

PUBLIC LAW BOARD NO. 6189

AWARD NO. 78

CASE NO. 78

System Docket OC-UTU-SD-714D

PARTIES TO
THE DISPUTE:

United Transportation Union

vs.

National Railroad Passenger Corporation (AMTRAK)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained

DATE: July 9, 2002

STATEMENT OF CLAIM:

"Request the discipline of dismissal imposed upon C. Waters in connection with the following charges be rescinded, expunged from his record and his seniority and vacation rights be unimpaired, and that he be compensated for all time and expenses incurred inclusive of Health and Welfare premiums, Reduced Train Crew Allowance and Productivity Savings Sharing Allowance and credit for Railroad Retirement payments for each month for all time lost in connection with:

Charge 1: Alleged violation of the 'Attending to Duties' section of Amtrak's 'Standard of Excellence', that reads in part, 'Amtrak success depends on using all available resources in the most efficient and productive way possible. As an Amtrak employee and, therefore, the company's most important resource, you have an obligation to perform your duties properly and in accordance with the standards set for your particular job. This requires that you remain alert to your duties at all times. Any activity or behavior that distracts or prevents you or others from attending to duties is unacceptable.'

Charge 2: Alleged violation of the 'Conduct' section of Amtrak's 'Standard of Excellence', that reads in part, 'On the Amtrak team, there is no place for activities or behaviors that compromise the safety, satisfaction and well being of our customers, the public or fellow employees. Therefore, boisterous conduct such as fighting, rudeness, assault, intimidation, horseplay and using profane or vulgar language is unacceptable. It is important to remain calm and be courteous to all customers, even those who may be difficult at times.'

Charge 3: Alleged violation of the 'Teamwork' section of Amtrak's 'Standard of Excellence', that reads in part, 'Being polite to each other is one of the basics of teamwork, so it is important that we all are considerate and respectful of each other. Part of teamwork is properly performing your duties. Another part is following instructions. Therefore, you must comply with all company and departmental policies, procedures, and rules as well as all instructions, directions and orders from supervisors and managers.'

Charge 4: Alleged violation of 'General Rule A.1' of 'Section One' of the 'Manual of Instruction for Transportation Department Employees' that reads in part, 'The duties of a passenger conductor demand good judgment, tact, honesty, and courtesy. The safety of his/her train and passengers as well as the reputation of the Company are dependent, to a great extent, on his/her discretion, care and the proper exercise of his/her authority.'

Charge 5: Alleged violation of 'General Rule A.7' of 'Section One' of the 'Manual of Instruction for Transportation Department Employees' that reads in part, 'Employees are required to be respectful and considerate in their dealings with passengers, politely giving them any information to which entitled and use every endeavor to contribute to their pleasure and comfort. Train crews must employ diplomacy when dealing with passenger problems so as not to offend passengers.'

Specifications: In that on February 4, 2001, at approximately 10:15 PM while working as an Assistant Conductor on Amtrak Train #3 after departing Flagstaff, Arizona, you were rude, loud and boisterous, and intimidating toward guests. In addition, you made improper physical contact with a female guest on the train while collecting tickets.

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed from all service as a result of the previous described passenger incident. Based on the "... particular facts and circumstances surrounding this case ..." that were recognized at his level, the Carrier's Director - Labor Relations reduced the discipline to a 60-day actual suspension plus receipt of additional customer service training.

The Organization advanced a number of procedural objections in addition to challenging the discipline on its merits. It took exception to the absence of certain witnesses, the completeness of the trial transcript, and the timeliness of the issuance of the hearing officer's findings. We need not deal with these objections because another procedural shortcoming is dispositive of the Claim.


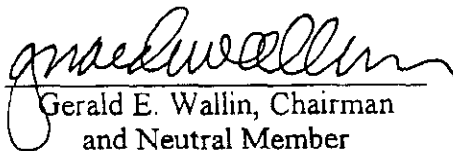

Rule 25 a. of the parties' Agreement precludes the taking of any disciplinary action whatsoever unless the affected employee is first provided a fair and impartial trial. Among other things, this requires that any disciplinary decision is based on proper findings of the hearing officer.

On this record, the hearing officer did not issue his findings until March 2, 2001. Those findings determined that Charges 1 and 3 were not proven at all nor were the physical contact allegations of Charges 2, 4, and 5 proven. Carrier's dismissal decision, however, was dated February 23, 2001. This typewritten date was not a mere typographical error; it was confirmed by

the same date stamp information printed across its top margin by a fax machine. Thus it is clear that Carrier made its disciplinary decision a full seven days prior to the issuance of the hearing officer's culpability findings. Such pre-judgment is fatally offensive to Rule 25 a. and serves to nullify any discipline flowing from the purported *fair and impartial trial*. Well-settled precedent in this industry has consistently so held. See, for examples, First Division Awards 13573 and 25043, Award No. 9 of PLB 5944 and Award No. 14 of PLB 6041.

AWARD:

The Claim is sustained.


P. L. Patsouras,
Organization Member
Gerald E. Wallin, Chairman
and Neutral Member 9/11/02
Lorraine McLaughlin, Esq.
Carrier Member
Written Dissent Attached

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Carrier Member Dissent

The Board sustained the claim in the instant matter based upon a procedural argument raised for the first time in the Organization's arbitration brief. It is well established in the industry by awards of the National Railroad Adjustment Board and other tribunals, that arguments not raised on the property as required by the Railway Labor Act, may not be properly considered for the first time at a Board. Representative of the plethora of awards that have consistently held to that well established arbitral principle are the following:

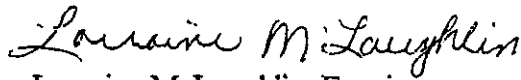
Second Division Award 10331 - Referee M. E. Zusman

"As a preliminary point, this Board underlines that all facts and/or lines of argument used by either party in their Ex parte Submissions, which were not a part of the record as handled on property, cannot now be properly considered before this Board. This position is a firmly established position of the National Railroad Adjustment Board, codified by Circular No. 1 and consistent with numerous Awards in this Division (Second Division Awards 7853, 7631, 7484, 7241)."

Third Division Award 24506 - Referee R. Silagi

"It is well settled that issues and contentions not raised on the property may not be considered de novo by this Board at the appellate level. Awards 22598 (Scearce); 22199-Roukis; 22831-Scheinman and others."

I Vigorously Dissent.


Lorraine McLaughlin, Esquire
Carrier Member

September 11, 2002


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ORGANIZATION MEMBER CONCURRING OPINION

Fortunately, the process is alive and well. We vigorously agree with the majority who saw through the post facto antics of the Carrier who comes forward in the state of denial.

Res Ipsa Loquitur. (The thing speaks for itself)

I vigorously concur:


P. L. Patsouras
Organization Member *by PML*

September 13, 2002

amwaters