

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25658

Docket Number NW-25822

Hymn Cohen, Referee

(Brotherhood of Maintenance of Way **Employees**

PARTIES TO DISPUTE: (

(The National Railroad Passenger Corporation (**Amtrak**)-
(Northeast Corridor

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

1. The sixty (**60**) days of suspension imposed upon **Trackman** W. **Kondratewicz** for alleged violation of Rules 'I' and 'J' on September 2, 1982 was without just and sufficient cause (System File **NEC-BMWE-SD-515D**).

2. The claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: The Claimant entered the Carrier's service on April 13, 1977. At the time of the events giving rise to the instant claim, he held the position of **Trackman** at the Carrier's Philadelphia Division. Following a **trial** that was held on September 16, 1982, the Claimant was assessed a sixty (**60**) day suspension for committing the following offenses on September 2, 1982, **a**) while using vulgar **language**, he exposed his genitalia to Trackperson Elizabeth Goode, another employee of the Tie Gang, and **b**) after exposing his genitalia, he hit Trackperson Goode with a stick, causing her personal injury.

On September 2, 1982, the Claimant was assigned to a Tie Gang. During a break for water the Claimant and a Trackperson walked toward the **gang**. According to the Claimant he said to them that "they were all sitting on their **asses** while we were back there breaking **ours****". At that point Trackperson Elizabeth **Goode** said that the Claimant was "nothing but a cry baby". The events that followed are in dispute. However, after carefully examining the record, the Board has concluded that the Claimant exposed himself to her while also directing inflammatory, lewd **and** vulgar remarks at her. Trackperson Goode's comment that the Claimant was "nothing but a cry baby" does not warrant the serious act of misconduct by Claimant. **It** cannot be seriously urged that Trackperson Goode's remarks provoked the offensive and lewd conduct of the **Claimant**.

The record also indicates that after the Claimant exposed his genitals, Trackperson Goode was angry, and screaming at the Claimant. She asked him why he "**would** do something like that". Trackperson Goode walked towards the Claimant and at the location of the "**water** bucket", the Claimant picked up a stick and struck Trackperson Goode on the arm. The Claimant indicated that he struck Trackperson Goode in self defense as she walked toward him, while she **was** shouting, and holding a **ballast** fork in her hand.

He believed that she would attack him with the ballast fork. It should be noted that Claimant had been using a ballast fork **as** part of her work assignment and had the fork in her hand from the outset of the episode with the Claimant.

The Board is of the opinion that the Claimant was not justified in striking Trackperson Goode. She may have been gesticulating with the fork while yelling at the Claimant but there is nothing in the record to indicate that she made any gesture to hit him with the fork. The Claimant's serious misconduct set off a series of events which created a mistaken belief that Trackperson Goode would attack him. The provocative offense conduct by the Claimant cannot be used to justify the assault and battery upon Trackperson Goode. It should be noted that soon after the Claimant struck her with the stick, Trackperson Goode was taken to the hospital where she was treated for **an** "abrasion" to her arm.

It is the Board's judgement that the Claimant violated Rules "**I**" and "**J**" of the Carrier's Rules of Conduct. Rule "**I**" provides, in relevant part:

*Employees will not be retained in the service who are ** 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**."

Rule "**J**" provides, in relevant part:

"Courteous conduct is required of all employees in their dealing with ** each other**. Profane or vulgar language is forbidden. Violence • * or threatening or interfering with other employees • * while on **duty** is prohibited.'

In his five and one-half years of service with the Carrier, the Claimant has had an unblemished record. Despite this record, the conduct of the Claimant **on** September 2, 1982 cannot be tolerated in the work place. Accordingly. it is the Board's judgement that the penalty assessed by the Carrier **should** not be disturbed.

FINDINGS: The Third Division of the Adjustment Board. upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

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That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

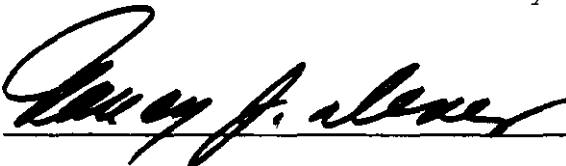
That the Agreement was not violated.

AWARD

Claim denied.

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

Attest:

A handwritten signature in cursive script, appearing to read "Nancy J. Dever", written over a horizontal line.

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1985.