PUBLIC LAW BOARD NO. 3103

Award No. 198
Case No. 236
System Docket No.:
ASWC-D-1968

Amtrak Service Workers Council

- and -

The National Railroad Passenger Corporation

STATEMENT OF CLAIM OF ORGANIZATION:

1. Albert Carlisle, Jr., Lead Service Attendant, was unjustly dealt with by the National Railroad Passenger Corporation (Amtrak) when he was dismissed from service effective November 19, 1987, after an investigation held on November 6, 1987, on charges filed against him on September 16, 1987 for alleged violation of National Railroad Passenger Corporation Rules of Conduct, specifically Rule G, Rule O and Rule F-3.

2. Accordingly, the National Railroad Passenger Corporation shall now be required to restore Albert Carlisle, Jr. to the position of Lead Service Attendant immediately, that he be made whole for all time lost, with seniority, Health and Welfare, vacation and other rights restored unimpaired.

FINDINGS: Mr. Albert Carlisle, Jr., hereafter Claimant, was a Lead Service Attendant, with a service date of July 31, 1974, and at all times pertinent here was assigned at Chicago, Illinois.

Claimant was removed from duty on September 14, 1987 and, by Notice of Disciplinary Investigative Hearing ("DIH"), dated

September 16, 1987, Carrier notified Claimant of the date, time and place of a hearing, which hearing was subsequently postponed by written notice to all concerned. The September 16 Notice contained the Charges and Specifications of alleged misconduct, and they are quoted in full as follow:

> "CHARGE 1: RULE G - Employees subject to duty, reporting for duty, or while on duty, are prohibited from possessing, using, or being under the influence of alcoholic beverages, intoxicants, narcotics or other mood changing substances, including medication whose use may cause drowsiness or impair the employee's responsiveness.
>
> In that on September 14, 1987 Chief Russ Hare allegedly found a marijuana cigarette and an open can of beer in the microwave of food service car #20033, on Train #351. Subsequently, you submitted to a drug screen which showed positive signs of cocaine and THC in your system.
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> CHARGE 2: RULE O - Employees must report for duty at the designated time and place and must attend to their duties during assigned working hours. Employees may not be absent from their assigned duty or engage in other than Amtrak business while on duty or on Amtrak property without permission from their supervisor.
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> Employees will keep the appropriate Amtrak authority apprised of their current telephone numbers and addresses and will promptly notify in writing, that Amtrak authority of any changes:
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> In that on September 14, 1987 you allegedly failed to make your assignment as a Lead Service Attendant on Train #351.
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> CHARGE 3: RULE F-3 - Conduct involving dishonesty, immorality, or indecency is prohibited. Employees must conduct themselves on and off the job so as not to subject Amtrak to criticism or loss of good will.

In that on Train #354, September 13, 1987, you allegedly sold Jewel brand hot dogs that you had purchased prior to your trip on Train #354, this [sic] depriving the Corporation of revenues."

On November 6, 1987, AMTRAK-designated Disciplinary Investigative Hearing Officer ("DIHO") John Anderson conducted a hearing on Charges 2 & 3 quoted above (Claimant waived his right to investigation regarding Charge 1 and its accompanying Specifications), at which Claimant and his Union representative were present. A transcript of this Hearing was prepared and copies, along with exhibits accepted by the DIHO, were supplied to Claimant, the Organization, Carrier, and this Board.

On p. 10, the DIHO noted that Claimant had executed a Rule G Waiver, which was accepted by Carrier and confirmed as "correct": the assertion of Claimant's Union representative to the effect that Charge 1 regarding " . . . use of drugs [had] no bearing on the decision [to be] rendered in the instant case."

By letter dated November 19, 1987 to Claimant, with copies to the Organization and Carrier, DIHO Anderson stated his Findings, and they are quoted:

"1. At all times in question in this case Rules F and O of the Amtrak Rules of Conduct were in effect and applicable to you as they are to all Amtrak employees.

2. It was established in part but not exclusively, through the testimonies [sic] of Train Chief Russ Hare and Station Supervisor Don Muscat that you failed to appear for your assignment as LSA on Train #351 on the date in question.

3. Your own testimony, Mr. Carlisle, contained admissions of guilt concerning the second charge cited. Further, your union representative, Mr. E. Davis, stated for the record that you were obviously guilty of violating Rule 'O', since you didn't show up to protect your assignment.

4. It was also established primarily but not exclusively through the testimony of Mr. Hare that non-Amtrak issue hot dogs were found in your work station. Mr. Hare's testimony reveals that, upon inventory by him and witnessed by Conductor J. Craig, nine less hot dog buns were found to be on hand than Amtrak issue hot dogs, indicating that nine non-Amtrak issue hot dogs were sold instead of Amtrak issue hot dogs. From the evidence supplied by Mr. Hare this same number - 9, was the number of hot dogs missing from a pack of ten (one, being still on hand) of the non-Amtrak issue hot dogs. All of the above logically substantiates the charge that you wrongfully deprived Amtrak of revenue it should have received.

5. Your own denials of misconduct in the circumstances under investigation were not so credible as the evidence presented by and the testimony of Mr. Hare, in part but not exclusively because you could offer no explanation as to how the hot dogs arrived in your work station and why Mr. Hare would fabricate charges against you.

Based on the foregoing Findings, and on the

hearing record as a whole, it is my decision that you are guilty of charge 2 and 3 of the above-quoted charges."

Appended at the end of the same November 19, 1987 letter of the DIHO was a statement of Regional Director Passenger Services A. L. McLaurin effectuating Claimant's dismissal, and it is quoted:

"Based upon the decision of the Hearing Officer as stated above, you are hereby assessed a discipline of:

Termination of your employment with the National Railroad Passenger Corporation effective this date. Please arrange to turn in all other items issued to you by the Corporation to Mr. John Gillis in the Chicago Crew Base."

Board Opinion

The Board has carefully reviewed: the transcript of the DIH of November 6, 1987; copies of the exhibits accepted by the DIHO the ensuing correspondence between the Organization and Carrier, pursuant to the Organization's exercise of its right of Appeal from a disciplinary determination provided for in Rule 19(i) and (j); the written and oral arguments of both Parties presented at the Board Hearing of April 13, 1989; and the oral statement of Claimant, who, having been informed of the date, time and place

of the Board Hearing and of his right to attend, was present during presentation of the arguments of both Parties.

Based on the above-described review of the entire Record, the Board has concluded that: Carrier has provided proof, as measured by a preponderance of the evidence, of Claimant's misconduct as detailed in Charge 2, and its related Specifications; that Carrier has not met its burden of providing proof, as measured by a test of the preponderance of the evidence* as to Charge 3 and its related Specifications.

In light of the footnote below, it is sufficient to say here that, while it is understandable how DIHO Anderson could find as he did regarding Charge 3, the Organization's succinct comment on those Findings, set forth on p. 10 of its written argument, has much merit, and it is paraphrased as follows:

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* While vital and relevant, no analysis is provided here on the difference between, on the one hand, the above standard of proof--one in which the word "probative" is inferred as a modifier of the word "evidence"--and, on the other hand, a standard of proof permitting disciplinary determinations to be made on the basis of "circumstantial evidence" or probable cause. Because countless books and articles have been written clarifying the differences between these two standards, such analysis would be redundant; and because such analysis here would, of necessity, have to be brief, it would not prove illuminating.

Carrier did not prove Claimant:

- purchased the hot dogs at or from Jewel;
- brought the hot dogs onto the train;
- sold any of the Jewel hot dogs.

In discharge cases, where an employee's job and livelihood are at stake, DIHOs have heavy responsibilities calling for the utmost conscientiousness. In the Board's view, for DIHO Anderson to conclude, as he did in Para. 4 of his Findings, that "All of the above logically substantiates . . . " Charge 2 is naive (emphasis supplied). It should be remembered that appearance and logic, not facts or evidence, caused Galileo to be executed.

In a similar vein, note is made of DIHO Anderson's Findings in Para. 5, which state that:

> "[Claimant's] . . . denials of misconduct . . . were not so credible as the testimony of Mr. Hare . . . because [Claimant] could offer no explanation as to how the hot dogs arrived at [his] work station and why Mr. Hare would fabricate charges against [Claimant]."

Credibility judgments cannot properly be based on the failure of an accused employee to provide an explanation, as, in the instant matter, of how the Jewel hot dogs arrived in his work station. That burden is on Carrier, and it is improper for the

DIHO to shift it onto Claimant's shoulders and then to impugn Claimant's credibility because he is unable to meet that burden. Similarly, it is pure casuistry to find Claimant's testimony less credible than Hare's because Claimant "could offer no explanation . . . [as to] why Mr. Hare would fabricate charges against [Claimant]."

First, it needs be noted that scrutiny of Claimant's testimony does not reveal that Claimant stated that Hare "fabricated" the charges against him; nor does it reveal that General Chairman Davis, Claimant's Union representative, in his closing statement, charged Hare with fabrication.

But even if Claimant alleged that "Hare fabricated the charges," the test as to Claimant's credibility, as compared to that of Hare's, is not the presence or absence of an explanation stated by Claimant as to " . . . why Hare would fabricate the charges." Claimant's ability or <u>inability</u> to offer an explanation for another's conduct, like that of the rest of mankind's, is highly circumscribed. To impugn a witness's testimony on the grounds that he stated something which the transcript contains no reference to, is, at best, carelessness; at worst, it is irresponsible. But to also impugn the same witness for not providing an explanation as to why Hare would

fabricate charges, is, at best, naive; and, at worst, a demonstration of a lack of knowledge of the nature of the duties of a DIHO. Such assignment requires recognition that the overwhelming bulk of human beings cannot provide explanations for most of their own actions, not to speak of the actions of others. For the DIHO to assert, in error, that Claimant alleged that Hare fabricated the charges, and to then compound the error by averring that Claimant's failure to provide an explanation for such fabrication is grounds for a finding that Claimant's credibility is less than Hare's in the instant case, makes a travesty of the adversarial process and the functions and duties of a DIHO. It demonstrates that this DIHO, and any others who do likewise, lack the requisite ability, training or directives to properly perform the task of making solidly grounded Findings* in the face of limited, purely circumstantial and conflicting testimony and evidence.

For all of the above reasons, the Board finds and concludes that the DIHO erred in his Finding as to Charge 3.

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* Since the days of classical Greece (350 B.C.), this complex and difficult task has, as a rule, been assigned only to those among the most mature of the citizenry; those who possess the unique skills and highly essential training to dissect, analyze and weigh testimony and evidence with, of course, impartiality and objectivity before reaching a determination.

* * *

It is well established that Carrier need not meet the stringent test of providing proof "beyond a reasonable doubt" as is required in the criminal courts. But it is Carrier's burden to provide proof, as measured by the test of a preponderance of the (probative) evidence, that Claimant committed the acts set forth in Charge 3, and its accompanying Specifications; namely, that Claimant obtained Jewel hot dogs; brought them to his work station and placed them in the freezer; cooked them instead of AMTRAK issue hot dogs, inserting them in AMTRAK rolls; sold them to passengers, and pocketed the cash received from such sales.

Carrier has demonstrated that some nine hot dogs were missing from the Jewel pack and that nine rolls were "missing" from the total issued to Claimant. Can it be said that this single piece of evidence constitutes proof, or compels the conclusion, that Claimant committed the requisite chain of linke acts: procurement, transportation, placement, cooking, insertion in AMTRAK rolls, sale, and pocketing the receipts, <u>essential</u> to prove the misconduct specified in Charge 3?

Because Carrier has produced only this slender bit of evidence as proof of Claimant's misconduct, the Board has

concluded that Carrier has not met its above-described burden of proof that Claimant " . . . sold Jewel brand hot dogs that [Claimant] had purchased prior to . . . [his] trip on Train #354, thus depriving the Corporation of revenues" (Charge 3). This conclusion seems well warranted in light of Claimant's 15 years of service with only a single reprimand. Therefore, the Board will direct that Claimant be reinstated to employment in his former classification as promptly as is administratively feasible. The above determination is compelled by the fact that the sole charge of misconduct for which Carrier provided the requisite level of proof was violation of Rule O, and by the Board's view that discharge of Claimant for the first instance in 15 years of service for late arrival and missing his assigned train constitutes harsh and excessive discipline. The Board finds fortification, if not compelling cause, for this conclusion, in the fact that, though requested, Carrier was unable to supply proof that discharge, solely for a single Rule C violation, was the typical or standard discipline assessed over the previous decade.

Unlike a simple Award directing reinstatement either with full or no back pay, the instant case compels the Board to find a proper balance between two conflicting elements. On the one hand, the Board has found Claimant's discharge was without just

cause and to that extent he is entitled to be made whole. On the other hand, Claimant's failure to be aboard his train constitutes serious disicplinable conduct, though not one warranting discharge, especially when consideration is given, first, to the fact that his tardiness was not compelled by an emergency; and, second, to the potential negative impact of that tardiness on passenger service. The latter was averted by the "heroic" measure of drilling out locks and the last minute assignment of a substitute for Claimant.

Disciplinary suspensions are not punative. Rather, they are imposed as essentially corrective in nature, designed to educate employees to the point where repetition of misconduct will not occur again, and dramatically draw to their attention that repeated misconduct will lead to dismissal and loss of virtually all the valuable rights flowing from employment.

In determining the quantum of discipline to be assessed, no one is an expert because of the large number of variables requiring consideration. Neutral chairmen and arbitrators have a distinct but limited advantage in that they encounter, over a lifetime of reviewing thousands of instances where they are required to assess the appropriateness of suspensions in different industries, with different traditions; where suspensio

is imposed on employees with vastly different levels of responsibilities--from airline pilots to those who rake leaves i parks.

Only rarely, and in egregious instances of excessive or obviously disparate disciplinary assessment, do arbitrators or neutral chairmen substitute their judgment for that of the employees' supervisors. Those impartials who exercise such restraint do so for sound practical reasons. In most instances, most of the immediate supervisors of grieving employees, especially those with long service, possess the most intimate an accurate knowledge of the incident, its impact, real or potential;, of the employee, and the degree of discipline necessary to focus the employee's attention on the infraction so as to achieve significant and permanent change in attitude and conduct.

It is believed necessary to stress that the above is the case for most, but not all supervisors. There are those in supervision who tend to be hot-tempered or who have been inadequately trained and treat employees in an authoritarian manner, requiring a military type of instant obedience and imposing stringent standards for measuring rule infractions.

The Board has been informed of the range of discipline

traditionally assessed by Carrier for a first violation of Rule O of a Lead Service Attendant with 15 years of service, who had been given a single reprimand for the equivalent of improper stripping of a lounge. Claimant is to be made whole because he was discharged without just cause and therefore lost some 19 months of earnings. However, from that make-whole payment there is to be deducted a sum equal to 120 days for Claimant's violation of Rule O, such period to be viewed as a disciplinary suspension.

Dated: New York, NY
June 27, 1989

AWARD:

The discharge of Claimant was not for just cause and he is to be reinstated in his former classification as soon as administratively feasible.

Claimant is to be paid full back pay for the period from the day he was removed from service until his actual return to employment minus any earnings, unemployment insurance or welfare payments made to him, and minus a sum equal to 120 days' pay to be viewed as a disciplinary suspension for Claimant's violation of Rule O.

L. D. Miller 7-5-89

L. D. Miller, Carrier Member
(I Concur) ~~(I Dissent)~~

John Czuczman n/c

John Czuczman, Employee Member
(I Concur) (I Dissent)

Jesse Simons

Jesse Simons, Chairman and
Neutral Referee