

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-3116/TCU File No. 393-C9-047-D)

Claim of the System Committee of the Brotherhood (GL-10446) that:

1. The Carrier violated the provisions of Rule 24(a) when, on June 7, 1989, it held Reservation and Information Clerk, Ms. Lisa Mitchell, 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 June 26, 1989, it assessed as discipline dismissal from service against Claimant, Reservation and Information Clerk, Ms. Lisa Mitchell.

3. The Carrier shall now reinstate the Claimant to service with seniority rights unimpaired and compensate her an amount equal to what she could have earned, including but not limited to daily wages, overtime and holiday pay, had she not been held from service and had discipline not been assessed.

4. The Carrier shall now expunge the charges and discipline from the Claimant's record.

5. The Carrier shall now reimburse Claimant for any amounts paid by her for medical, surgical or dental expenses to the extent that such payments would be payable by the current insurance provided by the 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 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.

On June 11, 1991, a Hearing was held before this Board during which the following facts were presented:

By letter dated June 7, 1989, the Claimant was notified to appear at a formal Investigation on June 15, 1989, to determine if she had violated the following Rules, as alleged:

Rule F (3): "Conduct involving dishonesty . . . is prohibited."

Rule K, 3rd paragraph: "Theft, misappropriation, or use for personal gain of Amtrak funds, property or services (including, but not limited to postage and mailing services, computer services, shipping services, printing services, communications services and the services of Amtrak employees) is prohibited. Employees must be specifically authorized to use the company's credit or receive or pay out money on the company's account. Employees must use Amtrak funds, property, services, and the services of other employees with care and economy and protect them from theft or abuse by others."

The Notice of Investigation alleged that Claimant issued EEV #75 0268205 dated May 19, 1989, in the amount of \$3,460.00 (for cash) to Sandy Stearn covering four alleged misconnects. This was to cover four airline tickets from Chicago to Portland, Oregon, two hotel rooms, four meals, baggage excess, and refund of unused Amtrak transportation from Chicago to Seattle.

The Notice further indicated that according to a preliminary Investigation the Stearns traveled from Seattle to Chicago on Train #8, arriving on May 19, 1989 at 5:55 P.M., made their connection on Train #30, did not stay at the hotel, did not utilize the meals, and did not utilize the airlines. Further, the Byrds terminated their trip in Chicago in accordance with their reservation.

Facts developed at the Investigation reveal that during the evening, there were two trains which were late arrivals into Chicago's Union Station. As a result, anywhere from 100-150 passengers missed their connections and had to be rescheduled on other trains, provided lodging and meals, and/or could exercise the option of taking bus or plane transportation to their destination.

Those who wanted to receive refunds for any portion of their train fare were provided with an EEV (a voucher which gave them a cash refund based on the cost of their train ticket, lodging and meal costs, and any alternate transportation they chose in lieu of continuing on the train). On that particular evening, the Claimant issued an EEV for two couples who claimed to be the Stearns and the Byrds who purportedly were traveling together. In

addition to refunding the cost of their train tickets and sleeper accommodations, she paid them for hotel accommodations, meals, and airfare to the destination of their choice. The total amount of the voucher was \$3,460.00 cash. In exchange for this voucher, the Claimant accepted a ticket from Seattle to Chicago. The ticket had already been punched, but the passengers contended the Conductor had pulled the wrong tickets. They also indicated they preferred airline tickets to Portland, Oregon, rather than to Seattle, Washington.

Since the Claimant was asked to come to work early the next morning, the Carrier arranged to have her stay at a nearby hotel at the conclusion of her shift that evening. After everyone's travel had been adjusted, the Claimant punched out. When the Supervisor was checking all the changes and completing the accounting, she could not locate the tickets for the Stearns and Byrds which should have been attached to the EEV. She called the Claimant at the hotel and inquired as to the whereabouts of the tickets and was told they were with the voucher. In the interim, the tickets were located. The Supervisor, upon looking at the tickets, asked why the tickets did not show travel from New York/Washington to Chicago, but indicated travel from Seattle to Chicago. The Claimant responded that the Conductor had pulled the wrong tickets. When the Supervisor also asked her why she had refunded the cost of a sleeper and provided alternate transportation, the Claimant said "... don't you remember you told me to do that." The Supervisor denied ever having made the statement to the Claimant.

According to the unrefuted testimony of the Claimant, she was called into the office of the Charging Officer two to three weeks later and questioned about the EEV she had issued to the Stearns/Byrds. Then on June 7, 1989, she was directed to appear for a formal Investigation into the matter of the EEV.

The Organization raises several procedural issues. It first cites the delay in bringing charges against the Claimant. It further argues that the Carrier did not question witnesses who were present the evening of May 19, 1989, until the Organization listed them as witnesses for the Claimant. This it urges was an attempt to intimidate witnesses. Thirdly, it holds that the Hearing Officer denied the Organization the right to present its case by denying it the right to establish the practices associated with the issuance of EEVs, while allowing the Charging Officer every opportunity to present generalizations in areas which benefited the Carrier's case against the Claimant. The only criterion he used in determining the admissibility of evidence was whether he thought it would incriminate the Claimant.

The Organization further argued that the Claimant was innocent of the charges against her. She was a victim of a scam, as was the Carrier. There is no evidence to show she violated any procedure or policy of the Carrier. The Carrier is merely using the Claimant as a scapegoat for its own lax practices.

The Carrier believes it has clearly shown the Claimant was guilty of the charges as presented. She issued an EEV based on an already punched

ticket, which was an Eastbound ticket when, in fact, the late arrival was a Westbound train. She gave a refund to a Sandy Stearns for both the Stearns and the Byrds when in actuality Mrs. Stearns' first name was Judith and the Stearns were not even traveling with the Byrds. The Byrds' final destination was Chicago and they were not going anywhere else. She not only refunded the passengers the sleeper accommodations, but she also gave them airfare, when normally the Carrier does not do both. She did not make airline reservations for the passengers, as is normally done, but merely gave them the money. She accepted the passenger's word that the Conductor pulled the wrong tickets. The EEV was an abnormally large amount, and she did not check with the Supervisor or check the computer.

For someone who bid into the job of passenger services, and had extensive knowledge in handling misconnects, the Carrier contends it is incredible she could misdirect such a large sum of money. Even though there may not have been evidence to show she had directly benefited from the scam, there is no doubt she did not safeguard the funds of the Carrier as she is supposed to do under Carrier policy.

There are three areas this Board must examine in making a decision in this matter. The first was the allegation that the Hearing Officer did not conduct a fair and impartial Hearing. Secondly, was there an established policy/procedure which was violated by the Claimant? Finally, regardless of whether or not there was a policy/procedure for handling EEVs, did the Claimant fail to take the proper precautions in issuing the EEV, thus allowing the embezzlement of Amtrak funds?

The Organization raises many pertinent procedural points. This Board is dismayed by the fact the Carrier waited over two weeks to question the Claimant about the EEV at issue. Furthermore, one has to question the thoroughness of its investigation when it did not question the Clerks that worked on May 19, 1989, until the Organization listed them as witnesses. Investigations should be conducted as soon as possible after the occurrence of an incident. Not to do so allows facts to become stale and memories to fade. In addition, the Hearing Officer erred significantly when he would not allow testimony concerning the practice of filling out EEVs. Contrary to his statements at the Hearing, the Carrier, unable to find the Claimant guilty of dishonesty and theft, found her guilty of violating the proper procedure for drafting EEVs resulting in her failure to protect Amtrak funds. Therefore, even though the Organization did manage to have some of its testimony on record, it was obvious from the manner in which the Hearing was conducted that such evidence was given little if any consideration. Furthermore, the Hearing Officer refused to allow any evidence to be presented which characterized the behavior of the Supervisor on the evening in question, and, as we will discuss later, that behavior may have been at least part of the reason the Claimant handled the EEV the way she did.

While this Board has established the right of Hearing Officers to make credibility determinations, it is not an absolute right. Especially in

cases where the Hearing Officer only allows one side of the story to be presented. That is not a determination of credibility; instead, it is a pre-judgment of the validity of the evidence before it is heard. This is particularly true when the only Carrier witness has a vested interest in the outcome of the Hearing. In order to appreciate the vested interest of the Supervisor in this case, one only need review her testimony. On page 47 of the transcript, we find the following exchange during her cross examination:

"Q. Well, we don't have a problem with the fact that it's not your signature, in fact, we know it's not your signature. What I'm having a little bit of a problem with is the fact that your tone of voice indicates that perhaps someone might think that it is your signature.

A. Possibly. It's my signature.

Q. Did you say that the clerks do sign your signature?

A. Yes, they do.

Q. To this?

A. Yes, they do.

Q. And they do it often?

A. Yes, they do but not for the total of \$3,406., (sic) which I am responsible for or would be." (emphasis added)

Since that was the case, and as it turns out, the procedures used and requested by the Supervisor were very much in question, the Carrier should have assured the integrity of its evidence by presenting the written policy and/or procedure for handling EEVs, if one existed. The very least it could have done was present the testimony of the other Supervisors who had allegedly advised the Clerks how to fill out EEVs. In addition, it should have permitted the Organization to present the testimony of its witnesses relative to the practices of completing EEVs, as well as the direction they received from the Supervisor in charge that evening.

This Board questions the existence of written procedures for reasons other than those cited above. If they do exist, why didn't the Carrier produce them on either of the two days of the Hearing. Additionally, doubt was cast on their existence by the Carrier witness during the following exchange which begins on Page 49 of the transcript:

"Q. . . . I'll go back to my original question. Are there procedures for the employees to do EEVs?

A. They are authorized to sign the supervisor on duties signature, yes.

Q. That isn't what I asked . . . .

A. Are there procedures?

Q. Yes. You heard the question.

A. Are there procedures to what signing the EEV or writing the EEV?

Q. Are there procedures for employees to handle EEVs?

A. Yes.

Q. Can you tell us, where these procedures are?

A. That I'm not absolutely certain.

\* \* \*

Q. . . . would you be able to present to us the procedures that you say you have for handling the EEVs?

A. I'm not absolutely certain. (and later in response to a similar question) I stated that as far as I have not seen them lately. I'd have to talk to Mr. . . . as far as getting access to anything in writing. (and still later) I can't recall in the last year or so if I have seen anything in writing as to the direct -- they change rules of procedures as to what we can and cannot do with EEV's for passengers. Each case is different, each train is different. The people in question all have their own personal trips, their own personal reasons why they have to be where they have to be, so there is -- maybe there is not a cut and dried list of what you can and cannot do. The supervisor makes that determination on that day in question."

Since the Carrier produced no evidence there was a concrete policy, even after the Organization made it such an issue on the first day of the two day Hearing, one can only conclude there was no written policy. From the Supervisor's testimony, it was clear the Supervisor on duty set the policy for any given day and for the circumstances. Therefore, it was all the more important to at least allow the testimony of the Organization's witnesses concerning what they were told on the evening of May 19, 1989.

If in fact, they were told to take care of everything themselves, the Claimant would not have approached the Supervisor. Likewise, if the Claimant did things as she was told, she would have seen no reason to approach the Supervisor. However, since the Organization was not allowed to produce testimony which demonstrated the Supervisor's alleged method of operation on the night in question, there was no way of determining whether or not the Claimant was influenced by the Supervisor's attitude.

The Carrier puts much stock in the amount of the EEV being so large the Claimant should have known to contact the Supervisor. However, no one knows if she was ever told of a maximum amount, as evidenced by the Supervisor's testimony on page 54:

- "Q. Is there any amount that's not acceptable for an employee to handle?
- A. Well, I have been in passenger services for a long time and over -- anything over a thousand dollars, that's personally speaking (emphasis added), I would want the agent to come and ask me.
- Q. Well, wanting it and informing the people - - -
- A. I have mentioned that to possibly not each and every one (emphasis added) but that is what I would - - -
- Q. So if we had a group of five people, one or two of them would know anything over a thousand dollars you want them to come to you?
- A. Possibly they wouldn't know. I can't say that they would or wouldn't. I can't tell you who I have told. Any large amount and I maybe gave a denomination, any large amount and I feel -- maybe I never said a thousand dollars, but I feel as though . . . (and later) Personally speaking a thousand dollars is a lot of money, is a lot of money, so I would want the agent to say look, I'm flying these passengers, I'm doing this. I said okay . . . (and later) That's correct. Might have said it six months ago, I have might have told them last week. I don't recall specifically telling any individual agent that particular amount."

There is no evidence the Claimant should have been aware of any monetary limit which required supervisory approval.

There were other errors in the way this case was handled at the Hearing, as well as the way in which the Carrier analyzed the evidence therefrom. The problems began with the refusal of the Hearing Officer to allow testimony

which had the purpose of showing how EEVs were handled generally by other employees. In addition, he disallowed testimony which may have shown the Claimant was actually following directions issued by the Supervisor. In fact, the Board believes the Claimant's Agreement due process rights were violated when such testimony was prohibited, but then, the Carrier used its absence from the record to substantiate the Claimant's guilt. For example, it was the Carrier's contention that employees never refunded first class sleeper accommodations while simultaneously providing air fare. It attempted to show this through the testimony of its witness. At the same time, the Hearing Officer refused to hear the testimony of one of the Organization's witnesses, hereinafter referred to as the "other employee," who wanted to testify that others were told by the same Supervisor to do exactly that. At Page 20 of the Carrier's Submission, we note the following argument: "Later in testimony the claimant recounted an elaborate scenario between Supervisor . . . , [the other employee,] and herself where the supervisor allegedly specifically instructed her to give passengers refunds on sleepers as well as air fare . . . . Yet, [the other employee] obviously recalls no such instance, as evidenced in her testimony previously quoted (pp.289-291) in the transcript."

The Carrier apparently failed to review the "other employee's" earlier testimony, as well as an earlier ruling by the Hearing Officer (commencing on Page 278) wherein the exchange went as follows:

"Q. (Union Rep): See the next line, refund of rooms, \$1,106. Do you refund bedroom space when you fly a passenger?

A. (other employee): I was led to believe that yes, you did. I have been told previously that you do refund sleepers. (emphasis added)

Q. Can you tell me if you know if Lisa did this all the time?

A. I don't know if she did it before then, but there was an instance a few months before that where --

(Charging Officer): Objection

Hearing Officer: We're talking about the night in question here, Mrs. (Union Representative). Anything prior to that is not going to help me make a decision. Just ask questions about the EEV in question and the night in question.

(Union Rep): Once again, Mr. Hearing Officer, I'm going to object to not being able to ask this question. It's extremely relevant.

(Hearing Officer): It's not relevant.



(Union Rep): The Company's witness, (Supervisor), sat here and said that a discrepancy in this EEV was the fact that Lisa Mitchell refunded rooms for airline tickets. By doing that, of course, it created a lot of the \$3,460. The Company witness implied that Ms. Mitchell was incorrect in doing this, that it was not her instructions, that it was not her policy to refund bedroom space when they are flying a passenger. I want to show that in fact that's not the case, and I'll be able to do it.

Hearing Officer: Mrs. (Union Rep), what (Supervisor) said was that that was what -- what you're referring to and what she said was that was what drew her attention to the EEV.

(Union Rep): Exactly.

Hearing Officer: What you said was she found fault with the procedures that Ms. Mitchell conducted with this EEV on that night. That's not in question here.

I keep telling you that, but the policies and procedures -- any improprieties for that -- are not up for questioning here. What is up for questioning is how Amtrak money got to people who apparently didn't deserve to get it. (And later on he continued) . . . I'm going to stand by my position. It does not help me make a decision, what (the other employee) may have been instructed to do prior to the investigation. We're talking about Ms. Mitchell here in this case, and we have to decide what she knows, what she has been instructed to do and how she conducts her business.

\* \* \*

Q. (Union Rep): (other employee) have you ever refunded sleeper rooms when you refunded airline tickets?

A. Yes.

Hearing Officer: Over my objections, you got that on the record. I hope you're happy about slipping by something again."

After this exchange the Organization Representative attempted to have the witness read into the record two statements. She was only permitted to read one.

While we do not know exactly what the witness would have testified to, we get a clear inference from the objections of the Representative that it

would have dealt with the directives the Supervisor issued previously regarding refunds for sleeper accommodations. At any rate, this entire scenario, along with the rest of the transcript, demonstrates an unfairness on the part of the Carrier. Certain evidence in support of the Claimant was simply not allowed on the record. Therefore, it is difficult for this Board to be certain the Claimant was guilty of anything but poor judgment which may have been enhanced because of the directions issued by her Supervisor.

In summary, the Carrier violated the Claimant's Agreement due process rights when it refused to allow her to present evidence which subsequently proved pertinent to the Hearing Officer's decision. Secondly, because of this there is a significant flaw in the conclusions arrived at by the Carrier. In this record there is absolutely no evidence the Claimant was guilty of dishonesty. While she may have shown what most people would believe to be poor judgment, there is at least some evidence that this, in part, must be laid at the feet of the Carrier and/or its agents.

Even though the Carrier failed to prove the Claimant violated policies and procedures on May 19, 1989, the Board is disturbed by at least one aspect of the Claimant's handling of the refund. If we review the situation on the night in question, we find the train which was arriving late was Westbound. The Eastbound train from Seattle had arrived sometime earlier. It is difficult for this Board to believe that any Clerk would accept dated, punched tickets from the earlier Eastbound train to issue a refund. Especially when the refund was as large as \$3,460.00. At the very least, one would expect an employee to conduct a more thorough investigation into the validity of the tickets being presented. This has to be considered careless or negligent, at best. Frankly, under normal circumstances, this Board could find no acceptable excuse for an employee's failure to safeguard his/her employer's money by at least requesting a receipt or insisting the passenger wait until the refund could be verified on the computer. However, this certainly is not proof that the Claimant was involved in a premeditated act to steal from the Carrier, which is the thrust of the Carrier's case. It is, however, a serious error in judgment.

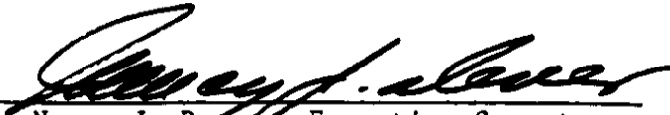
In light of the obvious deficiencies in the Carrier's case, this Board cannot uphold the discharge of the Claimant. We do, however, find it difficult to excuse the careless actions of the Claimant in accepting punched tickets for a refund of this amount. In accordance with the considerations outlined in this Award the Claim is sustained to the extent the discharge is to be rescinded and the Claimant is to be issued a sixty (60) day suspension in lieu of that discharge. She is to be reimbursed the difference in wages and benefits which would normally have been paid less any interim earnings, including unemployment compensation; her seniority and all other rights to be unimpaired.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.