner toward his fellow employees on the date in question. The Claimant admitted to some of the language that he used that violated the Carrier's rules, and there was really no defense offered for the Claimant's wrongful behavior.

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 action that the Claimant engaged in in this case often leads to employees being permanently removed. This Board believes that the Carrier has exercised leniency

by only issuing a ninety-day suspension to this Claimant for his wrongful behavior.

There is nothing unreasonable, arbitrary, or capricious about that ninety-day suspension.

Therefore, the claim will be denied.

AWARD:

The claim is denied.

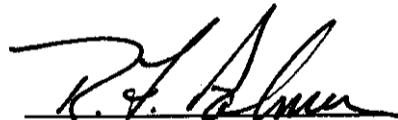


PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 9-29-05



CARRIER MEMBER

DATED: 9/23/05