

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35471
Docket No. CL-35876
01-3-99-3-888**

The Third Division consisted of the regular members and in addition Referee Andr  e Y. McKissick 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-12503) that:

- 1. The Carrier, acting arbitrarily and capriciously, violated Rule 19 when, on March 6, 1999, it notified Claimant, Auto Train Attendant Mr. Charles Simms, that he was removed from service.**
- 2. The Carrier, acting arbitrarily and capriciously, violated Rule 19 and other related rules of the Agreement when, by notice dated March 24, 1999, it assessed discipline of dismissal from service against Claimant, Auto Train Attendant Mr. Charles Simms.**
- 3. The Carrier shall now be immediately required to reinstate Claimant to service with seniority rights unimpaired and compensate him an amount equal to what he could have earned including but not limited to wages, holiday pay and overtime had he not been held from service and had discipline not been assessed.**
- 4. Carrier shall now be required to reimburse Claimant for any amounts paid by him for medical, dental or surgical expenses to the extent that such payment would be payable by the current insurance provided by Carrier.**
- 5. Carrier shall now expunge all references to the charges and discipline from Claimant’s record.”**

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.

The Organization alleges that the Carrier violated Rule 19 of the Agreement, and in pertinent part, reads as follows:

"RULE 19 -- DISCIPLINE -- INVESTIGATION - APPEAL

- (a) An employee who has been in service more than ninety (90) days shall not be disciplined or dismissed without a fair and impartial investigation, unless such employee shall accept such dismissal or other discipline, in writing, and waive formal investigation. An employee may, however, be held out of service pending formal investigation or notification of the discipline to be assessed only if his retention in service could be detrimental to himself, another person or the corporation.
- (b) If the corporation decides that disciplining of an employee is warranted and the employee has not been withheld from service, the employee will be notified in writing with a copy to his duly accredited representative, of the intent to discipline him. The notice will advise the employee of the specific charge(s) and the reason(s) for the intended imposition of discipline. A letter of intent to impose discipline shall not be issued to an employee for any offense of which the corporation has had actual knowledge thirty (30) calendar days or more, except where a civil action or criminal proceeding results

from the offense, in which event the letter of intent to impose discipline may be issued within thirty (30) days of the final judgment . . .”

It is the position of the Organization that the Carrier violated Rule 19 when it notified Claimant Simms that he was removed from service. In particular, the Organization argues that such removal was arbitrary and capricious, as the Claimant was treated more harshly than other similar employees for the same offense, rail pass abuse. Lastly, the Organization adds that the Claimant was taken out of service, pending the Investigation, without justification.

The Carrier rebuts the assertions of the Organization and contends that the Claimant knowingly and deliberately assisted a personal acquaintance aboard a train, without authorization. The Carrier argues that the Claimant was dishonest, as he had no right to use Amtrak property for his personal use. Moreover, the Carrier contends that a breach of trust coupled with a dishonest act constitutes valid grounds for removal. Lastly, the Carrier adds that the penalty of dismissal was justified and is not an excessive application of discipline, as the Organization asserts.

The Board finds that this claim must be sustained as dismissal is not appropriate for the following reasons. First, the record reveals that other similar situated employees received considerably lesser discipline for “rail pass abuse” than the Claimant. Consequently, the Board finds that a lesser, more appropriate sanction would be a ten day suspension, but without compensation. Second, the Carrier has the burden of proof in a removal. However, based on the evidence presented, the Board finds that the Carrier failed to meet this burden. Third, the Board finds that the Claimant was unfairly taken out of service pending this Investigation. Based on all of the above, the Board finds that the Carrier violated Rule 19 of the Agreement. The Claimant is reinstated to service with seniority intact and all other benefits unimpaired, with full backpay absent ten days pay.

AWARD

Claim sustained in accordance with the Findings.

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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 22nd day of May, 2001.