

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2406

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)	*	
	*	
-and-	*	CASE NO. 30
	*	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	*	AWARD NO. 30
	*	

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 Agreement dated May 19, 1976, on July 10, 1980, when it dismissed Claimant Ernest Harris.
- (b) The dismissal of Claimant Harris was excessive and unjustified. The Claimant now be restored to service with his seniority, and benefits unimpaired, and allowed pay for all time lost until restored to his former position."

Prior to his dismissal, the Claimant Ernest Harris, Jr., was employed by the Carrier as an Equipment Operator, working at New Vern Interlocking, Washington, D.C.

By letter dated June 10, 1980, the Claimant was directed to appear for trial on June 20, 1980, in connection with the following charge:

"Violation of Amtrak's Rules of Conduct, specifically Rules 'K' and 'L', in that you were found sleeping and not attending to your duties at approximately 12:15 a.m. on May 31, 1980, in the vicinity of New Vern Interlocking."

Rules "K" and "L" read as follows:

"K. Employees must report for duty at the designated time and place, attend to their duties during the hours prescribed, and comply with instructions from their supervisors."

"L. Employees shall not sleep while on duty, be absent from duty, exchange duties or substitute others in their place without proper authority."

By mutual agreement the trial was rescheduled for June 27, 1980. The Claimant was present at the trial and was accompanied by a duly authorized representative of the Organization. The Claimant was found guilty as charged and was dismissed from the Carrier's service by letter dated July 10, 1980. The Claimant appealed his dismissal and the appeal was denied by the Carrier in a letter dated August 13, 1980.

The record indicates that on May 30, 1980, the Claimant's tour of duty was from 4:30 p.m. until 2:30 a.m. the following morning. At approximately 11:30 p.m. the Claimant and another Equipment Operator were discovered to be missing. A search was made, but they could not be found on the railroad tracks or in the immediate lighted vicinity.

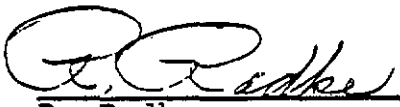
Two Carrier witnesses testified at the trial that at about 12:15 a.m. they found the two men seated in a car parked several hundred feet down the service road that intersects the railroad tracks. Their eyes were closed and when a flashlight was shone in their eyes, they did not stir. The witnesses stated that they did not disturb the men further, deciding "...that they would probably not be in any condition to work...any further that evening and that it was in their best interest and the railroad's interest to leave them in their car asleep." (Tr. p. 3). The Claimant was observed returning to work at about 1:00 a.m.

This Board finds that the Carrier has met its obligation to prove that the Claimant was sleeping during duty time. The Claimant's uncorroborated assertion that he was on his lunch break is not convincing in light of specific testimony to the contrary by the two Carrier witnesses. Additionally, it should be noted that the Claimant disappeared from at least 11:30 p.m. to 1:00 a.m., a time period far beyond that allotted for the lunch break.

The Organization has suggested that there was an element of entrapment involved in this case. This Board cannot agree. There is no evidence at all that the Carrier set a trap designed to catch unwary employees. Also, the Board cannot agree that there was any obligation on the part of the Carrier to attempt to rouse the sleeping employees by calling their names or knocking on the car window. The responsibility was on the other foot: the employees should not have gone to sleep while on duty time.

A final issue concerns whether the Carrier could properly cite a previous incident in which the Claimant was disciplined for sleeping on duty. The Organization argues that the Carrier cannot because the matter of the previous incident was not raised on the property. The record shows that the previous incident was not mentioned at the trial. Although this Board agrees with the Organization's position that the discipline record must be introduced below if it is to be considered here, nevertheless we find that in the instant case that the Carrier has met its responsibility to demonstrate that the discipline assessed was not arbitrary or capricious. Accordingly, the claim must be denied.

AWARD: The Claim is denied.



R. Radke,
Carrier Member



W. E. LaRue,
Organization Member



Richard R. Kasher, Chairman
and Neutral Member

February 3, 1982
Philadelphia, PA