

The Second Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

Parties to Dispute: { International Association of Machinists and
Aerospace Workers
{ National Railroad Passenger Corporation

Dispute: Claim of Employees:

1. That the National Railroad Passenger Corporation (Amtrak) be ordered to restore Machinist John Borg, to service and compensate him for all pay lost up to time of restoration to service at the prevailing machinists rate of pay.
2. That Machinist John Borg, be compensated for all insurance benefits, vacation benefits, holiday benefits, and any other benefits that may have accrued and were lost in this period and otherwise made whole for all losses in accord with the prevailing agreement dated September 1, 1977 subsequently amended.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Claimant entered the employ of Carrier on January 6, 1977 and, at the inception of this dispute, was working as a Machinist at the Carrier's 16th Street Mechanical Facility, Chicago, Illinois. On April 4, 1980, the Carrier sent Claimant a letter notifying him that he was being held out of service pending formal investigation in connection with certain actions alleged to have occurred on that date at approximately 3:00 a.m. Subsequently, a second letter was sent to the Claimant instructing him to report on April 22, 1980 for a formal investigation into the following charges:

"Your responsibility for your failure to comply with that portion of the National Railroad Passenger Corporation Rule of Conduct 'I' which reads 'Employees will not be retained in the service who are insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the Company will not be subjected to criticism and loss of good will' and

Rule of Conduct 'J' which reads: 'Courteous conduct is required of all employees in their dealing with the public, their subordinates and each other. Boisterous, profane or vulgar language is forbidden. Violence, fighting, horseplay, threatening or interfering with other employees or while on duty is prohibited' In that on Friday, April 4, 1980 at 0300 hours you were observed by Amtrak Police Officer, Mark Anthony, to be placing Company gas in your personal vehicle and when approached by Officer Anthony you became very violent, striking Officer Anthony and threatening him."

Rules "I" and "J" of the National Railroad Passenger Corporation's Rules of Conduct read as follows:

- "I. Employees will not be retained in the service who are insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the Company will not be subjected to criticism and loss of good will."
- "J. Courteous conduct is required of all employees in their dealing with the public, their subordinates and each other. Boisterous, profane or vulgar language is forbidden. Violence, fighting, horseplay, threatening or interfering (sic) with other employees or while on duty is prohibited."

The investigation, scheduled for April 22nd, was postponed by the agreement of the parties until May 15, 1980. As a result of the investigation held on May 15th, Claimant was dismissed from service effective May 21, 1980 due to his alleged theft of gasoline and assault on a security guard at Carrier's 21st Street Yards, Chicago, Illinois, while off-duty at about 3:00 a.m., April 4, 1980.

The Organization maintains that Claimant was not afforded a fair and impartial hearing prior to his dismissal, and further, that Carrier has failed to prove the charges preferred against him.

Initially, it argues that Carrier, over continuous strenuous objections by the Claimant and his representative at the investigation conducted on May 15th, introduced into the record written statements obtained by the Carrier which were detrimental to Claimant, without allowing either the Claimant or his representatives the opportunity to cross-examine the authors of these statements and even though the makers of the statements were in the employ of the Carrier and available to be present at the investigation. According to the Organization, the admission of the two statements under these circumstances deprives the Claimant of his right to due process and to confront the witnesses against him.

The Organization specifically argues that the Carrier had the power to compel the authors of the statements to attend the hearing and to subject themselves to cross-examination, as the two were employes of the Carrier. According to the

Organization, the right to confrontation and of cross-examination is a fundamental tool for reaching the truth.

According to the Organization, the introduction of the two statements improperly influenced the hearing officer and whomever later reviewed the record, thereby depriving the Claimant of a fair and impartial proceeding as is contemplated by Rule 24(a) of the controlling agreement which states, in pertinent part:

"Employes who have been in service more than 60 days shall not be disciplined or dismissed without a fair and impartial investigation, ..." (emphasis supplied).

It is axiomatic that investigations such as the one at hand are held for the purpose of ascertaining all the facts and must be fair and impartial. The Officer conducting the investigation is charged with the responsibility of developing all the relevant and material facts and circumstances surrounding them. As noted in Second Division Award No. 2923, "The judicial officer must make his decision based on all the relevant evidence, and any extenuating circumstances. Otherwise, the investigation would be a mockery and likely miscarriage of justice would result." However, the transcript reveals that the two statements objected to by the Organization contain no assertions that either confirm or deny that the Claimant was observed in the act of stealing gasoline for his own personal use. Both statements do confirm that there was a struggle between an AMTRAK Police Officer and Claimant. Since there is no dispute about this occurrence, but only as to who was the aggressor and the instigator of the physical struggle, the admitted statements were not material or relevant on that point. Careful scrutiny of the record shows that these statements were incorporated into a Chicago Police Department report and this was the sole basis for their introduction. This Police report was admitted in the first instance on the request of Claimant's representative. Under these circumstances, admission of these statements, despite the unavailability of the authors for direct and cross-examination, did not deprive Claimant of a fair and impartial investigation.

It should be noted that the Board has not considered in reaching its conclusion herein references to actions taken subsequent to the investigative hearing concerning related criminal charges. Nowhere on the property was this evidence ever discussed or alluded to and this Board, therefore, feels compelled to disregard such evidence. It has no place in this forum and has been given no weight by this Board.

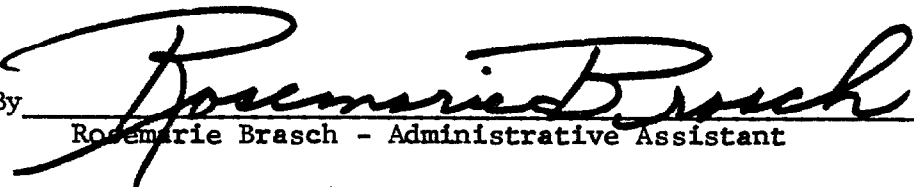
This Board finds that Claimant has been accorded a fair and impartial hearing; the charge of theft of company property has been supported by substantive evidence; as has the charge of assault on the Carrier's Police Officer. The Board is satisfied that there was substantial and substantive evidence of probative value on the merits. We are loath, therefore, to substitute our judgment for Carrier's and the claim cannot be sustained as a result.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of January, 1983.