NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 2406

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)	*	
-and-	*	CASE NO. 37
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	*	AWARD NO. 37

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 effective agreement, dated May 19, 1976, on May 7, 1980, when the Carrier, unfairly and without just cause, improperly disqualified the Claimant, Roy Penman, as Foreman in all capacities, subsequently reducing the disqualification to one hundred eighty (180) calendar days.

"(b) The one hundred eighty (180) day disqualification shall be removed from the Claimant's records and he shall be compensated for all wage loss on account of this disqualification."

The Claimant, Roy Penman, entered the Carrier's service on May 19, 1976, after being originally hired by the Penn Central Transportation Company on February 23, 1976. On March 27 and

March 28, 1980, the Claimant was assigned as a Track Foreman, at 30th Street, Philadelphia. By notice dated April 7, 1980, the Claimant was instructed to attend a trial scheduled for April 15, 1980, in connection with his alleged violations of Rules A, I, K and Y. These rules read, in pertinent part, as follows:

A. "Employees must render every assistance in carrying out the rules and special instructions and must promptly report to their supervisor any violation thereof."

I. "Employees will not be retained in the service who are insubordinate... ."

K. "Employees must...attend to their duties during the hours prescribed... ."

Y. "Employees must obey instructions from their supervisors in matters pertaining to their respective branch of the service... ."

The support for these charges was based on the Claimant's alleged failure to set his work gang directly to work on March 27 and 28, 1980, and his alleged improper use of a company vehicle on those dates. The trial was postponed until April 22, 1980, and held on that day. The Claimant was present at the trial and was represented by a duly designated representative of the Organization.

The record indicates that the Claimant and his work gang were observed by two Carrier officials on March 27, 1980, and by one of those officials on March 28, 1980. While the testimony of these two officials contained certain significant discrepancies, there is substantial evidence in the record that the work gang wasted time and did not go directly to perform their assigned work

on those dates, and also that they used a company bus to go to breakfast and lunch. However, there is nothing in the record that will support a charge of violation of Rule I, i.e., insubordination.

However, it is the view of this Board that, under the special circumstances of this case, the Claimant was improperly disciplined, and that the claim should be sustained. To begin with, the record does not clearly establish that the Claimant was in charge of the work gang on March 27, 1980. The Claimant testified that he was not in charge, rather that his assignment on that day was to assist another foreman. One of the Carrier officials also stated that it was his impression that on March 27, 1980, the Claimant was working as an assistant to the other foreman.

The Organization argues that the Carrier officials, having observed what they perceived to be infractions of the Carrier's Rules on March 27, 1980, should have notified the Claimant at that time that his activities did not meet the Carrier's requirements. The failure to do so, in the Organization's view, constitutes entrapment. While the Board does not agree that entrapment is present in this case, it does agree that the Carrier was remiss in not immediately informing the Claimant that he was not meeting his responsibilities to the Carrier. It should also be noted that, concerning the activities of March 28, 1980, two gangs and two foremen were involved at the work location. The Carrier official acknowledged under cross examination that at the time of his observation, he was not distinguishing the activities of one gang from the other.

The final issue to be addressed concerns the use of the company vehicle. The parties are in dispute as to whether using a company vehicle to get meals is a recognized and condoned practice. This Board is not convinced from the record that such use is clearly and uniformly forbidden by rule and/or practice.

For the various reasons cited above, it is the opinion of this Board that the Carrier has not met its burden of proof in this claim. Accordingly, this claim must be sustained.

AWARD: Claim sustained. Any reference to the disqualification shall be removed from the Claimant's records. The Claimant shall be compensated for the rate differential between foreman and trackman for the period of the one hundred eighty (180) day disqualification ending on November 3, 1980.

L.Hriczak, Carrier Member

W.E. LaRue, Organization Member

Richard R. Kasher, Chairman and Neutral Member

April 1, 1983
Philadelphia, PA

PLB 2406
AWD 37

CARRIER MEMBER DISSENT

PUBLIC LAW BOARD 2406

AWARD NO. 37

The Board has erred in its decision in Award No. 37 by considering arguments never made in the record nor progressed by the Appellant or Organization on Carrier's property. The majority therefore, has exceeded its authority in seeking to justify the decision in this award.

The Neutral Member of this Board found in Award No. 37 that the Carrier had proved that ". . . there is substantial evidence in the record that the work gang wasted time and did not go directly to perform their assigned work on those dates, and also that they used a company bus to go to breakfast and lunch." Therefore, the exoneration of the Appellant, whether he was clearly a Foreman over the employees of one of the two gangs or an Assistant Foreman over the employees of one of those two gangs, is not based upon the record in this matter and is erroneous.

The record in this matter contains an admission by the Appellant on page 45 of the trial transcript that he did not feel he performed his job as Foreman to the best of his ability. Further, on page 41 of the trial transcript, Appellant, in response to questioning, admits that he and the members of his gang utilized a company vehicle to go to lunch and that to the best of his knowledge that was not approved Company policy.

The record also discloses that in the appeal of this matter on the Carrier's property, Appellant only contended that as this was his first offense in more than four years he felt the discipline was harsh and unjust (Carrier's ex parte submission, Exhibit No. 9). During appeal, the Appellant himself never contended that he was not guilty and should be exonerated.

In view of the foregoing, the Carrier cannot accept the exoneration granted Appellant by Award No. 37 without dissent.

L. C. Hriczak
Carrier Member