

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25986
Docket Number MW-25462

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(National Railroad Passenger Corporation (Amtrak)

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

(1) The thirty (30) working days of suspension imposed upon Trackman R. H. Magaw for alleged violation of Rule 'L' and Safety Rule '#4143' on June 10, 1982 was without just and sufficient cause and on the basis of unproven charges (System File NEC-BMWE-SD-463D).

(2) The charges leveled against the claimant shall be removed from his record and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: After a Hearing conducted on June 22, 1982, by Project Manager Albert, Claimant was notified by Division Engineer Dailey of a thirty day suspension for violation of General Rule L and Amtrak Safety Rule 4143 "In that on June 10, 1982, at B & P Tunnel, at approximately 5:00 AM, you were found assuming the attention of sleep". (The word "attention" is an obvious clerical error. The charge was "attitude" of sleep and the case was handled on that basis.)

According to the testimony of Foreman James Bennett, Claimant was assigned as a Flagman in a tunnel on the night of June 9, 1982. Bennett observed Claimant lying in a splash chamber at about 4:00 A.M. on the 10th. He told Claimant to leave the splash chamber. At about 5:00 A.M. Bennett found Claimant asleep against an oil-o-static line. According to Bennett, Claimant's eyes were closed. He testified further:

"...he was laying against the oil-o-static line. I called his name, and he didn't respond and at approximately that time the flagman to the south of him blew ... (claimant) did not answer his signal. I called Rick again, and he did not respond. I then picked up his horn and blew it myself. And as I stated ... the relief flagman ... also observed what I just said here"

Bennett also testified Claimant asked him why he had blown the horn and he told Claimant he had tried to wake him and then blew the horn.

Claimant denies being asleep. He states he was alert and asks how "could a person pick up a horn and not wake you up". He did not however deny Bennett had blown the horn nor did he deny asking Bennett why he did it. He did not contend he himself had blown the horn.

The Relief Flagman was not called as a witness. The Organization contends that as the Carrier had the burden of proof it was incumbent upon it to call the Relief Flagman to resolve the conflicting testimony and failure to do so must be taken to mean the testimony would be unfavorable. Thus, the Carrier decided the case "upon the unsubstantiated testimony of one witness" which the Organization argues is insufficient to justify discipline. The Carrier maintains Bennett's testimony was sufficient and it was under no obligation to present further witnesses.

It is not a function of this Board to require the parties to call specific witnesses or to attempt to require them to present their positions in other than their own way. Obviously failure to call witnesses necessary to their case may be fatal in any given situation but that is a value judgment for the parties to make as they proceed on the property. Here both Claimant and Foreman Bennett testified. This Board cannot attempt resolution of conflicts in their testimony. Rather "Our function is to determine if the Carrier's conclusion on the whole, including decisions relative to conflicts in credibility, is supported by substantial evidence." (Third Division Award No. 24288) In view of Bennett's testimony we conclude in this case that it was. To the extent the Organization argues failure to call the Relief Flagman not only resulted in a failure of proof but also constituted a deprivation of Claimant's contractual right to due process we note Claimant did not call him either, nor did he request a postponement or continuance to allow him to do so.

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

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


That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of March 1986.

