

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2406

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| NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) | * | |
| -and- | * | CASE NO. 27 |
| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES | * | AWARD NO. 27 |
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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 Employees (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 effective Rules Agreement, dated May 19, 1976, on December 7, 1979, by capriciously and arbitrarily assessed discipline of ten (10) days suspension to Claimant James Capecci.
- (b) The Claimant be paid for all wages lost and the matter be expunged from his record."

The Claimant, James Capecci, was employed by the Carrier as a M/W Repairman, Bristol Shop, Bristol, Pennsylvania, at the time of the incident giving rise to this claim. By letter dated

September 24, 1979, the Claimant was directed to appear at a trial to be heard on December 6, 1979. The Claimant was present at the trial and accompanied by a duly authorized representative of the Organization.

The Claimant was charged with violation of Rule "J" of Amtrak Rules of Conduct, "In that on Thursday, September 20, 1979, at approximately 10:45 a.m., you threatened to 'knock out' General Foreman Carlo Juno." Rule "J" states in pertinent part:

"Courteous conduct is required of all employees in their dealing with...each other. [T]hreatening...other employees while on duty is prohibited."

The Claimant was found guilty as charged and was notified of a ten (10) day suspension in a letter dated December 9, 1979. The Claimant's appeal of the discipline was denied by the Carrier in a letter dated January 14, 1980.

The record shows that General Foreman Juno was on assignment out of town on the day of the trial and was not present at the trial. However an interoffice memo signed by Mr. Juno, dated September 20, 1979, was entered into evidence. It stated that on that same date, after he, Mr. Juno, had given Mr. Capecci two NRPC 490 Forms for not wearing his hard hat and safety glasses, the latter said, "I'll take care of these and I would like to knock you out." The Claimant denied making such a statement.

Mr. George Pirollo, Chief Clerk, testified that at the time in question he had been aware of an "exchange of words" between Mr. Juno and the Claimant. Then he heard the Claimant make

"... the statement to Mr. Juno to the effect about knocking him out." Other than that statement, he did not recall what they had said and "... was not personally interested in their private conversation." (TR. pp. 3 and 4).

The Board finds that the Carrier has not met its burden of proof. Mr. Pirollo indicated that he was not part of the conversation between Mr. Juno and the Claimant, and had no interest in it until he heard the "knock-out" comment. Since it can reasonably be inferred that he was not really paying attention to the conversation, the accuracy of his recall is not beyond question. More importantly, Mr. Pirollo was not privy to the entire conversation between the Claimant and his supervisor and thus his out of context testimony is not sufficiently probative to be conclusive.

The Claimant specifically denied having threatened Mr. Juno. This is self-serving testimony, but that does not necessarily make it untrue. The testimony of Mr. Juno could have been decisive, but he was not at the trial.

Rule 71(b) of the effective agreement provides that at the trial of an accused employee, the employee or his duly accredited representative "... shall be permitted to question witnesses whose testimony is presented at the trial insofar as the interests of the accused employee are concerned." The failure to produce Mr. Juno contravenes Rule 71(b) and denied the Claimant his right to cross-examination.

The Carrier has argued that Rule 71(b) was not raised on the property and for that reason should not be considered by this Board. While there is no specific reference to Rule 71(b) in the record, then General Chairman LaRue's letter of February 5, 1980, to Mr. S.H. Heltzinger states, "The charge has not been supported by the testimony introduced at trial." We construe this broadly as a challenge to the validity of the written statement as evidence.

Even if this Board were to disregard Rule 71(b), as urged by the Carrier, the general requirement for a fair trial mandates an opportunity to cross-examine crucial evidence. Mr. Juno was the only other participant in the conversation that led to this claim. His absence from the trial, which has not been shown to be unavoidable, made him unavailable for cross-examination, and left the Claimant at a severe disadvantage. Under these circumstances, Mr. Juno's written statement cannot be considered valid evidence. Accordingly, the claim will be sustained.

AWARD: Claim sustained.


R. Radke,
Carrier Member


W. E. LaRue,
Organization Member


Richard R. Kasher, Chairman
and Neutral Member