

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26669

Docket Number MW-26648

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation - (Amtrak)
(Northeast Corridor

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

1. The three (3) days of suspension imposed upon Welder B. L. Washington for alleged violation of Rules 'F', 'J' and 4007 at approximately 5:40 A.M. on February 3, 1984 was arbitrary, capricious and in violation of the Agreement (System File NEC-BMWE-SD-893D).

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: Following an incident with his immediate Supervisor, Gang 452 Foreman Mike DiGioia, Claimant received a notice to attend Investigation into the following charges:

"VIOLATION OF NRPC RULES OF CONDUCT RULE 'F' which states: Safety is of first importance in the discharge of duty and in case of doubt or uncertainty, the safe course must be taken. Employees shall comply with safety regulations and must exercise care to prevent injury to themselves or others. Employees will not be retained in the service who are careless of the safety of themselves or others.

VIOLATION OF NRPC RULES OF CONDUCT 'J' which reads in part: Courteous conduct is required of all employees in their dealing with the public, their subordinates and each other. Violence, fighting, horseplay, threatening or interfering with other employees while on duty is prohibited.

VIOLATION OF AMTRAK SAFETY RULES AND INSTRUCTIONS RULE 4007 which states: Your personal conduct must be free from scuffling, practical jokes or horseplay while on duty or on Company property.

SPECIFICATION: Whereas on February 3, 1984 at approximately 5:40 AM at the Odenton MW Base Building, you engaged in threatening and violent behavior resulting in the injury of your foreman, M. DiGioia."

At the commencement of the formal Investigation on March 22, 1984, Claimant and Representative Scales noted that Carrier's complaining witness, Gang Foreman DiGioia, was not present. In fact, Foreman DiGioia flatly refused to testify against Claimant, despite being subpoenaed to do so. BMW Representative Scales placed upon the record a March 12, 1984 letter from Foreman DiGioia to Hearing Officer Johnson which read as follows:

"I am not interested in testifying at any trial of Bernard Washington. I trust you will forget the incident as I have."

Hearing Officer Johnson rejected the Organization's objections to proceeding in the absence of Claimant's accuser and went forward instead with the testimony of another Supervisor. That witness stated that he had been an observer of an exchange of heated remarks between Claimant and Foreman DiGioia regarding work assignments. During that conversation DiGioia told Claimant to "shut up" following which Claimant punched his fist into a locker near the Foreman.

During the testimony of Carrier's witness, Hearing Officer Johnson repeatedly intervened to unburden himself of some observations to which BMW Representative Scales properly objected, as follows:

"Mr. Johnson: I would like to say something, if you don't mind. I said before that this trial or hearing is to bring out the facts of the incident. I - - in my dealings with people, I've seen and heard some harsh words spoken to me, but as a result I never took a swing or pushed an individual. It so states that you should not take violent action against your superior. In self defense you may protect yourself, but I feel that the words, 'shut up' was not enough to provoke anybody to swing or to push. This would be a very serious offense if we were out on the track in a main line territory and the foreman was busy working and a man would come up and say something and in hastily speaking, the foreman would say shut up, get away, the man would swing or push him. This could be very serious.

Mr. Scales: Mr. Johnson, were you at Odenton on February 3, 1984?

Mr. Johnson: No, sir. I was not.

Mr. Scales: Did at any time you observe any of the things that is going on in this trial proceeding today?

Mr. Johnson: The only thing that I observed is what Mr. Thomas Holmes stated - -

Mr. Scales: And you didn't observe that, but nevertheless in that you don't have anything that is pertinent to this proceeding, then your comments shouldn't even be noted for the record concerning this.

Mr. Johnson: Well my comments - -

Mr. Scales: You did not see the man swing at anybody. You didn't even see the man push anybody. I move to strike your entire testimony from the time that you interrupted me to the end.

Mr. Johnson: Well, it is so noted but I did ask permission to speak and I didn't interrupt you and I was just going by the rules of Amtrak, instruction rules of scuffling, horseplaying or being quarrelsome.

Mr. Scales: But again Mr. Johnson you were not there - - not there to observe whether or not the alleged violation actually took place. If you were to prejudge the trial, and obviously you are, then there is no need to continue with a trial proceeding here.

Mr. Johnson: It is so noted for the record and if you have any more questions - - "

In our considered judgment, the foregoing gratuitous comments by the Hearing Officer amply support the Organization's Claim that the Claimant was deprived of a fair and impartial Investigation to which he was entitled under Rule 68. Such observations by a Hearing Officer concerning the guilt or innocence of an accused employee are inappropriate under any circumstances. In this case, the Hearing Officer's transgression was compounded because he made his comments about Claimant's guilt even before he had an opportunity to present a defense. This plainly demonstrates a blatant prejudgment which fatally taints the Hearing record. The highly irregular and prejudicial comments by the Hearing Officer aggravated his earlier error of proceeding in the absence of the accusing witness. Foreman DiGioia was an employee of Carrier under subpoena and his failure or refusal to testify was never even explained, let alone justified on this record.

Because of the above noted fatal procedural irregularities by the Hearing Officer, we shall sustain this Claim without reaching or commenting upon the underlying question of Claimant's guilt or innocence.

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

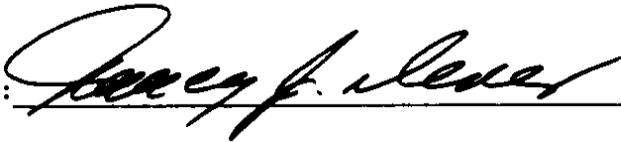
That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: _____



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1987.