NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 2406

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)	*	CASE NO. 49
-and-	*	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	*	AWARD NO. 49

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 March 4, 1981, by unfairly and unjustly dismissing Claimant Felix Morgan.
>
> (b) Claimant Morgan be reinstated to service with seniority unimpaired and compensated for all wage loss."

The Claimant, Felix Morgan, entered the Carrier's service on April 11, 1977. On December 11, 1980, the date of the incident giving rise to this claim, the Claimant was a Trackman.

By letter dated January 31, 1981, the Carrier informed the Claimant that as a result of an incident on December 11, 1980, it was revoking his Rail Travel Privilege Card for 180 days. By notice dated February 9, 1981, the Carrier instructed the Claimant to attend a trial on February 19, 1981 in connection with the following charges:

> "Alleged violation Rule O Amtrak Rules of Conduct that part which reads, 'Employees . . . .traveling on a free or reduced rate basis shall neither dress nor conduct themselves in a manner which could embarrass the company or is objectionable to other passengers.'
>
> Specification: (a) In that you conducted yourself in an unfit manner on Train #41 on December 11, 1980 disrupting passengers and subjecting the company to embarrassment while traveling on your Rail Travel Privilege Card."

The trial was held as scheduled on February 19, 1981. The Claimant was present and accompanied by a duly designated representative of the Organization. By notice dated March 4, 1981, the Carrier informed the Claimant that it had found him guilty of the charges and dismissed him effective immediately.

The Carrier contends that the trial record contains sufficient evidence to establish that after the Claimant used his Rail Travel Privilege Card to obtain a ticket for an Amtrak train, he became drunk, disorderly and distrubed other passengers

on the ensuing trip. The Claimant maintains that he cannot recall the time period of his alleged misconduct, and he should not be held responsible for his actions because he was involuntarily drugged by wine given him by another passenger on the train.

The Organization also raises two procedural defenses on behalf of the Claimant. First, it contends that the trial was defective because the Carrier did not issue the notice of trail within 15 days of the alleged incident as required by Rule 71(a). The Organization notes that a trainman filed a report concerning the alleged incident on the very date it occurred, and there existed no reason why the Carrier could not have issued a timely notice of discipline. Secondly, the Organization maintains that the Carrier placed the Claimant in double jeopardy when it disciplined him for the alleged incident by revoking his Rail Travel Privilege Card, and then subsequently dismissed him for the same incident. The Carrier argues that the Organization's procedural defenses are without merit. The Carrier contends that it did comply with Rule 71 by issuing a notice of trail within 15 days of the Division Engineer becoming aware of the incident. The Carrier maintains that the Division Engineer did not become aware of the Claimant's misconduct until January 28, 1981, when he received a memo from the Chairman of the Pass Abuse Review Panel. The Carrier also denies that it disciplined

the Claimant twice for the same incident, as it contends that the revocation of the Claimant's pass privilege was not discipline, but the suspension of a privilege it unilaterally bestowed.

The Organization also asserts that dismissal is too harsh a penalty for the alleged violation. The Carrier believes that discharge is an appropriate penalty for the proven offense, especially in light of the Claimant's past disciplinary record.

The record establishes that the Claimant used his Rail Travel Privilege Card to obtain a ticket for an Amtrak train traveling between Philadelphia and Chicago on December 11, 1980. The Claimant had been drinking beer and was "feeling all right" at the time he boarded the train. He was not on duty. The Claimant continued to drink alcoholic beverages on the train. He was observed swearing out loud to himself and walking through the train falling on other people. Other passengers complained to the Amtrak crew about the Claimant's behavior. In response to the Claimant's actions, Trainman John Itinger took the Claimant's Rail Travel Privilege Card and filed a report that day concerning the incident.

The Claimant testified that he has no recollection regarding his alleged improper behavior. After boarding the train, he accepted a drink of wine from an unknown passenger sitting next to him. He presumes the wine was drugged, because he can recall nothing else until the trainman was removing his Privilege Card.

The Claimant stated that he was robbed of $220.00 and a pair of socks during the period of the blackout.

This Board has concluded that the Organization's procedural objections are not sufficient to warrant sustaining the claim. This Board has previously ruled that the Carrier does not automatically violate Rule 71 when it fails to issue a Notice of Trial within 15 days of an alleged incident. In certain cases, the responsible Carrier official may not become aware of an incident until sometime after the date of the alleged offense. In the instant case, there exists no evidence that the Division Engineer had any knowledge of the incident prior to January 28, 1981. The Carrier then issued a notice of trail on February 9, 1981, within the 15 days allowed by Rule 71. Although other Carrier officials had knowledge of the incident shortly after its occurrence, the matter was initially investigated and considered by the Pass Abuse Review Panel. The delay occasioned by the review of the Panel was not dilatory, but was responsible action on the part of the Carrier. This Board has also concluded that the Carrier did not subject the Claimant to double jeopardy. Although we agree with the Organization's argument thar revocation of an employee's Privilege Card is a form of discipline, we do not find that a subsequent timely investigation by the Operating Department that results in formal discipline is impermissible. Actions by the Pass Abuse Review Panel are restricted to

revocation of pass privileges, and are separate and apart from any further warranted discipline which is imposed by the Operating Division.

This Board has also determined that the record contains substantial evidence to support the Carrier's finding that the Claimant became voluntarily intoxicated on December 11, 1980, while travelling on an Amtrak train, and this intoxication resulted in his unacceptable behavior. The Claimant admitted he had been drinking prior to boarding the train, and continued his drinking during the trip. Although the Claimant's case is somewhat helped by testimony from trainmen who were on the train that the Claimant's behavior was not unacceptable, Trainman Itinger personally observed the Claimant being disorderly and disturbing other passengers. Although the Claimant presumes his behavior was caused by his being involuntarily drugged, the most likely conclusion is that he was simply "sloppy drunk." His resulting behavior constituted a violation of Rule O.

This Board considers the Claimant's actions to be a serious breach of the Employee Conduct Code. The Carrier correctly notes that it is proper to consider the employee's past record when determining the appropriate measure of discipline to impose. The Claimant's record is poor. Although this Board overturned one of his previous disciplines in a very close case, the Claimant had previously been suspended three times for serious offenses. However, as the measure of discipline for the instant

case was in part based on his previous record, since modified by this Board, in this case we shall reinstate the Claimant without back pay. The Claimant shall also receive a strong warning, and shall be placed on notice that any further violations of Carrier rules shall warrant dismissal.

AWARD: Claim denied. However, the Carrier shall reinstate the Claimant without back pay. The Claimant shall receive a strong warning for his violation of Rule O and is to be placed on notice that it is his final warning. Any further violation of the Carrier's Rules shall warrant dismissal of the Claimant.

L. C. Hriczak, Carrier Member
(DISSENTING)

W. E. LaRue, Organization Member
(DISSENTING)

Richard R. Kasher, Chairman
and Neutral Member

March 10, 1984
Philadelphia, PA

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DISSENT OF THE EMPLOYE MEMBER
AWARD NO. 49
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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. 49 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. 49 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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CARRIER MEMBER DISSENT

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The Carrier agrees with the conclusion of this Board that an employee may both have pass privileges revoked and be formally disciplined based upon the same event and that such an employee is not placed in double jeopardy thereby; however, the Carrier feels compelled to comment on the statement of the Board that pass revocation is a form of discipline.

It is well established that the granting of pass rights is a gratuity. Emergency Board No. 106, in 1954, considered the matter of free transportation and found the following:

> "The Board doubts if free transportation comes within the language of the Railway Labor Act relating to 'rates of pay, rules, and working condition.' It is also the belief that, on the merits, this subject should not be required to be the subject of collective bargaining. It is a gratuity except when directly related to the employees' services and such should be left under the control of the Carriers."

Further, the Courts have upheld the emergency Board's determination that issuance of passes is a gratuitous action (McDougal v. Lehigh Valley R.R. Co. 21 Misc. 2nd 946, 198 N.Y.S. 2nd 91).

Without belaboring the point, the Carrier finds Fourth Division Award 3733, Referee Franden, summarizes the Carrier's position in this regard.

> "We do not find that claimant was entitled by contract to pass privileges, and the revocation of such privileges does

PLB 1376 - 19 (continued)

"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. 49, was considered a violation of the agreement and discipline should therefore be set aside.

William E. LaRue, Employe Member
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not constitute discipline. See First Division Awards 11727, 15130; Third Division Awards 9316, 13217 and 14130."

This finding was cited with favor by Neutral Member Quinn in Award No. 1 of Public Law Board 3355, established on this Carrier's property with the International Brotherhood of Electrical Workers, System Council 7.

The Carrier submits, therefore, that the Board erred in stating, in the instant Award, that revocation of pass privileges is a form of discipline and to that extent the Carrier registers dissent to this award. It is clear from the Board's decision in this case that pass revocation is not a form of discipline coming within the purview of the Labor Agreement.

L. C. Hriczak
Carrier Member