

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

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

Case No. 245

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

1. The dismissal of B&B Mechanic M. Diaz for alleged violation of Amtrak's Standards of Excellence was without just and sufficient cause and based on unproven charges (System Files BMW-507D).
2. B&B Mechanic M. Diaz shall be restored to service with all rights unimpaired and made whole"

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a B&B Mechanic, headquartered in Chicago, Illinois.

By letter dated September 16, 2004, the Claimant was notified to appear for a formal investigation and hearing on charges that the Claimant had failed to follow instructions numerous times and had also failed to follow a direct order from his foreman, in violation of the procedural and personal conduct standards in the Carrier's Standards of Excellence. After a postponement, the investigation was conducted on September 27, 2004. By letter dated October 5, 2004, the Claimant was notified that as a result of the investigation, he had been found guilty of the charges, and he was dismissed from the Carrier's service in all capacities. The Organization filed a claim on the Claimant's behalf, challenging his dismissal. The Carrier denied the claim.

The Carrier initially contends that the overwhelming testimony adduced at the formal investigation proves that on September 15, 2004, the Claimant failed to follow instructions and direct orders from Foreman Grizely to wash the oil tanks at the 16th Street Facility. The Claimant admittedly did not respond to Foreman Grizely, and he threw his hands up in the air and walked away. The Carrier argues that the Claimant ultimately must bear the responsibility for his predicament because he consciously chose to directly disobey orders. The Carrier asserts that the discharge of such an employee is a proper and inevitable response, especially in light of the Claimant's relatively short period of employment with the Carrier.

The Carrier maintains that based on the evidence in the record, including the Claimant's admissions, there can be no dispute that the Claimant's actions were in violation of the rules, and that he properly was found guilty. The Carrier emphasizes that it is well established that an employee may not disobey a properly authorized and communicated instruction, and numerous Board Awards have upheld the Carrier's right to dismiss an employee for refusing to comply with instructions. The Carrier asserts that given the Claimant's relatively short tenure of service, the seriousness of his wrongdoing, and his admissions, the discipline of dismissal cannot be viewed as arbitrary, capricious, or excessive. The Carrier points out that leniency is not a prerogative of the Board, and only the Carrier may grant leniency.

The Carrier argues that the Claimant's actions clearly were insubordinate and in violation of the Carrier's Standards of Excellence involving Personal and Professional Conduct. Insubordination in any form is grounds for dismissal, and the Carrier insists

that it cannot be expected to condone or tolerate insubordination. Moreover, the Carrier cannot be required to retain employees who have a misplaced belief that they have a right to determine what orders or directions they will and will not obey. The Carrier argues that the seriousness of the Claimant's admitted and proven violations, as well as his relatively short period of employment, justify the discipline of dismissal.

Addressing the Organization's argument that the Claimant was faced with conflicting orders from two different supervisors, the Carrier maintains that Grizely was the Claimant's direct supervisor and he had instructed the Claimant to wash the oil tanks prior to any alleged order from Greene to remove a pallet of water from the doorway. The Carrier emphasizes that Grizely issued his instructions to the Claimant prior to 8:00 a.m., but the Claimant still had not complied with Grizely's instructions at 11:00 a.m. The Carrier points to the Claimant's testimony that he saw Grizely at 11:30 a.m., as the Claimant was trying to move water out of the doorway per Greene's instructions. The Carrier contends that the Claimant had an obligation to advise his supervisor that he had conflicting orders from Greene to remove the pallet of water from the doorway, but the Claimant instead chose not to respond to Grizely at this point; the Claimant also chose to throw his hands up in the air and walk away. The Carrier further insists that if Greene had issued conflicting orders, the Organization would have requested Greene's presence as a witness; the Organization, however, failed to do this.

As for the Organization's assertions that the Claimant had prior problems with Grizely, the Carrier emphasizes Grizely's testimony that he had problems with the Claimant when the Claimant failed to listen to instructions, and that this issue was

discussed with Fred Roeber, Engineer Facilities, who ultimately issued verbal warnings to the Claimant. The Carrier argues that there is no evidence in the record that establishes that Grizely harassed the Claimant as alleged, and mere assertions without any basis in fact cannot be held as valid.

Turning to the Organization's argument that the Claimant did not receive a fair and impartial investigation, the Carrier maintains that the transcript demonstrates that the hearing officer did not limit the Claimant's questioning, but he did continually remind the Claimant that he was prohibited from making statements and testifying at that time, although the Claimant would be allowed to do so later in the investigation. There is no evidence that the hearing officer deprived the Claimant of his right to ask questions. Instead, the Carrier asserts that the Organization's allegations are merely an attempt to draw the focus away from the seriousness of the offenses at issue.

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

The Organization initially contends that the Carrier failed to grant the Claimant a fair and impartial investigation. The Organization emphasizes that the Carrier is responsible for presenting all witnesses with pertinent information and to develop all facts relevant to the Claimant's actions. The Organization maintains that in this case, the Claimant was following the instruction of Assistant Supervisor Greene when confronted by Foreman Grizely, but the Carrier failed to produce Greene as a witness to this crucial fact during the investigation. The Organization points out that Greene is superior to both the Claimant and Grizely, so Greene's instructions must be complied with even if they

are in conflict with those of the foreman. The Organization acknowledges that although it could have requested Greene's presence, it became the Carrier's obligation to produce Greene as a witness once it was developed that Greene had information critical to this dispute. The Organization also points out that during the investigation, the Claimant identified two individuals who were in close proximity to him and Grizely during the incident, but the Carrier also failed to call them to testify.

The Organization insists that the Carrier is responsible for presenting all witnesses with pertinent information and for developing all relevant facts. The Carrier's failure to produce these witnesses clearly deprived the Claimant of his right to a fair and impartial investigation. The Organization emphasizes that this is particularly true because the Claimant was found guilty based solely on Grizely's testimony. The Organization points out that this Board consistently has held that an employee cannot be found guilty on the testimony of a sole witness. The Organization's asserts that there can be no doubt that the Carrier's failure to call other witnesses and the fact that it based its decision on the testimony of its sole witness deprived the Claimant of a fair and impartial investigation.

The Organization goes on to argue that there apparently was a bad relationship between the Claimant and Foreman Grizely. The Organization points to Grizely's testimony that he was instrumental in removing the Claimant from service following the September 15, 2004, incident, under the guise of a suspected Rule G violation. In addition, the Claimant felt so persecuted by Grizely that he filed a written complaint with the Carrier on July 7, 2004, and then filed another complaint in connection with the events surrounding this dispute. The Organization asserts that such evidence leaves no

doubt as to the bias of Grizely's testimony and the ills of basing a decision of guilt solely on that testimony. The Organization contends that the instant claim should be sustained solely because the Carrier failed to grant the Claimant a fair and impartial investigation.

Notwithstanding this assertion, the Organization goes on to contend that the Carrier failed to prove the charges for which dismissal was imposed. The Organization insists that there is no evidence that the Claimant's behavior compromised the safety, satisfaction, and well being of customers, the public, or fellow employees. There also is no evidence that the Claimant exhibited boisterous conduct or used profane and/or vulgar language. Instead, the Organization argues that the evidence demonstrates that the Claimant made very effort to avoid such behavior.

The Organization goes on to maintain that the Carrier also failed to establish that the Claimant was not acting on the instructions of Assistant Supervisor Greene. Accordingly, the Carrier has failed to prove that the Claimant was not properly performing his duties or following the instructions, directions, and orders of a supervisor, or that the Claimant was not attending to his duties. Moreover, at the time of the events at issue, the Claimant was complying with Grizely's instructions and was returning to the work that Grizely had assigned. The Organization argues that because the Carrier failed to present any evidence whatsoever to show, much less prove, that the Claimant's actions were a violation of any of the cited rules, the instant claim should be sustained in full.

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. The Claimant was guaranteed all of his procedural rights throughout the course of the investigation.

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 he failed to follow a direct order from his direct Supervisor to wash the tanks. The record is clear that the Claimant simply walked away and chose to disobey the direct order. He admits that he "did not respond."

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.

It is fundamental that insubordination is a dismissible offense. This Board has stated on numerous occasions that the workplace is not a debating society and when an employee gets a work order, he must follow it; and if he has a problem with it, he can grieve it later.

In this case, the Claimant chose to disobey the direct orders from his Supervisor. Given the short term of employment of this Claimant, less than one year, plus the very serious offense of which he was clearly found guilty, this Board must find that the Carrier did not act 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: 8/26/05



CARRIER MEMBER

DATED: 8/27/05