

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 3038

NATIONAL RAILROAD CORPORATION (AMTRAK)

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-and-

* Case No. 7
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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

* Award No. 7
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Public Law Board No. 3038 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:

"While the Claimant may have readily admitted to Charge No. 1 at his appeal hearing, he maintains his innocence in Charges Nos. 2 and 3. It is requested that the severe, capricious and arbitrary discipline assessed Claimant O'Neill, of disqualification as Foreman and Assistant Foreman, be removed and that he be rightfully restored to his positions as Foreman and Assistant Foreman."

Background Facts

The Claimant, T. J. O'Neill entered the Carrier's service on May 17, 1976 and is credited with railroad service from July 12, 1974. On March 9, 1982 he was assigned to the position of Assistant Foreman on the Carrier's Boston Division. As a result of an incident at Hamden Connecticut involving an accident with a Company vehicle he was operating, he was removed from his assignment as Assistant Foreman effective 7:00 a.m. March 11, 1982. The Claimant was, however, permitted to work a Trackman's position at his Assistant Foreman's rate of pay pending completion of an investigation to determine the facts regarding the incident on March 9, 1982. By notice dated March 15, 1982, the Claimant was notified to attend an investigation on March 19, 1982 in connection with the following charges:

- "1. Misuse of a company vehicle while you were on duty as an Assistant Foreman with Gang S662, in that you were charged with Improper Passing by the Hamden Police Department on March 9, 1982, at approximately 1:00 p.m. on Anns Farm Road, Hamden, Connecticut.
2. Absence from your assigned work location without proper authority on Tuesday, March 9, 1982 when you were driving a Company vehicle No. AA21927.
3. While driving Company vehicle No. AA21927 you were involved in an accident in an area not assigned to you."

After one mutually agreed upon postponement, the investigation was held on March 24, 1982. The Claimant was

present at the investigation accompanied by his duly authorized representative. Following the investigation the Claimant was assessed the discipline of "disqualification of Foreman and Assistant Foreman effective immediately".

In the investigation General Foreman Kirner testified that Foreman Gaudioso and Assistant Foreman O'Neill on March 9, 1982 were assigned to Hyrail car 3248 (Amtrak vehicle AA21929) to patrol the tracks from New Haven to Oakwood Avenue (Hartford). He further testified that upon arriving at Hartford the assignment of Foreman Gaudioso and Claimant O'Neill, according to standard practice, would be "to repair any defects they found they were able to get any earlier, and to get another gang on, and/or to put in bolts". General Foreman Kirner testified that if Foreman Gaudioso had felt it necessary he could have patrolled beyond Hartford towards Springfield and that he (Kirner) had issued no instructions to Foreman Gaudioso as to what he was to do upon completion of the Hyrail trip. Mr. Kirner also testified that Foreman Gaudioso was responsible for the supervision of the employees assigned to his gang and for the whereabouts of the Hyrail car assigned to him.

Carrier Police Officer Kelly testified regarding his investigation of the accident which occurred in the vicinity of Evergreen Avenue and Anns Farm Road in the town of

Hamden, Connecticut on March 9, 1982; and, regarding the Hamden Police Accident Report which states that "Vehicle #1 headed eastbound on Anns Farm Rd. struck Vehicle #2 parked at the south curb forcing it into Vehicle #3 also parked at south curb. Vehicle #2 as forced over the south curb 8 feet and into a tree at 18 Anns Farm Rd. Vehicle #3 was forced forward and to the north curb 20 ft."

Foreman Gaudioso testified that he was Foreman of the gang identified as S662 and that Claimant O'Neill was assigned to that gang. Mr. Gaudioso testified the assignment he received on March 9, 1982 was to patrol New Hven to Hartford. He stated he did not absent himself from his assignment on that date. He testified that his regular supervisor Kenny Sullivan has a standard practice for employees to patrol through Oakwood Avenue and through Hart Tower when time permits. He testified that the Supervisor's Assignment Log states "New Haven to Hartford Patrol" and this job, after patrolling was completed, involved a job of putting bolts in at North Haven Junction, which the regular supervisor, Sullivan, wished to have performed. Foreman Gaudioso further testified that when he and Claimant O'Neill arrived at Route 10 they noticed an employee stopped on the side of the highway. The employee was a female Carrier employee whose car would not operate. Foreman Gaudioso

stated that they stopped and got the car started. He testified that, for reasons of safety, he drove the female employee's car to her house and that he was followed by Claimant O'Neill in the Hyrail car. Foreman Gaudioso stated that while he and Claimant O'Neill were returning to New Haven the Hyrail car was struck by an object and Claimant O'Neill, in reacting, struck a parked vehicle. Foreman Gaudioso further stated that he and Claimant O'Neill were on their lunch period at the time the accident occurred. He further testified that he directed Claimant O'Neill to follow him in the Hyrail car as he drove the other employee's car to her home.

Claimant O'Neill testified regarding the accident, and his testimony corroborated that of Foreman Gaudioso. He further testified that he was cited by the Hamden Police Department for "Improper Passing". He stated that the purpose in following the disabled vehicle was to insure it arrived at its destination.

Findings and Opinion

The Carrier, in the investigation, cited various Carrier Operating Rules and instructions. Claimant O'Neill testified that he was conversant with the rules and instructions and had complied with them. The Claimant admitted to that portion of Charge No. 1 which involved his being cited for "Improper Passing". However, the Claimant and the Organization deny any guilt regarding Charge No. 2, which alleges that Claimant O'Neill was absent from his assigned work location without proper authority, and regarding Charge No. 3 which alleges that the Claimant was involved in an accident in an area not assigned to him.

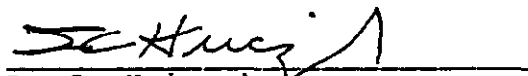
It is clear from the record that Claimant O'Neill was working under the supervision of Foreman Gaudioso and subject to his orders and instructions. Claimant O'Neill was in the company of Foreman Gaudioso during the entire incident. Foreman Gaudioso testified that he directed Claimant O'Neill to accompany him, specifically to drive the Hyrail car following Foreman Gaudioso to the home of the owner of the disabled car. Thus Claimant O'Neill was following and carrying out the instructions of his supervisor. He was neither absent from his assigned work location without authority nor "in an area not assigned to you" in as much as he was in the area at the direction of his supervisor.


Foreman Gaudioso was the sole and proximate cause for the placement of the vehicle at the scene of the accident.

The Board finds that the Carrier has not shown that Foreman Gaudioso lacked authority to direct Claimant O'Neill. As a matter of fact, a Carrier witness, General Foreman Kirner, testified that Foreman Gaudioso was responsible for the supervision of employees assigned to his gang and was responsible for the whereabouts of the Hyrail car assigned to him.


Under the above circumstances, this Board cannot hold that this Claimant, who was following the specific instructions of his supervisor, was guilty of the charges preferred against him. The Carrier has not established its case; the claim must be sustained.

AWARD: Claim sustained. The Claimant shall be paid the difference in rates, if he could have held Foreman or Assistant Foreman's positions, during the period he has been disqualified.


L. C. Hriczak,
Carrier Member


W. E. LaRue,
Organization Member

I DISSENT. THE BOARD CAN NOT LEGITIMATELY
FIND THAT APPELLANT ADMITTED HIS GUILT
TO CHARGE NO. 1 AND FIND
COMPLETE EXONERATION.


Richard R. Kasher,
Chairman and Neutral Member

August 3, 1985
Philadelphia, PA