NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 2406

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)	*	
-and-	*	CASE NO. 25
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	*	AWARD NO. 25

Public Law Board No. 2406 was established pursuant to the provisions of Section 3, Second (Public Law 89-456) of the Railway Labor Act and the applicable rules of the National Mediation Board.

The parties, the National Railroad Passenger Corporation (Amtrak, hereinafter the Carrier) and the Brotherhood of Maintenance of Way Employes (hereinafter the Organization), are duly constituted carrier and labor organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

After hearing and upon the record, this Board finds that it has jurisdiction to resolve the following claim:

"(a) The Carrier violated the Rules Agreement, effective May 19, 1976, as amended, particularly Rule 71, when it assessed discipline of dismissal on Donald Burton, Track Foreman, Philadelphia, Zone 4, on December 18, 1978.

(b) Claimant Burton's record be cleared of the charges brought against him.

(c) Claimant Burton be restored to service with seniority and all other rights unimpaired, and compensated for all wages lost."

The Claimant, Donald Burton, was employed by the Carrier as a Track Foreman, Bryn Mawr Maintenance, Bryn Mawr, Pa., prior to his dismissal. By letter dated November 30, 1978, the Claimant was directed to report for trial on December 5, 1978, in connection with the following charge:

> "Fraudulent use of Amtrak Credit Card in that you used it on October 7, 1978, to purchase gasoline for an unauthorized (non-Amtrak) vehicle. Violation of Rule "I" of Amtrak Rules of Conduct."

Rule "I" reads as follows:

> "Employees will not be retained in the service who are insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious, or who do not conduct themselves in such a manner that the Company will not be subjected to criticism and loss of good will."

The Claimant was present at the trial and was represented by the Organization. By letter dated December 14, 1978, the Carrier notified the Claimant that he had been found guilty as charged and was dismissed from the Carrier's service effective December 18, 1978. The Claimant appealed his dismissal, which the Carrier subsequently denied.

It is clear from the record that the Claimant was guilty as charged. He specifically admitted as much at the trial. (Tr. pp. 2 and 3). The Organization urges that this Board consider two issues: first, whether the Carrier violated the Rules Agreement, particularly Rule 71; and second, whether the penalty of dismissal was excessive. Each of these issues shall be considered in turn.

Rule 71, as amended, Memorandum of Agreement effective June 9, 1977, reads as follows:

> "Advance Notice of Trial
> An employee who is accused of an offense, and who is directed to report for trial therefor, shall within fifteen (15) days of date of alleged offense, be given notice in writing of the exact charge on which he is to be tried, and the time and place of the trial."

The Organization points out that the Carrier became aware of the offense on November 5, 1978, yet the notice of trial was dated November 30, 1978. This is a time span of twenty-five (25) days and, it is argued, a violation of Rule 71. This Board cannot agree. While it is true that an allegation of misuse was made to the Carrier on November 5, 1978, the Carrier prudently made a check of its records to assure that there had been, indeed, a misuse of the Amtrak credit card. That record check did not produce proof of misuse until November 21, 1978, and thus there was a time span of nine (9) days before the trial notice. The delay occasioned by this record check was not dilatory, but was a responsible action on the part of the Carrier.

Regarding the severity of the discipline, this Board finds no basis for mitigation. The Claimant's past record, which is appropriate for review in considering the severity of the penalty assessed, indicated three other disciplinary actions within the previous year. Accordingly, the claim will be denied.

AWARD: Claim denied.

L. C. Hriczak, Carrier Member

W. E. LaRue, Organization Member

Richard R. Kasher, Chairman
and Neutral Member

February 3, 1982
Philadelphia, PA

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DISSENT OF THE EMPLOYE MEMBER
AWARD NO. 25
PUBLIC LAW BOARD NO. 2406

The Board has erred in the interpretation of Rule 71, as amended, which reads as follows:

"Advance Notice of Trial

An employee who is accused of an offense, and who is directed to report for trial therefor, shall within fifteen (15) days of date of alleged offense, be given notice in writing of the exact charge on which he is to be tried, and the time and place of the trial."

The rule provides that an employee must be charged within 15 days of the offense, and such charges must be in writing. The Board has amended this rule by Award No. 25 to read that the 15 days is not from the date of the offense but 15 days from the date the Carrier allegedly has knowledge of the offense.

The agreement to establish this Public Law Board, dated April 30, 1979, made provisions in Paragraph 3 of that agreement to provide that the Board is not authorized to change existing agreements, governing rates of pay, rules and working conditions and shall not have the right to rewrite any rules.

In this case should the Award No. 25 be accepted as written, Rule 71 of the agreement would have been rewritten in that the Carrier would now be allowed the time limit of 15 days starting from the date of knowledge of the alleged offense.

Therefore, the Carrier's argument in this matter would be without merit since many such agreements on their property have included such a rule, stating from the time the Carrier had knowledge of the offense. This the Carrier has not done, and the rule does not provide for such.

Similarly, in PLB 1376 - 19, BRAC vs. Penn Central Transportation Company, Referee Sickles rendered the following:

"Claimant did raise the procedural issue at the trial. The fact that he refused an offer of recess does not cure the deficiency, because of the mandatory nature of the contractual obligation.

The parties have determined, in the agreement, that time limits may be extended under certain circumstances; but none of those circumstances are present here. This

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"author, and numerous other Referees, has refused to allow a Claimant to rely upon a time limit defense when the Claimant himself has stultified the import of the agreement by deliberate action of avoidance, evasion and/or the like. But, again, such is not the issue presented. Carrier miscalculated, and its effort to rectify the error was directly blocked by another contractual prohibition. While this result may appear to be unduly technical in nature, we hasten to point out that it was the parties - not the Board - who wrote the agreement language in absolute and mandatory terms - and our jurisdiction is limited to interpretation of existing agreements: it does not permit a rewriting of contractual obligations."

In similar cases, Third Division Award Nos. 18335, 18352, and 18354 held favorably of the employes, in that such violation, as set forth in Award No. 25, was considered a violation of the agreement and discipline should therefore be set aside.

William E. LaRue, Employe Member
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