

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32064
Docket No. CL-32691
97-3-95-3-546

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11176) that :

1. Carrier violated the Agreement specifically Rule 24 among other Rules of the Agreement, when by letter dated April 8, 1994 it terminated from the service of the National Railroad Passenger Corporation, employee, Mr. Chris Lane.
2. Carrier acted in an arbitrary, capricious and unjust manner when it failed to provide Claimant a fair and impartial investigation. Further violating his rights under Rule 24(g) when it failed to provide a true transcript of the investigation.
3. Carrier shall now reinstate Claimant to service, compensate him an amount equal to what he could have earned had he not been dismissed from service. Carrier shall also expunge his work record of all charges relating to this hearing."

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 this claim arose, Claimant was a Redcap in Atlanta, Georgia. Part of his responsibility was driving an electric motor vehicle, commonly referred to by the local parties as a "golf cart," around the station. On November 19, 1993, he backed the vehicle off the edge of the train platform and over Track #2. The cart was subsequently struck by an approaching freight train, resulting in substantial damage. By letter dated November 19, 1993, Carrier directed Claimant to report for an Investigation with reference to the following charge:

"Your alleged violation of the following rule of the Amtrak Rules of Conduct:

CHARGE 1

General Rule 'B', that part reading 'Safety is of first importance in the operation of the railroad and, therefore, is the most important aspect of an employee's duties. Employees must understand and comply with the safety regulations and practices pertinent of their class or craft of employment. In all circumstances, employees should take the safest course of action.'

CHARGE 2

General Rule 'K', that part reading, '...Employees must use Amtrak....property...with care...and protect them from...abuse...'

Also, it is alleged that you violated Amtrak's Onboard and Station Services Rules listed below:

CHARGE 3

General Rule '2134', that part reading, 'Do not foul a track....'.

CHARGE 4

General Rule '2127', that part reading, '...Maintain constant lookout in the direction in which moving,...for....unsafe conditions....'

CHARGE 5

General Rule '2159', that part reading 'Only place...truck, mechanized equipment...a safe distance from track, edge of platform...'

SPECIFICATION: In that while on duty as a Redcap at the Atlanta GA Station, on Friday, November 19, 1993, at approximately 8:08 AM, it is alleged that you:

1. Failed to observe safety rules which resulted in damage to Amtrak Property, when you moved the Amtrak personnel carrier vehicle off the platform and into the right of way.
2. Operated the Amtrak personnel carrier in an unsafe manner, when you moved it off the platform onto the tracks.
3. Fouled Track #2 with the personnel carrier which was struck by Southern Freight Train #211, causing substantial damage."

At the outset, the Organization maintains that Claimant was denied a fair and impartial Investigation. Specifically, Carrier's Hearing Officer failed to record accurately the entire Investigatory Hearing. By Carrier's own admission, the testimony of two witnesses was reconstructed in whole or in part by the Hearing Officer, because of the failure of the Carrier's tape recorder. All opening remarks by the Carrier and Organization, as well as the testimonies of two Carrier witnesses, were not properly recorded and had to be "reconstructed." The Organization contends that essential components of the actual proceedings, such as the Organization's initial objection, have been completely omitted from the transcript. More importantly, according to the Organization, the record does not reflect the fact that the testimonies of Carrier witness Magnum and Carrier witness Ginyard were contradictory. The Organization points out that Carrier's insistence that the Organization prove in what manner the missing testimony of one Carrier witness contradicted the other, is a specious requirement, since

by its own failure to include the testimony of each witness in its entirety, the Carrier has deprived the Organization of the very proof of contradiction it has required be provided.

Finally, the Organization contends that, with the unsupported assertion that he had penned his own notes during the proceedings, Carrier's Hearing Officer has made a blatantly misleading attempt to present the appearance that he had been diligent in his attention to the ongoing proceedings and that his diligence could be relied upon for the creation of an accurate record of the Investigation. The Organization asserts, however, that the Hearing Officer actually took no notes whatsoever during the proceedings, and his declaration that he relied upon his notes to provide an accurate record and form his decision of guilt is utterly false. During on-property appeals handling Carrier's response to the issue of the Hearing Officer's misstatements amounted to "so what." In sum, Carrier's actions show a blatant disregard for observing even the most basic principles of due process, and the instant claim should be sustained on the basis of this fatal procedural flaw.

This Board has continually held that the multiple roles served by Carrier officers inherent in the present system of grievance processing place a serious burden upon those officers to be as fair as is reasonably possible under the circumstances. (See for example First Division Award 11364; Third Division Award 18150). We have allowed Carrier some leeway where minor errors in transcription, or other *de minimis* problems have occurred in building a Hearing record or submitting a transcript to the Organization. That is not the case before us here. By Carrier's own admission, the first two witnesses' testimonies were not recorded. The first was not recorded at all, and the second was recorded only partially. There is an unanswered challenge that there were no "notes" from which Carrier's Officer could credibly "reconstruct" testimony which the Organization asserts was contradictory. Even more disturbing is Carrier's cavalier attitude concerning these serious irregularities. In its initial response to the Organization's procedural objections the Carrier responded:

"...Even if, as you contend, Mr. Ullmark [the hearing officer] failed to take notes at the investigation, there is no indication the investigation record deleted any information which would have altered the outcome of this dispute. Further, you have offered no specifics to support your contention that the testimony of Mr. Ralph Magnum, District Supervisor, Customer Services was 'contradictory to the testimony of

Ms. Ginyard.’ Without such specifics, your contention must be dismissed.”

In short, the Carrier has told the Organization in form or substance that, since the record which the Hearing Officer reconstructed *de novo* from his alleged notes is incomplete, and the Organization is thereby prevented from quoting from an accurate record, the Organization has failed in its burden of persuasion to show that the actual testimonial evidence presented was significant to its position. Such Byzantine reasoning removes even the premise of a fair proceeding in this case. Having poisoned the process, the Carrier now asserts that the Organization has failed to provide “specifics” the Carrier itself has prevented the Organization from finding. As the Board held in Third Division Award 18150,

“...Carrier by its nonfeasance -- failure to make [available] ‘all statements made a matter of record at the investigation or hearing’ -- could not comply with the demand [for a full transcript]. As a result, it prevented Claimant from perfecting his contractual right of appeal to Carrier’s initial findings of guilt as charged and assessment of the penalty: ‘discharged.’ Consequently, we find that Claimant was denied due process.”

See also, Third Division Awards 27023 and 25276; and Award 25 of Public Law Board No. 4267.

Based upon the foregoing, the Board has no alternative but to grant the claim as presented without ever reaching the matter of the merits of the case.

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 10th day of June 1997.