Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28844
THIRD DIVISION Docket No. CL-29415
91-3-90-3-343

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM: (Carrier's File No. TCU-D-3277/Organization's File No. 393-CO-006-D)

"Claim of the System Committee of the Brotherhood (GL-10472) that:

1. The Carrier violated the provisions of Rule 24 (a) when, on December 14, 1989, it removed and held Reservation Sales Agent, Mr. Hector Nateras, from service pending a disciplinary investigation.

2. The Carrier acted in an arbitrary, capricious and unjust manner and in violation of Rule 24 of the Agreement, when by notice of January 5, 1990 it assessed as discipline termination from service against Mr. Hector Nateras.

3. The Carrier shall now be immediately required to reinstate Claimant, Mr. Nateras, to his former position as a Reservation Sales Agent and to compensate him an amount equal to what he could have earned, including but not limited to daily wages, overtime and holiday pay had he not been withheld and subsequently dismissed, as mentioned above.

4. The Carrier shall now be immediately required to clear Claimant's record of the charges made against him in this matter and restore all his rights, privileges and seniority unimpaired.

5. The Carrier shall now also be immediately required to reimburse Claimant for any amounts paid by him for medical, surgical or dental expenses for himself and his dependents to the extent that such payments would be payable by the current insurance carriers covering his fellow employees in the Craft."

FINDINGS:

The Third 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 employes 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.

The Claimant had seven months of tenure with the Carrier when he and several probationary employees were sent on a familiarization trip from Chicago to Denver returning to Chicago. According to the instructions provided to the employees, they were to leave Chicago on the afternoon of Friday, December 8, 1989, and return from Denver the following evening, December 9, arriving back in Chicago on December 10, 1989. They were to ride coach class going to Denver with sleeper accommodations on the return to Chicago. They would be paid their regular compensation for the three days, but not overtime. Their meals and beverages would be paid for by the Carrier. Included in their instructions for the trip, was the following directive: "Alcoholic beverages will not be consumed or allowed at any time during the trip. This includes beer and wine."

When the employees arrived at Denver, there was a layover of approximately thirteen hours. During this time, they were on their own and had no job related activities. If they chose to get a hotel room, they had to pay for the accommodations themselves.

According to testimony at the Hearing, the following events took place in Denver. The Claimant and another employee shared a room. After the two had slept and showered, the Claimant suggested they find a bar, particularly one that the desk clerk had mentioned to him as a place where he could play darts. The other employee declined and instead went to breakfast. The Claimant went out alone. When he returned around 3:30 P.M., he had a liter bottle of beer. He offered the other employee a drink, but he declined. The Claimant poured him a glass anyway and the other employee set it on the table. When the Claimant finished the beer, he indicated he might want to go to a bar. However, they decided instead to go to the mall. On their way, they stopped at the room of another employee to ask if she wanted to join them; she did not. The Claimant indicated he was going to a liquor store to buy beer and asked if she wanted anything. She said no. He and his roommate then went to a liquor store where his roommate bought cigarettes and the Claimant bought more beer. The other employee then went to eat. When he returned to the room, he saw the Claimant consume more beer. At least two other witnesses said the Claimant told them he was going to purchase beer. One of the two claimed his breath smelled terrible when they went to get on the train for the trip back to Chicago. However, she did not testify that his breath smelled specifically of alcohol.

Other testimony indicated the Claimant was boisterous and loud on the train during the return trip. However, no one of authority confronted him about his behavior. There was also an allegation that the probationary employees had a party and were drinking alcohol during the return trip, however, no one was questioned or challenged that evening.

When the group arrived back in Chicago, they had two days off. They returned to work on Wednesday, December 13, 1989. They were told there was going to be an inquiry into their behavior during the familiarization trip. They were individually called in and asked questions about what had occurred on the trip. The Claimant denied he had been drinking any alcohol and denied any knowledge of anyone else drinking during the trip.

Finally, the Claimant was accused of threatening a co-worker. After attempting to get her to coordinate her comments about the trip with the other employees, he said, "If I go down, I know where you live."

Several employees had their applications for employment rejected. Claimant was directed to attend an Investigation to be held on December 22, 1989. On December 19, 1989, he met with Carrier Officials and an Organization Representative in an attempt to resolve the matter before Hearing. This meeting involved two conditional waivers which were apparently offered to the Claimant. The settlement efforts failed for reasons that are in dispute. When the Organization attempted to enter testimony at the Hearing which concerned the meeting and the waivers, the Charging Officer objected and the Hearing Officer sustained the objection. Regardless, the Organization in its summation statement read into the record one of the waivers and alleged the waivers were withdrawn because the Claimant refused to provide a written statement implicating his co-workers. The Carrier chose not to address the issue during the Hearing, but subsequently in responses throughout the appeal, did try to counteract the accusations that it had attempted to coerce the Claimant.

Based on the evidence adduced at the Hearing, the Carrier had sufficient cause to terminate the Claimant for a Rule G violation. While the Organization denies the Claimant had anything to drink, it also implies that even if he did, he was on his own time and, therefore, did not violate Rule G. This Board cannot agree with either contention. The employee who roomed with the Claimant presented testimony which was credited by the Hearing Officer. He not only said he saw the Claimant drink beer, but the Claimant poured a glass of beer for him, which he refused to drink. It is not reasonable that anyone would confuse a glass of beer with a glass of gingerale as was asserted.

Beyond that, despite its attempt, the Organization was simply unable to demonstrate that the roommate was in any way coerced by the Carrier. Furthermore, it was clear from the testimony presented, that other employees were well aware of the drinking restriction during the entire trip. The directive stated: "alcoholic beverages will not be consumed or allowed at <u>any time</u> during the trip. This includes beer and wine." (emphasis added) The Claimant was even advised by his co-workers not to buy beer. He chose to ignore their advice. Even though the employees were on unstructured time, they were on a Carrier sponsored trip. They were paid their regular rate of pay for December 8, 9, and 10, 1989. They knew they were expected to board the train for the trip back to Chicago later in the evening on December 9, 1989. It is not unusual in the transportation industry to expect employees to abstain from alcoholic beverages for a reasonable time prior to reporting for work. Besides, the direct order prohibited alcoholic beverages at any time during the trip; it did not say while on the train. If the Claimant had any questions about his prerogatives, he should have consulted his Supervisor.

In addition to the Rule G violation, the Claimant did not help himself when he threatened his co-worker. Such threats cannot be dismissed as being uttered in the heat of emotion. When is one to know when an individual who cannot control his words can no longer control his actions? If it was not meant, it should not have been said, but once said, it should be given credence by anyone in authority. The Carrier may have been on shaky ground for initially removing the Claimant from service pending an Investigation for the Rule G violation, especially since the removal was three days after the alleged infraction. However, the Carrier was completely warranted in removing the Claimant from service pending an Investigation once he threatened another employee.

The final issue to be disposed of by this Board is whether or not we should consider the waivers offered to the Claimant, as well as the Carrier's refusal to allow testimony on this issue. This Board certainly concurs with previous decisions which indicate that settlement offers should never be raised at arbitration. However, there is a strong temptation to find the Carrier guilty of a procedural impropriety because it failed to allow evidence into the record in response to the Organization's allegations that the Carrier coerced employees into testifying against one another and when the Claimant refused, it withdrew the waivers it had offered. The danger in this however, is it makes every unsuccessful settlement effort vulnerable to any allegation. It would defeat the very essence of the rationale which dictates that settlement efforts are matters between the parties. True, the Carrier has no right to attempt to coerce an employee by seeking his testimony against others in exchange for exonerating himself, but it is equally true the Carrier has every right to place certain reasonable conditions on any waiver it offers. As has been determined in other decisions, allegations of wrongdoing do not in and of themselves prove the accusations. There just is not enough evidence in this case, especially in light of the testimony of other witnesses, to ignore the precedent which has been established which advocates a "hands-off" practice where settlement offers are concerned.

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 25th day of June 1991.