Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29266
THIRD DIVISION Docket No. CL-29350
92-3-90-3-259

The Third Division consisted of the regular members and in addition Referee John B. LaRocco when award was rendered.

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

STATEMENT OF CLAIM:

"(Carrier's File No. TCU-TC-3230/TCU File No. 393-119-089)

Claim of the System Committee of the Brotherhood (GL-10454) that:

1. Carrier violated Rule #12, #14, #28 and other related rules of the Agreement, beginning May 5, 1989 when it failed to safeguard Claimant Irma Pittman's health, and continuing thru and including May 23, 1989, during which time it failed to compensate Claimant for wages lost due to her being disabled by illness resulting from her inhalation of toxic gas while on duty at the WRSO on May 5, 1989.

2. Carrier shall now compensate Claimant for all wages lost from her regular assignment plus all overtime that she would have been eligible to work beginning May 5, 1989, thru and including May 23, 1989. Carrier shall also compensate Claimant for all unreimbursed medical expenses incurred as a result of her aforementioned exposure."

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 waived right of appearance at hearing thereon.

The Carrier's Western Reservation Sales Office (WRSO) is situated on the eighth floor of a downtown Los Angeles, California building. The Carrier leases the office space and staffs the office with Reservation Sales Agents. The building is managed by FAB Enterprises (FAB), although the record is unclear if FAB is also the owner. For purposes of this Award, FAB is the Carrier's landlord.

At 10:30 A.M. on May 5, 1989, several Reservations Sales Agents informed the WRSO Director that they smelled a foul odor in the office. At about the same time, the Director also detected an odor of gasoline in the office. When he went to investigate the odor, the Director encountered a building maintenance man and the Los Angeles Fire Department (LAFD), both trying to detect the source of the noxious odor. At 11:00 A.M., the LAFD advised all persons to evacuate the building. The building was evacuated. Approximately seven employees were treated for nausea and vomiting. One and one-half hours later, the LAFD allowed Carrier employees to return to their work stations on the eighth floor, although the LAFD had been unsuccessful in discovering the source of the odor. The odor had dissipated, but the LAFD warned the WRSO Director that the odor could recur at any time.

At 1:00 P.M., several employees again smelled the unpleasant odor and became ill. A short time later, the LAFD ordered another building evacuation and the 200 WRSO employees on duty left the building. Fifteen to twenty employees were treated by paramedics and a total of thirty-one workers, including Claimant, received treatment at local hospitals.

Later in the day, the LAFD determined that the probable cause of the odor was a broken sewer line on the ninth floor, immediately above the WRSO. Building maintenance personnel had evidently worked near the sewer line, ruptured it, but did not adequately repair the hole. As a result, sewer gas seeped from the line into a nearby air conditioning intake vent. The gas then circulated through the air conditioning system in the WRSO.

Claimant experienced headaches, blurred vision, nausea and a mild stomach disorder. She was treated by her own physician as well as an ophthalmologist. Due to these symptoms, Claimant was off work from May 5, through May 23, 1989.

In a Memorandum dated May 8, 1989, the Carrier informed WRSO Reservations Sales Agents that while it paid them for their full shift on May 5, 1989, it would not pay them for any medical expenses or lost time as a result of the foul odor incident. The Carrier urged the Agents to contact FAB for reimbursement of lost wages and medical expenses.

For the first time in its Submission to this Board, the Carrier questioned whether or not Claimant was truly ill and, even if she was actually ill, whether her maladies resulted from the mildly noxious odor present in the WRSO on May 5, 1989. Since these arguments were not raised on the property, we must accept the Organization's unrefuted assertion that Claimant lost wages and incurred medical expenses as a direct and proximate cause of the sewer gas leak. Also we note that in the May 8, 1989 Memorandum, the Carrier conceded that many employees sustained injuries due to the inhalation of fumes emanating from the open sewer line on the ninth floor of the building.

The Organization asserts that under Rule 28 of the applicable Agreement, the Carrier is obligated to provide its employees with a safe and healthy working environment. In this case, the Organization charges that the Carrier not only failed to provide a healthy working atmosphere for its employees, but it also deliberately jeopardized the safety of the employees. According to the Organization, the Carrier knew, after the first evacuation, that many employees were vomiting and the source of the odor was still unknown (so it could resume at any moment), and yet the Carrier callously directed its employees to return to the potentially poisonous office. The Organization alleges that if the Carrier had not insisted that the employees return to their work stations, most of the employees would not have suffered any illness. The Organization concludes that the Carrier recklessly disregarded the health and welfare of its workers. Finally, the Organization argues that the Carrier may not simply pass off its inviolate obligation to provide a healthy work environment to the building landlord.

The Carrier submits that it cannot be faulted for the unfortunate incident. The Carrier stresses that it was not responsible for building maintenance, including broken sewer pipes. Moreover, the Carrier argues that no Rule in the applicable Agreement mandates the Carrier to reimburse its employees their medical expenses and lost wages resulting from on-the-job injuries. The Carrier takes vigorous exception to the Organization's argument that it did not provide a safe work place for Reservations Sales Agents. The Carrier complied with all LAFD directives and evacuated the building twice. The Carrier points out that there are approximately 200 employees in the WRSO and most were unaffected by the odor. Lastly, the Carrier argues that employees could have sought compensation for on-duty injuries, including wage losses, through the Federal Employer's Liability Act or the Carrier's Claim Department.

After this case was docketed with the Board, the Carrier Member challenged our jurisdiction to adjudicate this Claim. As the Carrier Member points out, a jurisdictional contention may be raised at any time. (Third Division Awards 27575, 20832, 20165, 19527, 18577.) In essence, the Carrier argued that its Claims Department, as opposed to the grievance procedure and appeals process, is the exclusive forum for handling claims for compensatory damages emanating from on-duty injuries.

For two reasons, we conclude that this Board may assert jurisdiction over this Claim. First, the Carrier is estopped from arguing that its Claims Department is the exclusive avenue for resolving this Claim inasmuch as, after the incident, the Carrier directed Claimant to seek compensation for lost wages and medical expenses from FAB, rather than its Claims Department. Since the Carrier unilaterally blocked Claimant from obtaining redress through its Claims Department, the Carrier may not now assert that only its Claims Department has jurisdiction to resolve this matter. Second, the working Agreement contains an express provision, Rule 28, which, as we will discuss later, applies to the specific facts herein. The presence of Rule 28 vests this Board with authority to fashion the appropriate remedy if the Carrier has violated the Rule.

Rule 28 provides:

> "It is the policy of the company to safeguard the health and safety of employees. Both the company and the employees shall cooperate in maintaining safe and sanitary conditions of company facilities."

This Board finds that, in Rule 28, the parties confirmed the Carrier's policy to safeguard the health and safety of its employees. The parties raised the Carrier's policy to the status of a contractual obligation. Inherent in this obligation is the Carrier's duty to insure that the work place is free of hazards even if the hazard is beyond the Carrier's direct control. Rule 28 is not fault-based. Rather, the Carrier assumed a general, contractual obligation to provide a healthy and safe work environment, without regard to the Carrier's negligence. Thus, the Carrier was ultimately responsible for the unhealthy fumes at the WRSO.

Reservations Sales Agents did not have any contractual relationship with the landlord. Thus, while the employees may have had a tort claim against the landlord, it would be difficult for the employees to take on the burden of proving the landlord's negligence. As between FAB and the Carrier, the latter had a direct, contractual duty to its employees. The Carrier, as opposed to the workers, can exert more control over the landlord's maintenance of the building and the prevention of toxic gas leaks. Therefore, the Carrier was the primary obligor to Claimant herein.

Of course, the Carrier may seek indemnification from FAB for any sums it must pay its employees. Whether or not the Carrier was at fault for the sewer gas leak or was negligent for not taking more immediate steps to evacuate the building is a matter of contention between the Carrier, as the tenant, and FAB, the Carrier's landlord.

The grievance procedure is not the ordinary process for employees to utilize to obtain redress for on-the-job injuries. This Board is not an expert at determining the validity of Claimant's medical expenses. In the record, Claimant failed to substantiate any sum she incurred for her medical treatment. Nevertheless, while we must deny Claimant's request for reimbursement of her alleged medical expenses, this Board sustains the Claim for her lost wages without prejudice to any rights she might have to make a claim for medical expenses with the Carrier's Claims Department or to pursue other legal remedies. Under the unique facts in this case, Rule 28 is sufficient to permit a sustaining Claim for lost wages in view of the surrounding circumstances, especially the Carrier's attempt to shuffle off its responsibility to FAB. Therefore, the Carrier shall pay Claimant for wages she lost between May 5, and May 23, 1989.

This Board emphasizes that its remedy is restricted to the peculiar and unusual facts in the record before us. Also, nothing in this Opinion should be construed to mean that this Board will routinely accept jurisdiction over claims filed by employees seeking compensatory damages for on-duty and on property personal injuries. (Fourth Division Award 4839.) Our assertion of jurisdiction over this case is narrowly limited to unique circumstances manifested in this Claim.

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 12th day of June 1992.