

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13765

Docket No. 13686

03-2-03-2-12

The Second Division consisted of the regular members and in addition Referee Don A. Hampton when award was rendered.

**(Sheet Metal Workers' International Association
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)**

STATEMENT OF CLAIM:

- "1. The Carrier violated the provisions of the current controlling agreement when they improperly dismissed sheet metal worker Joseph Ryback from service of the National Railroad Passenger Corporation on August 16, 2002, as a result of an investigation conducted on August 8th, 2002, at the Carrier's Hearing Office, 525 W. Van Buren Street, Third Floor, Chicago, Illinois."**
- 2. That accordingly, the Carrier be required to compensate Mr. Ryback for all time lost, including Holiday Pay, overtime pay which may have been lost and any other benefits he may have been deprived due to his improper dismissal."**

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

By correspondence dated July 19, 2002 the Claimant was notified to attend a formal Investigation on July 25, 2002 concerning allegations that "... on July 16, 2002 at approximately 3:28 A.M. you failed to remain alert and were found sleeping in Passenger Car 31517, on a coach seat, at 14th Street S&I Building, in Chicago, Illinois." Also by correspondence dated July 19, 2002, the Claimant was notified that he was being held out of service, pending Investigation. At the Organization's request the scheduled Investigation was postponed until August 8, 2002.

The record reveals that on the date of the incident in question a group of managers assembled at the Carrier's Yards and inspected the yards to ascertain if employees assigned to the third shift were present and working. As the Vice President of the Carrier and the Carrier's Director of Cars Intercity walked through Coach 31517 at approximately 3:28 A.M. they came upon the Claimant. "He was in a coach seat, fully reclined on the west side of the coach or on my right-hand side." (Transcript P. 11 and P.23)

The Vice President spoke to the Claimant and received no response. As the power was off in the car, he also shined his flashlight on the Claimant and still no response. It was not until he stepped in front of the Claimant and stuck out his hand as an introduction that the Claimant acknowledged him. At that time, the Claimant immediately got up and introduced himself. The record also reflects that at the time the Claimant was wearing a set of headphones.

As a result of the Investigation the Claimant was notified by correspondence dated August 16, 2002 that based on the Hearing record that the charge was proven and that the Claimant was assessed the discipline of termination.

The Organization contends that the Carrier has not met the burden of proof in the instant case and the Claimant should be reinstated. Paid for time lost and other benefits lost due to his improper dismissal.

The Organization notes that the record reflects that the Claimant was sitting in the seat waiting for the car to be moved after power to the car was turned off. Taking a seated position in such circumstances is required by the Carrier's Safety Rules. In addition, the Carrier was aware that the Claimant suffers from a hearing defect. The Organization summarizes it is evident that the combination of no lights,

a hearing impairment, and the headphones were the contributing factors that prevented the Claimant from noticing the Carrier Officials.

After a complete review of the record, it is understandable why the Carrier is of the opinion that the Claimant is in fact guilty of the Rule infraction which he is charged. The Claimant while contending that he was not asleep did testify that he was lying down and was listening to music on the headphones.

It is well established that the Carrier must prove their case by sufficient substantial evidence (Consol. Ed. Co. v Labor Board 305 U.S. 197,229) that the Carrier has done in this case.

There remains the question of the penalty imposed. Our role in reviewing the penalty is limited. We may only disturb the penalty if we conclude that it is arbitrary, capricious, or excessive. We have noted that the Claimant had approximately 23 years of service.

The Claimant's dismissal shall be reduced to a long-term suspension. The Claimant shall be reinstated with seniority unimpaired but without compensation for time held out of service.

The Claimant must understand that his reinstatement is on a last chance basis. That any such recidivist behavior on his part will result in immediate and permanent dismissal. The Claimant would be wise to use this last chance opportunity to prove to the Carrier that he can be a dependable and productive employee.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 1st day of October 2003.