

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33396
Docket No. CL-34133
99-3-97-3-617

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11828) that:

1. Carrier violated the provisions of Rule 24 when, on February 24, 1996, it held Claimant John Murphy from service pending a disciplinary investigation.
2. Carrier acted in an arbitrary, capricious and unjust manner in violation of Rule 24 of the Agreement, when by notice of March 18, 1996, it assessed discipline of “Termination from Service” against Claimant, pursuant to an investigation held on March 13, 1996.
3. Carrier shall now reinstate Claimant to service with seniority rights unimpaired and compensate Claimant an amount equal to what he would have earned, including but not limited to daily wages, holiday pay and overtime, had he not been held from service and had discipline not been assessed.
4. Carrier shall now expunge the charges and discipline from Claimant’s record.
5. Carrier shall now reimburse Claimant for any amounts paid by him for medical, surgical or dental expenses to the extent that such payments would be payable by the current insurance provided by Carrier.”

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 were given due notice of hearing thereon.

At the time the incident leading to the instant claim occurred, Claimant was employed by Carrier as a Ticket Agent in Davis, California. On January 10, 1996, he sold a ticket to a passenger. The ticket was for round trip fare from Davis to Santa Barbara. The amount of the fare was \$82.00. When the passenger offered her credit card, the Claimant noticed that she had not signed the card and told her she would have to purchase the ticket with cash. The passenger did so. However, since Claimant had run the credit card through the computer, the passenger discovered an \$82.00 charge on her account when she received her credit card statement.

The passenger contacted Amtrak and eventually spoke with Claimant's Supervisor, R. L. Jones in person at the Davis station, on or about February 16, 1996. The following week, on February 22, 1996, Mr. Jones reviewed Claimant's records for the date in question. The original records showed an overage of \$82.00 for the date in question, but that number had subsequently been whited out, with the result that the record showed a balanced account. It is unrefuted on this record that Claimant offered no explanation for the apparent contradiction when questioned by Mr. Jones on February 24, 1996. On that date Mr. Jones removed Claimant from service pending an Investigation into the matter.

By letter of February 28, 1996, Claimant was notified to appear for an Investigation. The essence of the charge was "Violation of the Trust and Honesty section of Amtrak's Standards of Excellence," specifically, that Claimant had taken the money at issue and corrected the records to disguise his theft. The Investigation was held on

March 13, 1996, following which Claimant was notified of his dismissal from Carrier's service.

The Carrier's case against Claimant is circumstantial. The Carrier maintains that, although circumstantial, the assembled facts are so compelling as to lead to an unavoidable conclusion that Claimant intentionally defrauded the Carrier of the amount in question, and then attempted to hide that fact. Carrier's chief witness is Supervisor Jones, whose testimony in many details (especially concerning the events leading up to Claimant's departure from the property on February 24, 1996) differs diametrically from Claimant's.

Correspondence from the Organization to Carrier following the Investigation and notice of Claimant's dismissal raises a question concerning Mr. Jones' knowledge at the Hearing that an overage sum of \$82.00 cash had been found in the safe formerly used by Claimant prior to the Hearing and had been deposited. The Carrier does not dispute that accusation, but maintains that such "hearsay" evidence is without weight, particularly coming as it does after the decision of termination has been made (Award No. 45, Special Board of Adjustment No. 1026.

The Board respects the Hearing Officer's responsibility in determining credibility. In this case, the Hearing Officer found Mr. Jones more credible than Claimant. However, in a case where circumstantial evidence is said to inveigh for dismissal, the Board has a serious responsibility to scrutinize the hearing record to assure itself that the circumstantial evidence permits no other reasonable conclusion than the one reached by Carrier, particularly where, as in this instance, the Claimant is a thirty-year employee with an otherwise unblemished record.

The record of the hearing suggests that the evidence presented is less than "compelling" and that the subsequent concerns of the Organization regarding Mr. Jones' contemporary knowledge of "found funds" may have merit. Of particular interest is Claimant's testimony (Transcript p.53) concerning the procedure for adjusting paper work:

... the procedure is if it's done with pencil, I erase and correct it and if it's written in ink, we use a dry white-out which covers it, but still leaves a record of it having been done.

Claimant's comment concerning the white-out implies that he would have been well aware that the overage he recorded on January 10, 1996, would show through the white-out. Accordingly, when he corrected his records the following day, both entries would be visible to anyone inspecting the balance report. It rings untrue that a 30-year employee would attempt to defraud the Carrier via a method through which he knew he would be detected. Thus, the Board finds that there is more than a reasonable doubt that the circumstantial evidence advanced by Carrier is an accurate representation of Claimant's behavior and intent on the day in question.

With respect to the issue of whether Carrier violated the Agreement when it held Claimant from service pending an Investigation, we do not so find. The Board has consistently held that theft is a serious violation of the covenant between employee and employer, and Carrier was within its rights to withhold a suspected thief from service. However, we do not find that Carrier has met the serious burden of persuasion required by the circumstances of this case. Accordingly, we sustain the remainder of the Claim as presented.

AWARD

Claim sustained.

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 13th day of July 1999.