

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32503
Docket No. CL-33582
98-3-96-3-1005

The Third Division consisted of the regular members and in addition Referee James E. Conway 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-11580) that:

- (1) Carrier acted in an arbitrary, capricious and unjust manner in violation of Rule 24 of the Agreement, when by notice of December 7, 1995, it assessed discipline of ‘Termination from service, effective immediately’ against Claimant, pursuant to an investigation opened on November 6, 1995 and concluded on November 28, 1995.
- (2) Carrier shall now reinstate Claimant to service with seniority rights unimpaired and compensate Claimant an amount equal to what he could have earned, including but not limited to daily wages, holiday pay and overtime, had discipline not been assessed.
- (3) Carrier shall now expunge the charges and discipline from Claimant’s record.
- (4) Carrier shall now reimburse Claimant for any amounts paid by him for medical, surgical or dental expenses to the extent that such payments would be payable by the current insurance provided by 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 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.

Claimant Geary Johnson's Submission in this matter is anomalous to the extent that, at his request, it consists of two parts. Part I was submitted by the Organization after review by Claimant. Part II was submitted by Claimant with instructions that Part I be considered as an insert to it. For ease of discussion, the Board does not distinguish those position statements herein unless context requires otherwise. Regardless of whether expressly referenced herein, the extensive evidence and argument advanced by all Parties has been considered in its entirety in the preparation of this Award.

Claimant was terminated from his position as Metrolink Ticket Clerk with Amtrak on November 28, 1995 for activity deemed by the Carrier to violate its policies and standards governing personal conduct. When terminated, Claimant had three and one-half years' service with Amtrak and was assigned to its station at Los Angeles. The charges upon which that action was based were stated initially in the Notice of Formal Investigation directed to Claimant on October 18, 1995:

"1.) Charge 1: It is alleged that you have violated Professional and Personal Conduct section of the Amtrak Standards of Excellence which reads in pertinent part: 'you must comply with all company and departmental policies, procedures and rules as well as all instructions, directions and orders from supervisors and managers.'

Specifications: On June 6, 1995, you were instructed by Ms Lillian Tamoria, Manager Customer Services that letters to fellow employees threatening or intimidating them was neither proper, nor acceptable. On October 4, 1995, [sic] you caused to be delivered to Ms. Lucy Bormann, Amtrak Ticket Agent at LAUPT, a certified letter signed by you, the

content of which intimidated Ms. Bormann and caused her to fear for her safety.

Charge 2: It is alleged that you have violated Professional and Personal Conduct section of the Amtrak Standards of Excellence which reads in pertinent part: 'On the Amtrak team, there is no place for activities or behaviors that compromise the safety, satisfaction and well being of . . . our fellow employees, . . . conduct such as . . . intimidation . . . is unacceptable.'

Specifications: On June 6, 1995, you caused to be delivered to Ms. Lucy Bormann, Ticket Agent at LAUPT, a certified letter signed by you, the content of which intimidated Ms. Bormann and caused her to fear for her safety."

Although it is apparent from the record that this dispute is intense and multilayered, the facts leading to Claimant's discharge are relatively simple. For background purposes, an abbreviated chronicle of those events follows.

On May 12, 1995 Claimant wrote an interoffice memo to Crew Assignment Clerk Joanie Goss captioned "Retaliation." In it, he summarizes and quotes the criminal penalty provisions of a Temporary Restraining Order he describes as in place against Lucy Bormann, an Amtrak Lead Agent and Claimant's immediate Supervisor. This memo further recites that Goss "on two occasions within the last two weeks [has] verbally told me that Amtrak Payroll is going to rescind my anniversary date pay raise (3 years). I consider such action to rescind unlawful and if it is taken I deem it as retaliatory. . . ." After then quoting from material cited as "Government Code," Claimant writes:

"I appreciate you forwarding such pay cut information to me. I am awaiting my first check that reveals a cut in pay as you indicated and upon such receipt I will sue Amtrak as well as you as an individual."

On May 22, 1995 Claimant sent a certified letter to his fellow employee Flora Davies purporting to review a conversation he had with her on May 17. That communication states in part:

"As regards my United States District Court Case [cite omitted], I was informed by you not to change my retaliatory reduction in pay time card. You said this directive came from station manager Lillian Tamoria. When I asked you who had directed my pay to be reduced . . . you said that Lillian said that it was done at the direction of Lillian, Amtrak payroll, Lucy Bormann, Mike Davis, Jack Dinsdale, J. Bergstrom, R. Jeffries, R. Henderson, S. Poindexter, M. Ramirez, M. Serrrano, L. Zepeda, R. Donofrio, T. Fleming, L. Villamor, and R. Wood . . . I deem your action to be another intentional act of harassment in violation of the TRO as set down in the above case. Such violation can be punishable by \$1000 fine and/or 6 months in jail. . . ."

This letter reflects copies to Claimant's Union Representative, Amtrak Labor Relations, Amtrak Payroll, Metrolink, the Federal Bureau of Investigation, the Amtrak Police, and L. Tamoria, who was Amtrak's Manager-Customer Services at Los Angeles at the time.

On June 6, 1995, Tamoria wrote Claimant citing the above letters, characterizing both as "intimidating and threatening," and directing Claimant to pursue any future complaints through his bargaining representative. Tamoria then held further discussions with Claimant, one lasting three hours on July 27, and a second on September 29.

On October 2, 1995, Claimant sent by certified mail to his immediate Supervisor a four-paged, single-spaced typewritten communication styled an "Open Letter to Lucy Bormann."¹ Long and rambling, that letter indicates it was directed by Amtrak President Tom Downs.² It says much about Claimant's estrangement from his

¹In an obvious typo, Carrier's Notice of Formal Investigation cites the date of this letter as October 4, 1995.

²Claimant wrote Downs on March 14, 1995 to complain about Metrolink's policy on Ticket Clerks entering and exiting the Los Angeles ticket office. On April 19, Downs responded, explaining that while there were then no restrictions in place on that subject, Manager Tamoria "expects an employee will use good judgment at such times to ensure that customers . . . are not adversely affected by the absence of a clerk. If an employee has any question about the appropriateness of departing the ticket office, he/she should consult the ticket agent."

workplace and his co-workers, and about why Amtrak believed it had to act to avoid the kind of calamity that so often leads the evening news. Accordingly, we excerpt passages below at length:

"This letter is a communication to you under instruction from Amtrak President Thomas Downs . . . It shall in no way constitute a resolution of damages that have occurred [sic] as a result of actions stated herein. . . .

When I started this job in August of 1994, contrary to what is given to Amtrak ticket sellers and commissary workers, I was not provided with a written training guide, written job description, written standards of operating procedures, or entry card to the ticket booth. The week before I started the Metrolink Ticket Clerk job (MTC) I was cheated out of two days pay . . . I was not given a log on to sell tickets. Later I would be told that after that first week it was determined that I was 'slow' at selling tickets even though I sold no tickets! Of course this was untrue and a pretext for discrimination. . . .

No more than one month into the job I am cheated out of \$600.00 worth of overtime and denied training for travel clerk [sic] representing over 17 violations of the TCU agreement. Then I am assaulted twice by Macio during the performance of my job duties. . . .

Even though I go to a bad faith meeting and there is a lot of empty discussion by Amtrak officials where most of my workplace questions remain unanswered, I continue to work harmoniously with others. . . .

Around January 1995 I switch to the night shift . . . you become my immediate supervisor and you tell me that I am not to leave the ticket booth . . . I courteously respond that you are mistaken . . . I again go to Lillian . . . and to Patty Ryan . . . No one at Amtrak, Metrolink, or TCU will verify my duties.

Even though you have actual and constructive knowledge that as a MTC I am to leave the ticket booth, you persist again and again that I am not to leave the booth . . . on February 24, 1995 you assault and harass me twice claiming that I am not to move from the ticket window. . . .

I have every legal reason to seek answers to the question of do you know what my job is? There is the Standards of Excellence Contract by President Thomas Downs; there is the hostile work environment [illegible] standard. By law we are both required to act reasonable towards each other. It is now seven months after the February incidents and I believe that is over a reasonable amount of time for AMT (Amtrak, Metrolink, TCU) officials to tell me whether you know my job and that you will not take actions to harass me again . . . Most important, I have every reason to be afraid of you for many reasons. First, you raised your hand to strike me in February . . . That is frightening to me. EEO's biased Ed Monge said he could find no witnesses to corroborate my story of when Macio harassed me. Frightening. The Amtrak Police delayed serving the TRO on you. Management refuses to admit that anything was wrong, in face of a perponderance [sic] of the evidence, does not take corrective action against you, and portrays me as the harasser and wrongdoer. By not communicating these issues to me, I am denied the equal terms and conditions of employment afforded to white workers.

I was harassed and provoked in retaliation for me opposing unlawful discrimination. By law, what you intended to do is irrelevant; I felt harassed and assaulted by you actions and that is what the law recognizes. You should know that you could have done much greater physical harm than you did because there are many who protected you by saying, 'She would never do anything like that. I've known her for 20 years.' Frightening. . . .

I live with the fear everyday that you will assault me again. I fear that you will again hold me up for public ridicule. . . .

As you assaulted me, I want to assure you that I didn't think of hitting you or striking back, or cursing you out. . . .

Do you know my job? Tell me. Will you violate my civil rights again? Tell me what my rights are. . . .

I have previously worked as a counselor to (illegible) juvenile delinquents. I have worked to keep criminals off the streets. . . .

If I was asked a question by you and did not answer, would I be disciplined?

Two workers, who happen to be white, unjustly classified me as a trouble maker. They have rightfully apologized and said they were wrong . . . Of course there are management people who have called me a trouble maker too, but that's another story. Classification to deny a person job benefits is unlawful.

Amtrak tried to convict a worker of being a health and safety threat in 1992— they lost and the case was dismissed 'with prejudice. . .'

... Because I have questioned the working conditions, now employees and management have unlawfully labeled me as a crazy health and safety risk....

Ms. Bormann, I respect you as a person, a supervisor, and a Mexican American. I've never had any thoughts of physical or verbal abuse towards you. But I want you to know that AMT has repeatedly suggested that I should have thoughts of harm towards you; they have numerous times planted it in my mind that I am to cause physical harm. Naturally I resist such suggestions very strongly. . . .

AMT intentionally endangers the lives of their own workers and passengers and I have asked them to cease. For this, they will suspend or fire me. Sometimes I sit and cry because I don't know how to deal with asking legitimate questions and no one answers. I can assure you that I will do everything possible to assure my rights are not violated in the workplace. . . ."

The Board reviewed every document in the nearly three inch file comprising the record in this matter, including the 203 page transcript of Claimant's formal Investigation conducted over a two day period in October and November 1995. Vast tracts of this material consist of Claimant's wordy harangues. No purpose is served in a detailed summary of that troublesome discourse, or in an itemized recounting of his behavior before and after he composed the letters leading to his dismissal, except to note that in our view his employer, bargaining representatives and coworkers without

exception demonstrated patience and civility in dealing with him under what appear to have been difficult circumstances. That point is perhaps best made by regarding some of the ominous seismic activity they observed starting with a seemingly trivial dispute between Claimant and Bormann in February 1995 and continuing through the case handling of his termination on the property.

Among the written allegations by Claimant against Amtrak during this period were charges of race discrimination, sex discrimination, retaliation, intentional infliction of emotional distress, unlawful conspiracy, doctoring transcripts, unfair labor practices, breach of employment contract, and maintaining a hostile working environment. Among the laws and Rules he contends Amtrak offended were the United States Constitution, the Railway Labor Act, the collective bargaining Agreement, EEO procedures, the Federal Rules of Civil Procedure, Carrier's "Standards of Excellence," the California Code of Civil Procedure, unspecified federal, state and local laws, undefined safety standards, and Public Law 85-257. There is an allusion to torture. Among those invited to jump into the debate by copies of Claimant's very substantial correspondence are the NAACP, the Black Caucus, Diane Feinstein, Janet Reno, Amtrak President Tom Downs, the "Railroads Congressional Committee," President William Clinton, all Amtrak Department Heads, the President of the TCU and various officials of the Organization, Amtrak Labor Relations, Amtrak Police, the FBI, an Attorney General, the National Railroad Adjustment Board, the National Labor Relations Board, the Federal Office of Revenue Accounting, the Nation of Islam, Los Angeles Mayor Richard Riordan, Los Angeles City Council Members, Long Beach Mayor Beverly O' Neil, Long Beach Council Members, the Civil Rights Division of the AFL-CIO, "MTA," "SCRR," the Amtrak Inspector General, the Secretary, Department of Transportation, the U. S. Commission on Civil Rights and numerous parties unidentified by title but for whom the record reveals no apparent connection with this dispute. Among the various demands asserted by Claimant were claims for one thousand dollars daily and one million dollars in actual and punitive damages against the Carrier.

No silver lining to these clouds appeared during the handling of this claim on the property. Originally scheduled to commence on October 27, 1995, Claimant's formal Investigation was delayed to November 6, 1995 at his request. A full day of testimony was had, and the Investigation was recessed until November 28 after numerous fellow employees Claimant had asked to appear on his behalf failed to do so. Neither did they appear at the reconvened Hearing, where Claimant himself also declined to testify on his own behalf. He was, however, allowed to defend his actions *pro se* at these

proceedings, and both he and his TCU representative were permitted to cross-examine and argue in tandem. Claimant's efforts in that regard, although reasonably indulged by the Hearing Officer, tended to be obstructive, fixated on irrelevant legalisms, and marked by both an atomizing preoccupation with race and a grim determination to avoid the very issues that had to be addressed.

If the problem were merely ineptitude, the Board would have little reason to play these particular keys so hard, for incompetence is commonplace. It is not trial tactics, however, but rather Claimant's obvious mind set at these Hearings which strongly reinforces our view that no further amount of progressive discipline conceivably could have been effective in modifying his abusive behavior. Claimant - nearly two months after being dismissed - still did not understand that his conduct had caused the values of his company and his colleagues to be severely jostled. For example, this exchange was had at the November 6 Hearing:

"CLAIMANT: I think your testimony was that Lucy [Bormann] was agitated and concerned when she got Exhibit 6, which was the Open Letter. Is that your testimony, that she was agitated and concerned?

TAMORIA: That's correct.

CLAIMANT: And, did Lucy ever say to you the words 'I feel threatened, I feel intimidated?'

TAMORIA: Yes.

CLAIMANT: Say that again?

TAMORIA: Yes.

CLAIMANT: Okay. I don't recollect your testimony saying that. I . . . I recollect you saying she was agitated and concerned.

* * *

Okay. And, you also testified that you said Lucy was frightened?

TAMORIA: That's correct.

CLAIMANT: Is it possible something else could have occurred that day, before she got the letter, that could have caused her to be frightened?

* * *

Or this surreal testimony, moments later:

"CHARGING OFFICER: Could you . . . indicate for the record your conversation with Ms. Tamoria.

BORMANN: Uh, yes. I was very concerned about, again, the contents of the letter. I felt frightened and I felt that, uh, the letter was really not true, and I feared for my life at that point . . . because having to work with [Claimant] here, I didn't know what was in his mind at that time, when he wrote that letter. And, after that, it's like, I haven't been able to concentrate on my work. I mean, even my personal life has suffered a lot.

CLAIMANT: Objection. Irrelevant to the charges.

HEARING OFFICER: I think she's just responding to how she feels. I think it's a valid response, I'll let it stand. Mr. Villamor?

CLAIMANT: Is that . . . objection. Am I being charged with uh, with her feelings, or is the charge that I'm violating the Standards of Excellence?"

There is not much here to suggest the Board must reach for recondite conclusions from the obvious facts. On this record, this relatively short term employee has never acknowledged, never mind accepted, responsibility for activity in the workplace that was categorically beyond excuse. Warned about composing threatening letters, and declining an opportunity to confer with Employee Assistance counselors, he failed to follow clear and explicit instructions to conform his behavior to basic standards of right and wrong. He then squandered his Hearing time nit-picking, disdaining his victims and - the idea is laughable - portraying himself as a martyr for on-the-job safety. In contrast, TCU representative Davis focused sharply on the substance, effect and seriousness of Claimant's conduct, arguing that Claimant was in the habit of

communicating by letter with co-workers, and the letters in question were simply further attempts to correspond about legitimate workplace issues. Davis worked with economy of expression and professionally, but in isolation and against long odds, to put the best face on a bad case.

The Board finds no evidence of racial or sexual bias, and no retaliation or other unlawful conduct in Carrier's handling of this matter. No objective facts were produced in support of suggestions that the TCU conspired to frustrate Claimant's statutory rights to effective representation. Plentiful evidence to the contrary abounds on this record.

The Board finds that Carrier acted reasonably in concluding that, in an era long on workplace violence, Claimant's conduct could no longer be tolerated. Claimant's termination was for just cause, and necessary to restore a measure of serenity to Amtrak employees at Los Angeles terrified by his behavior.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of March 1998.