

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30924
Docket No. CL-28831
95-3-89-3-318

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth 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
Brotherhood (GL-10374) that: (CARRIER'S FILE
NO. TCU-D-2955/TCU FILE NO. 393-D8-102-R)

1. Carrier acted in an unjust and arbitrary manner, violating Rules 24 and other related rules of the contract when, on 16 June 1988, it issued a letter of reprimand to Claimant Sharon Berniard, and directed Claimant Berniard to pay Carrier an amount of \$731.00 said amount having been stolen from Carrier by persons unknown.
2. Carrier shall now be required to clear Claimant Berniard's record of all reference to any letter of reprimand.
3. Carrier shall now be required to return to Claimant any and all monies paid by Claimant to Carrier as a result of Carrier's 16 June 1988 directive. Carrier shall also be required to pay Claimant interest on said money at the current prevailing interest rate."

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.

This dispute concerns the Organization's challenge to the Carrier's decision to require Claimant, a Ticket Clerk, to reimburse the Carrier in the amount of \$731 for funds that were left in her ticket drawer when she left the office, and were subsequently stolen in a robbery. The Organization also disputes the Carrier's decision to issue Claimant a reprimand as discipline for this incident. On April 6, 1988, the Regional Director, Passenger Service notified Claimant that a formal Investigation would be held on April 14, 1988 on the following charge:

"Violation of Rule "D", Rule "H" and Rule "L" of the National Railroad Passenger Corporation Rules of Conduct, in that on March 13, 1988 at approximately 8:35 a.m., while working as a Ticket Clerk at Bakersfield, California, you allegedly did not secure Company funds in the station safe as required in General Supervisor Bulletin Number STA-85-0024, dated October 17, 1985; and therefore failed to protect Amtrak property, resulting in a loss to the Corporation of \$731.00."

The Hearing set for April 14, was postponed to June 7, 1988 by mutual agreement. On June 16, 1988, the Hearing Officer issued the following findings:

"1. The rules cited were in effect and applicable to you at the time of the alleged wrongdoing, as they are applicable to all Amtrak employees in your job category.

2. The charge against you was substantiated primarily, but not exclusively, by the testimony of yourself and General Supervisor G. Rose. Such evidence established that a directive had been issued to secure Company funds in the safe, that you did not do so, and that the funds which you did not lock in the safe were subsequently stolen.

In view of the above, as well as the entire record, I find that the charge has been proved."

The Organization argues that the reimbursement and discipline were arbitrary and unjust, in violation of Rule 24. According to the Organization, Claimant should not be responsible for the loss of the Carrier's funds due to an undisputed forced entry and robbery. The Organization also asserts that the parties have a past practice of not requiring employees to reimburse the Carrier

for losses due to a "bonafide theft." The Organization further contends that the Rule under which Claimant was held responsible was only one of 50 such operating directives involving such matters, and that mitigating circumstances existed in this case. The Organization thus requests the Board to rescind the discipline and to direct the Carrier to reimburse Claimant for the monies deducted from her pay.

The Carrier asserts that Claimant was guilty of the charge. The Carrier stresses that neither the Organization nor Claimant disputes that she left \$731 in her ticket drawer, instead of placing that money in the locked safe, as required by Carrier policy. The Carrier also emphasizes that Claimant acknowledged receiving that policy, which specifically provides that employees will be responsible for any shortages resulting from leaving money in a ticket drawer. The Carrier therefore requests the Board to deny the claim.

The Board carefully reviewed the record in this case, and studied the Submissions of the Parties. The Board finds that there is substantial evidence in the record to support the conclusion that Claimant was guilty of the April 6, 1988 charge. While the Board has further concluded that the requirement that she reimburse the Carrier is not arbitrary, capricious or excessive, the Board has determined that the reprimand given Claimant was excessive. The Board therefore sustains the claim only to that extent.

On October 17, 1985, the General Supervisor sent the following Memorandum to all Station Agents and Ticket Clerks:

"Please be advised that anytime the ticket office is left unattended for any reason, all cash funds must be secured in the safe in full lock position.

It is not permissible to leave Amtrak monies in your ticket drawer whether it is locked or not.

In the event there is a shortage resulting from your leaving your money in your drawer, you will be held responsible for the shortage. It only takes a moment to take your money out of your drawer and place it into the safe. Compliance with this bulletin is absolutely mandatory." (Emphasis supplied).

Claimant acknowledged at the Hearing that she had signed this directive, and that she was familiar with its contents. She further candidly admitted that she had left the money at issue in her ticket drawer when she left the Amtrak office to deposit Amtrak funds in the bank. She characterized that decision as "human error." Claimant was also asked why she did not follow the directive and lock the money in the safe, particularly since she

had noticed some "rough characters ... hanging around" the station before leaving to make the deposit. Her candid answer was that it never "dawned [on me] that anyone would even rob the place," since the station had heavy doors and had never been robbed.

The Board has concluded that the October 17, 1985 directive was reasonable, and that Claimant's admitted failure to follow the instructions contained therein justifies the requirement that she reimburse the Carrier for the money taken during the robbery. The Board notes that the directive explicitly notified Claimant and other employees that such reimbursement would result from "a shortage resulting from your leaving your money in your drawer."

The Carrier's directive is certainly reasonable, as is made clear in Third Division Award 1027, dated January 26, 1940. In that Award, the Board denied a claim challenging a Carrier's requirement that a Steward reimburse the Carrier for funds that were locked in the bar when the Steward left the train. The Steward in that case did not, however, deposit the funds with the company agent, as the Carrier required. The Board in the instant case is persuaded by the following statement from the position statement of the Carrier in that 1940 case:

"The principle is elementary, that where an individual chooses to reject the mandatory instructions of his superior, and embarks instead upon a different and self-chosen course of action, he assumes direct responsibility for the results of his election.

That principle applies here, and fixes the responsibility upon claimant, regardless of the alleged theft or burglary. Having chosen the particular place of deposit, in preference to leaving moneys with the company's designated agent, claimant virtually guaranteed their safety and integrity; thus assuming a particular and even more direct responsibility, wholly apart from his general obligation to safeguard and account for company moneys, at all times while he was in possession thereof."

The employee in that 1940 case had argued that the money had been taken during a robbery, and that this third party action superseded his failure to follow company policy. While the Carrier in that earlier case argued that there was insufficient evidence of a robbery, it also argued that:

"...the question whether a burglary or theft took place is entirely immaterial, so far as concerns any issue before this Board. By his own deliberate choice, claimant accepted responsibility for the safety of the moneys even against burglary; and there would be no reasonable ground for relieving him of that

responsibility even if it were proved that a burglary had been committed."

The Board applied this principle in a 1970 decision in Third Division Award 18239, in which it upheld a carrier's decision to require an employee to reimburse the carrier for money the employee had left in his cash drawer, and that was then stolen during a robbery. The Board concluded that "such a penalty for the violation of explicit instructions is neither arbitrary, capricious nor unreasonable," noting that the carrier could only require the employee to make reimbursement for that portion of the money stolen that was not covered by the carrier's insurance policy. See also, Third Division Award 4005 citing Award 1027, supra; the Board upheld the reimbursement requirement when the Steward failed to make "proper use of the facilities furnished [for storing such moneys during his absence] and as a result the funds were lost. ... The fault was with the Claimant and not the Carrier.")

The Board does not agree with the Organization that the Claimant's conduct is excused by mitigating circumstances. The Organization argues in its position statement that the Carrier's Investigation revealed that the perpetrators had pried open the front door of the Amtrak station and two inner doors. In addition, the Organization stresses that the robbers used a pry bar on all three doors. The Organization further contends that the inside alarm system in the Amtrak office was broken, a claim the Carrier disputed.

In the judgment of the Board, these circumstances do not mitigate the Claimant's failure to follow the clear directions in the directive she had received concerning procedures for securing funds. The fact that the robbers may have exerted significant effort in order to enter the station and ticket office does not erase the undisputed fact that Claimant left \$731.00 in the cash drawer, instead of locking it in the station safe. In addition, the Board agrees with the Carrier that it is not necessary to resolve whether the inside alarm was operational, since Claimant knew that she should not leave the money in the cash drawer under any circumstances.

The Board also agrees with the Carrier that the Board cannot consider the Organization's evidence of alleged disparate treatment of employees in such circumstances, since this is a new issue that was not raised during the proceedings on the property. The Organization's assertion is based on the Carrier's March 28, 1988 decision to settle a claim by another Amtrak employee who had been required to reimburse the Carrier for allegedly failing to protect company funds which were then stolen during a "bona fide" robbery. The Organization, however, had access to this information during

the appeal of the Hearing Officer's June 16, 1988 decision. Since this issue was not presented during the proceedings on the property, the Board cannot consider it at this juncture.

While the Board has concluded that requiring Claimant to reimburse the Carrier was not an arbitrary, capricious or excessive penalty, the Board has reached a different conclusion about the reprimand that Claimant received. Claimant was forthright and candid at the Hearing in admitting that she received the directive, and that she erred in not following those instructions. She accepted responsibility for her actions. It is apparent from the record before the Board that she has indeed learned her lesson, and that the corrective purposes of progressive discipline have been served. Since the Carrier was made whole for its loss, there is no need to impose a disciplinary reprimand on Claimant, and such discipline was therefore excessive.

The Agreement was violated by the imposition of a disciplinary reprimand, but was not violated in any other regard.

The claim is denied as to the requirement to reimburse the Claimant for the \$731.00 taken from the Carrier's station. The claim is sustained as to the imposition of a disciplinary reprimand, and the Carrier is ordered to clear Claimant's record of all reference to any letter of reprimand.

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 8th day of June 1995.