NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 2406

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)	
-and-	CASE NO. 21
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 21

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 defind 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:

> "The Carrier violated the effective agreement, dated May 19, 1976, on March 26, 1980, when it arbitrarily and capriciously dismissed Claimant Fred A. Ringbloom.
>
> The Claimant be restored to service with all benefits and seniority unimpaired and compensated for all wages lost."

Prior to his dismissal, the Claimant held the position of Foreman-Track, in the Carrier's Philadelphia Division. By letter dated February 19, 1980, he was notified to attend a

trial in connection with alleged violations of various Carrier rules: conduct which would bring discredit upon the Carrier (Rule D AMT-1); unauthorized possession, removal, or disposal, of railroad property (Rule L AMT-1); guarding against loss of Company property (Rule H); and dishonesty (Rule I). Specifically, Claimant was charged with having

> "...sold railroad property specifically steel, to Earl and Dave Scrap Company, Middletown, between June 14, 1979 to August 14, 1979 on ten (10) different occasions in the weight total amount of 74,995 pounds resulting in $1,608.86 being paid to you by the aforementioned scrap company. This above mentioned scrap was obtained from the area of Harris, State Interlocking."

The trial was originally scheduled for February 27, 1980, but was postponed until March 12, 1980, by mutual agreement. The Claimant appeared at his trial and was accompanied by a duly authorized representative of the Organization. The Claimant was found guilty of the charge and was dismissed from service on March 26, 1980.

The record shows that in September or October, 1979, officials of the Carrier began to suspect that there was not as much scrap steel located at the Dock Street yard as should have been expected. Some informal and unsuccessful, attempts at investigation were made, and in early December 1979, the Amtrak police were asked to look into the matter.

Mr. David Chernoff, owner of Earl & Dave's Scrap Company informed the Amtrak police that on a number of occasions between June 14 and August 14, 1979, he had bought the type of scrap

steel missing from the Carrier's property. The man he brought it from had given his name as Bill Norton. The description Mr. Chernoff gave of Bill Norton generally fit the Claimant, "tall and bearded." Also, the Claimant had access to a truck similar to the one Mr. Chernoff said Bill Norton had driven. Somewhat later, Mr. Chernoff, shown a "fairly fuzzy" picture of the Claimant taken by the Amtrak police, identified the Claimant as the man known to him as Bill Norton. The Claimant was arrested by the Amtrak police on February 14, and held out of service the next day.

A procedural argument made by the Organization is that the Carrier violated Rule 71(a) of the effective agreement. Rule 71(a) provides:

> "An employee who is accused of an offense and who is directed to report for a 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 Organization points to the fact that the alleged sale of steel occurred between June 14, and August 14, 1979. The Notice of Trial is dated February 19, 1980, one hundred and eighty-nine (189) days from August 14, 1979, and thus exceeds the fifteen (15) days required in Rule 71(a).

This argument is rejected. In certain cases, such as theft, the Carrier may not become aware of an incident(s) until sometime after the date of the alleged offense. In this case, the specific dates for the alleged offense, June 14, through August 14, 1979,

were determined as a result of the investigation conducted by the Amtrak police. That information was made available to the Amtrak police on February 1, 1980. However, it was not until February 8, 1980, that Mr. Chernoff was shown the "fairly fuzzy" picture and identified the Claimant as Bill Norton. Thus, the earliest the Carrier could definitively connect the Claimant with the alleged offense was eleven (11) days before the Notice of Trial, well within the fifteen (15) days required by Rule 71(a).

However, the Organization's main argument -- that the case against the Claimant has not been proven in the absence of testimony from Mr. Chernoff, and the opportunity for cross-examination -- must be sustained. This Board agrees that the evidence provided by Mr. Chernoff was absolutely vital to the Carrier's case. Because he was not available at the trial and could not be cross-examined, and most importantly, since his testimony weighed and evaluated was the basis for the finding of guilt, this Board finds that the Carrier has failed to provide substantial evidence to show that the Claimant was guilty of the alleged offense.

The Carrier attempted to have Mr. Chernoff testify but was notified that he would not be available because of illness in his family. The Carrier has no power to compel a non-employee to appear for trial, and thus, an affidavit from Mr. Chernoff was accepted. However, in this case there is no hard evidence

in the record against the Claimant without the evidence provided by Mr. Chernoff. Mr. Chernoff's failure to appear for the Claimant's trial, and the inability of the Claimant to confront his accuser, weakens the circumstantial evidence linking the Claimant to the alleged offense to something less than "substantial."

Based on the record, without Mr. Chernoff's testimony, it has been shown that the Claimant had pieces of rail cut up into smaller sections, which actions were part of his regular duties, he had scrap loaded on the kind of truck mentioned by Mr. Chernoff, and he had driven the truck. However, no witness at the trial stated that he had seen the Claimant drive the truck off the property or sell scrap. There was testimony given by certain officials of the Carrier that employees had told them that the Claimant was stealing scrap and selling it, but employee witnesses provided by the Carrier at the trial denied specific knowledge of such activity by the Claimant. Rumor and conjecture may have led the Carrier to be justifiably suspicious, but it was not sufficient to establish that the Claimant was guilty and that he should therefore have been dismissed from service. Accordingly, the claim will be sustained.

AWARD: Claim sustained.

R. Radke
R. Radke, Carrier Member

W. E. LaRue
W. E. LaRue, Organization Member

Richard R. Kasher
Richard R. Kasher, Chairman
and Neutral Member

December 31, 1981
Philadelphia, PA