NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 2406

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)	*	
-and-	*	CASE NO. 19
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	*	AWARD NO. 19

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 claims:

"(a) The Carrier violated the Rules Agreement, effective May 19, 1976, as amended, particularly Rules 71, 73, 74 and 64, when it assessed discipline of three days' suspension on Third Railman L. L. Morrison, September 5, 1978.

(b) The Carrier further violated the foregoing Agreement and rules when it assessed ten days' suspension on Third Railman L. L. Morrison, September 5, 1978.

(c) Claimant Morrison's record be cleared of the charges brought against him on July 27 and August 3, 1978, and he be compensated for wage loss sustained in accordance with the provisions of Rule 64."

This case involves two separate trials and two separate disciplines. Both trials involve allegations of a failure to return to duty. The disciplines assessed were suspensions of three (3) and ten (10) days respectively.

The Claimant entered the service of the Penn Central Transportation Company on January 4, 1969. After an implementing agreement was negotiated according to the provisions of Section 504(f) of the Regional Rail Reorganization Act of 1973, the Claimant became an employee of the National Railroad Passenger Corporation on May 19, 1976. At the time of the two trials, the Claimant had approximately nine and one-half years of service with the Carrier and its predecessor.

By notice dated July 27, 1978, the Claimant was directed to attend trial on August 10, 1978 to determine his responsibility in connection with the following charge:

> "Violation of Amtrak's Rules of Conduct Rule 'K', which reads as follows: 'Employees must report for duty at the designated time and place, attend to their duties during the hours prescribed and comply with instructions from their supervisor.', in that on 7-26-78 you absented yourself from your duties at 12:30 p.m. without notifying your gang foreman."

By notice dated August 3, 1978, the Claimant received instructions to attend trial on August 29, 1978 in connection with alleged violations of the same Rule "K" on July 28, 1978 and July 31, 1978.

At the request of the District Chairman, both trials were convened on August 29, 1978. Notices of discipline dated September 5 1978 and September 8, 1978 informed the Claimant of the assessment

of three (3) and ten (10) day suspensions. Appeals were filed first with the Assistant Chief Engineer, and then with the Director-Labor Relations and were denied at both levels.

The Organization contends that the discipline was unwarranted because the charges were not proven and that the Claimant's supervisor failed to investigate his whereabouts on the dates in question. The Organization also alleged that the manner in which the discipline was imposed was arbitrary and capricious and in the nature of deliberate harassment on the part of the Carrier.

On the dates in question the Claimant held the position of Third Railman, Electric Traction Department, New York Division. His tour of duty was from 8:00 a.m. to 4:00 p.m. On July 26, 1978, the date of the first incident, the Claimant's Gang Foreman instructed his gang to reassemble at "Q" Tower, Sunnyside Yard, at 12:30 p.m., after their lunch break. The Claimant did not appear at "Q" Tower after lunch nor did he report to his Gang Foreman at any time during that afternoon. The Gang Foreman, following instructions he had received from his Foreman, docked the Claimant for the afternoon. The Claimant was paid for four and one-half hours' work on July 26, 1978.

On July 28, 1978, the first of two dates involved in the second charge, the Claimant was working with his gang in Sunnyside Yard, Line 2, in the engine house. The Gang Foreman instructed his gang to meet in the engine house at 12:30 p.m.,

after their lunch period. The gang met at the appointed hour, but the Claimant was not present. The Claimant was not seen by anyone in his gang during the entire afternoon. The Claimant was credited with working only four and one-half hours on July 28, 1978.

On July 31, 1978, the last of the two dates involved in the second charge, the Claimant was instructed by his Gang Foreman that the gang would be working at 13 Track in the Station. The Claimant was not seen the entire day after 9:30 a.m. and was credited for working one and one-half hours.

This Board finds that the Carrier has presented substantial evidence to support the allegations made at both trials. This Board also finds that the disciplines assessed were reasonably related to the proven offenses.

The Claimant contended that he was in and about the vicinities of the working assignments on the dates in question, and that he spoke to other employees. However, the Claimant did not present any witnesses at the trials to corroborate these assertions.

The Organization contended that the Carrier failed to show that the Gang Foreman made any attempt to search for the Claimant when the Claimant failed to appear on July 26, 28 and 31, 1978 at the designated times and places. The Organization made this argument in a manner suggesting that it was incumbent upon the Carrier to meet a burden of showing that such a search was made.

The Carrier had no such burden. It is unreasonable to impose such a burden on the Carrier. The Claimant was an employee with more than nine years of service with the Carrier. He knew his way around the property and the yard in question, and he knew when he was responsible to report at a certain location. It was the Claimant's responsibility to report to the reassembly points, not the Carrier's to determine his whereabouts.

Another fact pointing to the Claimant's guilt is that he made no protest of being credited for four and one-half hours on July 26, 1978; for four and one-half hours on July 28, 1978; and for one and one-half hours on July 31, 1978. If indeed the Claimant had been on duty on those dates, he likely would have contested the Carrier's failure to pay him for working his entire tours of duty.

The Organization also contends that the Carrier harassed the Claimant, first by giving instructions to gang foremen not to credit employees for time not spent with their group, and second by reason of the fact that the Carrier "split" these alleged absences into separate cases for the purpose of imposing greater discipline.

Regarding the former argument, the Board finds that the Carrier's instructions were not aimed at the Claimant specifically, but at employees absenting themselves from duty generally. In such case we find no discrimination or harassment.

Addressing the latter argument, this Board finds that the Claimant was not harassed by facing separate charges and trials.

Notice of the first trial was sent on July 27, 1978, before the second incident ever arose. After notice of the second alleged offense was received, the Carrier granted the request of the Organization to hear both cases on August 29, 1978. For the purpose of ascertaining the Claimant's responsibility regarding the separate charges, and for making independent judgments, separate trials for separate alleged offenses were conducted. This is not harassment.

The Claimant had ample time to secure witnesses and there is no showing that the trials were not fair and impartial. The Organization has not shown that the Claimant has been prejudiced or harassed, and the Carrier has proven his guilt of the alleged offenses. Accordingly, the claims will be denied.

AWARD: Claims denied.

R. Radke, Carrier Member W. E. LaRue, Organization Member

Richard R. Kasher, Chairman
and Neutral Member

September 20, 1981
Philadelphia, PA