

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31586
Docket No. CL-32488
96-3-95-3-304**

The Third Division consisted of the regular members and in addition referee James E. Conway when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11149) that:

1. The Carrier acted in an arbitrary, capricious and unjust manner and in violation of Rule 24 of the Agreement when, by notice of November 24, 1993, it assessed discipline of termination against Ticket Receiver Joseph Hayes.
2. The Carrier shall be immediately required to reinstate Claimant to service with seniority rights unimpaired and compensate him an amount equal to what he could have earned, including but not limited to daily wages, overtime and holiday pay had discipline not been assessed.
3. Carrier shall now expunge the charges and discipline from Claimant's record."

FINDINGS:

The Third 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 waived right of appearance at hearing thereon.

The Claimant, a Ticket Receiver at Amtrak's Ticket Receiver's Office (TRO) in Chicago, was dismissed from his position on November 24, 1993, for misappropriation of company funds following the loss of nearly \$5000 in cash receipts on November 2, 1993. Claimant at the time had nearly 18 years of service with the railroad.

The facts surrounding the disappearance of those funds are not seriously contested. The Parties are, however, in sharp disagreement over the inferences to be drawn from those facts and from certain missing evidence. Accordingly, we summarize below, at somewhat greater length than usual, aspects of record evidence that the Board finds relevant to resolution of this dispute.

Claimant worked on November 2 as a Cashier from 2:30 PM to 11:00 PM in Carrier's TRO. From approximately 3:15 PM until completion of his shift that evening, the Claimant was the only AMTRAK employee assigned to work in that office. His duties as a Cashier included counting cash received during his shift, preparing reports and deposit slips in accordance with established procedures, and depositing those funds in a safe overnight until they could be picked up by the appropriate armored car personnel and transferred to the Carrier's bank the following day. The Carrier's policy was to hold its Cashiers strictly responsible for following established procedures as well as accountable for losses incurred while on duty.

The Claimant maintains that he prepared his day's receipts for deposit in conformity with company policy and cannot explain the loss of a significant portion of them. He represents that he separated the currency into bricks of \$9000 and \$5932.53, and inserted those monies into a bag, sealed the bag properly, and dropped it into the designated safe. He also deposited a second bag containing checks totaling \$1093. That deposit is not in dispute.

According to the testimony of the Carrier's Lead Cashier, she found the office to be in its normal condition when she reported for duty on November 3 at 6:30 AM, with the alarm set and the door and the two office safes locked, negating any suggestion of break-in. At approximately 11:00 AM on November 4, however, she received a call from the Manager of Carrier's bank advising her that upon opening Carrier's sealed money bag bearing a tag that reflected a deposit of \$14,932.53, bank employees had found only \$10,000 therein. The bank manager represented that no deposit slip had accompanied the bag, and that she therefore would be returning to AMTRAK a receipt for the \$10,000 actually received. The Lead Cashier without success tried to locate the missing sum by checking thoroughly around the office, looking in cash drawers, mailboxes and even the trash.

AMTRAK's established procedure for storing and transferring company monies to its retained armored car guard service was as follows. Upon arrival, one guard would hand to the Lead Cashier or Supervisor his key to the "drop safe." It was this safe into which the Cashiers were instructed to deposit their receipts. Keys to this safe were held only by the Lead Cashier, the Supervisor and by the armored car company personnel responsible for pick up and transport of company funds, and by no one else. The Lead Cashier or Supervisor unlocks the drop safe, works the combination lock, returns the key to the guard, and removes the bagged contents of the safe. The Lead Cashier or Supervisor then reads the dollar number entered on the tags attached to the bags containing the receipts. The guard enters those numbers on his clipboard sheet. The Lead Cashier or Supervisor re-locks the combination lock. The guard re-locks the key lock and double checks to be certain both are secure and that the safe cannot be reopened without both key and combination. Lastly, the guard checks to see that the money bags are totally secured and free of rips before departing for his company's own processing center to prepare the receipts for delivery to the bank.

One further aspect of the Carrier's procedures is significant. In closing out at the end of a shift and after verifying that all sums were in balance, a Cashier was to place the funds in a canvas bag with the deposit slip, securing loose currency in a manner that would reduce the possibility of accidental loss. A seal would then be applied to the neck of the bag with a crimping tool. Two of such tools were apparently in use at the time. The evidence is in dispute as to whether none, one or both left an imprint of the letters "CUS" in the soft lead seal. (Neither type of seal, according to this record, was maintained under lock and key in the Chicago TRO during this period. Unsecured seals were kept in a box in an open drawer and elsewhere throughout the office.) Thus crimped, the bag would then be affixed with a small, manila tag by the Cashier upon which he or she would write the amount of the deposit inside. The Cashier would then put the bags into the drop safe and the key to that safe into the other safe. If the Cashier noted a serious discrepancy in balancing at the end of a shift, he or she was to make the deposit in the usual manner. In the morning the Lead Cashier and a Supervisor would jointly unlock the drop safe, count the contents together and initial the paperwork. The record does not reveal by what process the depositing Cashier was to alert his supervisors of the perceived shortage. If there were "after sales" in the form of receipts taken in after the Cashier had balanced out, the Cashier would enter those funds in a separate, bright blue bag, wrap the monies with a corresponding receipt, and place the bag in the drop safe.

This routine, according to the Claimant's Lead, was followed on the afternoon of November 3. The armored car personnel arrived at the TRO around 2:00 PM. The Lead removed from the drop safe the two bags from Claimant's previous shift, inspected them for rips or tears, and read off to the guard the amounts appearing on the bag tags intended to reflect the value of the contents. The bags showed cash contents of \$14,932.53 and checks totaling \$1091.00. The guard accepted both bags without protest. For reasons never explained on this record, four signatures by armored car personnel appeared on the Carrier's records reflecting pick-up of receipts on November 3, three of which appeared similar. The record suggests that the fourth did not entirely resemble the other three. The Claimant's paperwork included a four-ply bank receipt bearing the Claimant's dated stamp and reflecting a cash deposit by the Claimant on November 2 of \$14,932.53. One copy of that document was to be stamped by the bank to verify its receipt of that amount. A second document in the form of a summary report completed by the Claimant reflected cash and checks totaling \$16,023.53 as the remittance to the bank from the daily revenues of November 2. A third form, NRPC Form 3003, contained a breakdown of those deposits by types of checks, money orders and cash, and the denomination of each. That form also reflected a grand total of \$16,023.53 to be deposited in the Carrier's bank.

The record evidence on the issue of chain of custody beginning with transfer of funds from the Carrier to the armored car company personnel was developed through the testimony of the Claimant's Lead. According to her, one guard enters the TRO while a second remains in the armored truck. After signing for and accepting the Carrier's receipts, the guard logs the breakdown of funds by check, cash or Canadian on his clipboard since each will ultimately be directed to a different department of the receiving bank.

From that point forward, the processes described by the Lead were admittedly secondhand to her, having been obtained from the employee of the armored car company who actually received Claimant's deposit on November 3. As she understood the system, after leaving the TRO, both guards transport the Carrier's funds to their processing center. The Carrier's bags are there examined again for rips or tears, and the amounts reflected on those bags are read to the armored car person receiving the delivery. The guards then place the bags into large "duffel bags" which are addressed to the Carrier's bank. Those bags in turn are sealed and secured with a lock. The record is silent as to who if anyone has the key to that lock in addition to the bank. Delivery is made to the bank the following morning.

The bank's procedure, again according to the understanding of AMTRAK's Lead as she gained it from the bank, is to open the Carrier's bags upon receipt, count the funds, and in the case of slight discrepancy, i.e., under \$100, mail a debit or credit advice, as appropriate, together with a copy of the Carrier's deposit receipt. If the discrepancy is over \$100, the bank calls the TRO. The record reveals that such calls are not uncommon. The Carrier's Lead described the typical communication between the Carrier and the bank in this context as follows:

"She usually calls me and says, 'I have a discrepancy here.' And she'll tell me what the discrepancy is. A lot of times I'm aware of it because inadvertently the wrong deposit slip was put in--make out a deposit slip and you find that you did something wrong and you tear it up and put it in the garbage and put in a new one. Maybe sometimes you'll get pulled or you get disrupted and you put the wrong deposit slip in. And then she'll call me and she'll say, 'I have a discrepancy here. I've got a deposit slip for \$5000 and, in fact, there's \$8000.'"

As with the protocol employed by the armored car personnel, the Carrier's Lead was not aware of precisely what the bank's process was at the time for counting incoming receipts such as the funds in question here. Sometimes, however, it appeared to her, based upon the paperwork returned to the Carrier from the bank, that at least two bank clerks counted incoming cash and checks since the receipt returned to the Carrier appeared to indicate that funds were counted by one clerk and verified by a second whose initials appear on the receipt. No such document, however, was received by the Carrier in the transaction giving rise to this dispute. Additionally, the record reflects that the receiving bank frequently only "spot checks" incoming receipts, often forwarding them on to a Federal Reserve Bank to be counted by a counting machine, which in turn advises the receiving bank of any overages or shortages.

In contrast to the Lead's testimony, her Supervisor, who talked with bank personnel on November 4, testified that the bank informed her that the AMTRAK receipts in question were counted by one Teller and checked by both a second and a Supervisor after the shortage was discovered. Those actions were monitored by video cameras, according to the bank, and both the bank's trash and its cash handling center were scoured in an effort to locate the missing funds. The record contains a report from the bank's Security Analyst confirming his investigation into the missing funds and exonerating the bank entirely of any wrongdoing or negligence. That report wrongly puts the date of the loss as October 4, 1993.

The Carrier, having alleged that Claimant has violated its most basic rules and engaged in conduct that constitutes criminal activity, bears the burden of proving those charges. In the view of this Board, the standard of proof in such a case is proof by clear and convincing evidence. In theft cases, where direct proof may be difficult, some or all of the evidence is often necessarily circumstantial in character. It nonetheless may be sufficiently probative to support a finding of guilt. Mere allegations, assertions or conclusions, however, are not proof, and are entitled to little weight.

This Board has reviewed the record evidence relied upon by the Carrier in determining that the Claimant lost or stole nearly \$5000 of its funds, and finds that the evidence does not support those charges.

As an initial matter, it bears mention that there is in the voluminous record of this case no *direct* evidence that the Claimant was guilty of the charges against him. The Carrier's principal evidence of Claimant's guilt is entirely circumstantial and consists of the testimony of the Lead Cashier and Supervisor, the Carrier's Manager of Revenue Accounting and an AMTRAK Police Investigator. None of these witnesses had first-hand knowledge concerning the loss in question, and the evidence adduced through them was of necessity largely inferential. No witness expressed even an opinion, without regard to a basis for an opinion, as to Claimant's guilt. No representative of the bank or armored car company whose testimony may have made a valuable contribution to this record was called by the Carrier. The Claimant's credibility is vital, but indeterminable to this Board without benefit of live testimony. As suggested above, while a strong web of circumstantial evidence might well suffice in the absence of hard proof, the evidence in this record, examined against the strict standard of proof cited above, does not sustain the conclusion the Carrier reached with regard to this Claimant.

A brief, objective summary of the testimony and evidence provided by the Carrier's witnesses may aid an understanding of our findings in this dispute. Carrier's first witness, the Claimant's Lead Cashier on the night of the loss, testified in detail regarding cash handling procedures in the TRO and, as indicated above, described the armored car company's procedures as she learned about them from the guard who actually picked up the Carrier's funds on November 3.

She also described in very general terms the bank's procedures as she understood them, but was candid in acknowledging that she was not intimately familiar with those procedures. She indicated that she herself had once been held responsible for a shortage she disputed, and that there had been instances of discrepancies between the bank and the Federal Reserve. She testified that she never received a shortage notice from the

bank in this case because the bank told her there had been no deposit slip in the Claimant's bag upon which to note that shortage.

The Claimant's Supervisor testified that Claimant had been a qualified, experienced Cashier, although he had worked in the Chicago TRO only since October 18, 1993. She testified that she had taken the call from the bank advising her of the shortage and informing her that the bank denied all responsibility for that loss. She indicated that the bank informed her that there was videotape footage of both the bank tellers' and the check handling center's contact with Carrier's funds, that both that film and the bank's trash had been examined, and that everything was "in order." She testified that the bank was in the process of trying to locate the seal it removed from Claimant's bag but that Carrier had not seen that evidence. She testified that in addition to the key to the drop safe kept by the armored car company, a second key was maintained in the Carrier's Revenue Accounting Department, accessible by approximately five employees including herself. She testified that neither she nor any other Supervisor or Lead had talked with the Claimant concerning his cash handling on the night of the loss. She testified she had not spoken to the armored car company and had no direct knowledge of their procedures in transporting or handling Carrier's funds.

The Carrier's Manager of Revenue Accounting testified that he had security personnel determine that no unauthorized entry had been made into the Chicago TRO on November 2, and that their review of the bank's film revealed no wrongdoing. He testified that a brief conversation with the Claimant had produced no explanation for the loss. He testified that although there is a camera monitoring the work area in question, not all monitored areas are viewed at all times by security, and he did not know whether there was any film on record of the Claimant's office taken on November 2. He testified that neither he nor any other AMTRAK employees that he was aware of had contacted the armored car company or its employees, although he believed the Bank Manager had done so. He testified that so long as the bank received a bag from the armored car company with a seal intact they would accept it and would have no way of knowing whether the seal was the original seal affixed to the bag by the Carrier.

He testified that he had not been aware that there was a "CUS" imprint in any crimper used on the seal, and that he had been unable to obtain the original seal from the bank. He testified that although he did not know how many people handled the missing funds at the courier's clearing house, he assumed he could vouch for their integrity since the bank reported that it had received a sealed bag from AMTRAK. He testified that the bank had refused to release their video tape to the Carrier. He testified that he considered the seal and attached tag to be important pieces of evidence.

An Investigator from the Carrier's Police Department, employed six months previously, introduced the letter from the bank's Security Officer, referenced above, indicating that there was no wrongdoing on the bank's part on October 4, an apparently mistaken reference to November 4. He testified he had not spoken to the author of that document. He testified that he had met with the Claimant, asked him numerous questions, "none of which I have in front of me right now," and that in any event he was "not at liberty to discuss this right now." He testified that his Supervisor had been the first to be notified of the cash disappearance but to his knowledge had not conducted any investigation before delegating the matter to him. He testified he interviewed the Carrier's Manager of Revenue Accounting, the Lead Cashier and the Supervisor regarding money handling procedures in the office. He testified he did not visit the property of the armored car company, speak to the employees on duty on the day in question, know how many of such employees handled the Carrier's funds, or yet have any written documentation in hand from that company. He testified he did not visit the bank or know who there was the first to open Claimant's bag of receipts. He was not allowed by the Hearing Officer at Claimant's November 16 Hearing to express his opinion as to whether Claimant was receiving a fair hearing. He did express the view that all the evidence relevant to the Claimant's dismissal was not available at the time of the November 16 Hearing. He did not indicate whether he had interviewed any of Claimant's fellow Cashiers. He testified that this case had been his first experience with a railroad disciplinary Investigation.

As may be apparent from the foregoing, there is evidence in this record that reasonably raises suspicion with respect to the Claimant. The same can be perhaps be said with varying degrees of assurance regarding Claimant's co-workers and superiors, the armored car guards who picked up the receipts on November 3, their fellow workers and the employees of the bank in which the funds were deposited. But suspicion is not persuasive evidence of guilt. Probative evidence of either theft by the Claimant or negligence on his part is no part of this record.

For several reasons, that fact is not surprising. First, it seems clear from this record that the Carrier was not entirely focused on what it was looking for in investigating this substantial loss of funds. Indeed, the very charges against the claimant denote a degree of uncertainty on Carrier's part about exactly what happened to its money on November 2 or ensuing days. In directing Claimant to appear for a formal Investigation on November 9, Carrier lodged in its "Specifications" the following two inconsistent charges in the conjunctive: that Claimant had "[d]iverted Amtrak funds for your personal use by failing to deposit them into the bank deposit bag. Failed to use care to protect AMTRAK funds from theft from others." Unclear itself about which of two offenses was involved, Carrier established neither.

Secondly, we are compelled to comment about the quality of Carrier's Investigation, which, given the financial and human stakes involved, seemed to be flaccid. Much evidence of that ineffective effort can be seen in the foregoing discussion. Because, for example, Claimant's Supervisors did not contact the armored car service to investigate their handling of Carrier's funds, the record is silent as to what measures are taken by those authorities to safeguard the funds while they await delivery to the bank, or who has access to them during this period. If the funds disappeared during that phase of handling, there is nothing on this record to suggest how Claimant might have prevented such a loss. Neither did AMTRAK police visit the armored car premises, or speak to either of the two guards who made the pickup or to any other guards who were on duty on November 3 at their clearing house. The police seemed to know little about the procedures governing the guards' actions. They were clearly unwilling to elaborate on their discussions with the Claimant at his Hearing on November 16 and, in fact, expressly refused to do so. The Officer testifying at that Hearing had neglected to bring his notes. Neither had the AMTRAK police spoken with any bank employees who may have handled the funds in question. They did not recall whether the TRO was videotaped on the night Claimant worked alone. They told the Claimant the garbage in the TRO had been checked, but did not recall who had done so. The bank disclaimed all responsibility, providing a statement that inaccurately put the incident a month earlier than it occurred, and refused to turn over the tapes it said recorded the actions of its Tellers in opening Claimant's deposit. That sin is made scarlet by the fact that it also could not or would not locate and hand over for examination the seal used by Claimant on the bag he says he deposited November 2. Had either or both that seal or the bank's film been available, that evidence may have shed some useful light on the issue of possible interim tampering. Finally, there is no suggestion on this record that any thought or inquiry was directed to the possibility of any alternative theories that might explain the loss, such as, for instance, an AMTRAK Cashier other than Claimant providing a guard with a spare seal and tag, and even a crimping tool, to facilitate removal of funds and resealing of the pilfered bag.

The Carrier's suspicions concerning the Claimant, in sum, were understandable, but were no better grounded on hard facts than were any possible concerns about the armored car couriers or the bank employees or others. The Organization argues that Carrier's decision was arrived at by a "pathetic process of elimination." In our view, that rhetoric contains a seed of truth but is wide of the mark. In a sense, the record here demonstrates that Amtrak found no person or persons it could rationally hold accountable for the missing funds, and so acted against the one individual over whom it had authority and who inarguably had been in a good position to cause the loss. The

Carrier's investigation in our judgment never conclusively eliminated anyone. We think an 18 year employee with no prior record of rule infractions involving dishonesty deserves better, and find discharge on these facts to be arbitrary.

One concluding observation is appropriate. Effective November 15, 1993, the day prior to the Hearing accorded to the Claimant in the formal Investigation held in Chicago on this termination, the Carrier modified its handling of cash receipts in the Chicago TRO by introducing the "seal-a-meal." "Seal-a-meal" was a clear plastic bag designed to hold the Carrier's receipts and deposit slip, hot-sealed at the top. The reason advanced by the Carrier's Lead for this modification in procedures was "because of shortages occurring in deposits."

There was not just cause for Claimant's discharge. The Claimant shall be reinstated with seniority unimpaired and with full backpay, reduced by interim earnings from all wages, salary and/or unemployment benefits, if any, received by him between the time his unemployment commenced as a result of this discharge and the date of his reinstatement pursuant to this Award. All references to Claimant's dismissal for the incidents discussed above shall be deleted from his personnel records.

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 Third Division

Dated at Chicago, Illinois, this 29th day of August 1996.