

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 3038

NATIONAL RAILROAD CORPORATION (AMTRAK)	*
-and-	*
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	* Case No. 5
	* Award No. 5
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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 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 claim:

"The dismissal of Claimant Craig T. Madison was without just and sufficient cause and based on unproven allegations. Claimant Craig T. Madison should be exonerated of the charges and restored to service as provided in Rule 74 of the current Schedule Agreement. The Carrier shall reimburse the Claimant to the extent of any liability as the result of the loss of health and welfare benefits."

Background Facts

On September 23, 1982 Mr. Craig T. Madison, hereinafter the Claimant, was working as an Engineer Work Equipment "A" on the Track Laying System in Perryville, Maryland. On the morning of September 23, 1982 the Claimant was emerging from the dining area and noticed that the crew bus, being driven by a Mr. Morris Brice, was apparently departing for the work site without him. The Claimant shouted in a loud voice for Brice to stop the bus. Mr. Andrew McNally, the Carrier's Manager of Construction, heard the Claimant yell and stated to the Claimant that "if he had been on time he would have been on the bus with the other members of the gang". There is some conflict in the record regarding whether Mr. McNally called the Claimant a profane name. That dispute and testimony will be addressed below. The Claimant then stated to the Manager of Construction that he should stop harrassing him and it is further contended that the Claimant directed profanities at Mr. McNally.

As a result of this verbal confrontation, McNally advised the Claimant that he could either work or be taken out of service. The record is not abundantly clear as to what words were then exchanged, however, the record does indicate that McNally proceeded to the office in order to obtain out of service papers to serve upon the Claimant.

The Claimant, apparently without invitation, followed McNally into the office and there is testimony in the record, albeit contested, that a physical confrontation ensued. McNally requested the Claimant to accompany him to a local hospital in order to have a blood test taken because McNally perceived that the Claimant was under the influence of a "controlled substance", which meant in McNally's words the use of alcohol.

McNally and the Claimant began the trip to the hospital, and again there is disputed testimony in the record regarding what events then took place. McNally testified that the Claimant became exceedingly violent, threatened him, and at one point put his hands on his throat after threatening to strangle him. The Claimant testified that none of these events took place.

As a result of the above transactions the Claimant was served notice to appear at an investigation to determine facts regarding charges that he had violated Carrier rules regarding quarrelsome and vicious behavior, boisterous, profane or vulgar language being used, and failure to attend to duties during prescribed hours. The charges also indicated that the Claimant had caused damage to Carrier equipment because it was alleged that he had pounded upon and ripped the dashboard of the truck which McNally was driving while

he was attempting to have the Claimant undergo a blood test at a local hospital.

An investigation was conducted on October 18, 1982 in Odenton, Maryland. The Claimant attended the investigation and was represented by a duly authorized officer of the Organization. The Claimant was afforded the opportunity to present witnesses in his own behalf and to cross-examine witnesses presented by the Carrier.

After the Carrier reviewed the record of evidence it was determined that the Claimant should be dismissed from service. During subsequent steps in the grievance procedure, as the result of appeals by the Claimant, the Claimant's dismissal was reduced to a disciplinary suspension contingent upon the Claimant accepting a return to service on a leniency basis. The Claimant determined that he wished his record to be entirely expunged of the incident and declined the Carrier's offers of leniency reinstatements.

The claim for restoration of pay and benefits is before this Board ripe for adjudication on its merits.

Position of the Carrier

The Carrier contends that it relied upon substantial, probative and credible testimony of Manager of Construction McNally which establishes that the Claimant committed serious violations of Carrier Rules. The Carrier further contends that significant portions of McNally's testimony are corroborated by the testimony of Mr. Earl W. Harris, Sr. the Project Engineer. The Carrier does not contend that the Claimant was under the influence of alcohol, and has, in fact, stipulated that that contention is not before this Board. However, the Carrier does contend that the Claimant engaged in abusive and profane language, that he threatened the Manager of Construction, that he engaged in a physical altercation with Mr. McNally, and that he caused damage to a Company vehicle while he was being transported to a hospital to take a blood test which he subsequently refused to undergo.

The Carrier discounts the testimony offered by the Claimant's witnesses, as the Carrier contends that none of those witnesses, most of whom were inside of the bus, were in a position to determine what took place inside the office where the physical altercation occurred. The Carrier also contends that the Claimant's witnesses, by the Claimant's own admission, had "an axe to grind" with Manager of

Construction McNally. Thus, the Carrier contends that the testimony of the Claimant's witnesses is suspect as it would be motivated by negative considerations.

The Carrier also contends that it has the right to determine credibility in disciplinary investigations. The Carrier argues that it acted properly when it credited the testimony of Mr. McNally and discredited the testimony of the Claimant. Accordingly, the Carrier contends that this Board should find that it acted properly when it disciplined the Claimant for serious infractions of its Rules. The Carrier also points out that the Claimant can seek no more than restoration for approximately one hundred and thirty-four days that he was out of service as any time out of service beyond that date was due to the Claimant's "defiant refusal" to accept the leniency reinstatement.

In conclusion, the Carrier requests that the claim be denied.

Position of the Organization

The Organization initially contends that the entire incident was senseless and was caused by Manager of Construction McNally's abuse of discretion and of the Claimant. The Organization contends that the evidence of

record establishes that Supervisor McNally antagonized, harrassed, and demoralized the employees involved, particularly the Claimant. The Organization relies upon the colloquy between its representative at the investigation and the Carrier's Project Engineer wherein the Project Engineer testified that had Mr. McNally "kept his mouth shut" that there would have been no incident.

The Organization contends that Manager of Construction McNally was particularly out to get the Claimant and that he had engaged in a purposeful program of harrassment of the Claimant. In support of this contention, the Claimant and the Organization point to the fact that on the day prior to the incident which gave rise to the Claimant's discipline that he, the Claimant, was cited by McNally for failing to wear safety glasses with his hard hat while he was engaged in activities in a heavy rain storm. The Organization and the Claimant contend that this incident proves clearly that the Claimant was being harrassed by McNally.

The Organization also contends that the Claimant's version of the facts should be believed as his version is supported by the testimony of some nine fellow employees all of whom also testified that the Claimant was the recipient of discipline when there is not showing that he committed any infractions. They also testified that he was rational

throughout the entire incident.

The Organization also contends that the testimony by Manager of Construction McNally that the Claimant attempted to strangle him while he was driving him to a local hospital for a blood test is absolutely incredible. The Organization contends that the facts surrounding the ride to the hospital are not supported by any reasonable interpretation of what rational people would be expected to do if they were under such an attack.

The Organization relies upon several awards of Boards of Adjustment which establish that an employee may respond where he is being provoked and/or harrassed by supervision, and that such a response will not justify the imposition of discipline.

Accordingly, the Organization requests that the Claimant be restored to service, that his record be cleared of any of the charged infractions, and that he be fully compensated for all time lost and for all benefits relinquished.

Findings and Opinion

Let us first address the question of the Claimant's declination of the Carrier's offers for a leniency reinstatement. First, we draw no negative inferences from the Claimant's declination of the offers for a leniency reinstatement. Clearly, the Claimant had the right to decline such a reinstatement without fear of any retribution from the Carrier or this Board. However, we find the Claimant's and the Organization's contention that the Claimant did not understand that he could accept the leniency reinstatement and still challenge the propriety of the Carrier's imposition of discipline without merit. The Claimant presented himself at the investigation, through his correspondence with the Carrier, and before this Board as a reasonably intelligent and articulate young man. There is no indication in either letter offering the Claimant a leniency reinstatement that he would have to waive his right to further prosecute his claim that he had been improperly disciplined. In these circumstances, we find that no "confusion" existed as the Organization has claimed regarding the leniency reinstatement offer. In this Board's view the Claimant clearly understood that he could accept the leniency reinstatement and continue to appeal what he viewed as an improper disciplinary suspension. Therefore,

this Board will only determine whether the Claimant was improperly held out of service for the approximately one hundred and thirty-four days which he would have served had he accepted the last offer of a leniency reinstatement.

Secondly, this Board will not consider any testimony or contentions in the record regarding the Claimant's allegedly being "under the influence". The Carrier has dropped this contention and this Board finds no basis for viewing the facts in this case from any such perspective.

The events which transpired on September 23, 1982, although they appear to be somewhat complex, essentially boil down to a fairly simple case. The Claimant was not really late for the bus. In fact, the bus was not leaving the camp site without the Claimant. The Claimant was understandably upset when he saw the bus pulling away and he yelled in what was apparently a loud and demanding voice that the bus stop. At this point in time Manager of Construction McNally made what might be considered a snide or antagonizing comment to the Claimant that had he not been late then he would have been on the bus with the other employees. In this Board's view that statement was not sufficiently provocative for the Claimant to have responded and told Manager of Construction McNally to "kiss my a--" or to "suck my d---". There is substantial and sufficient cre-

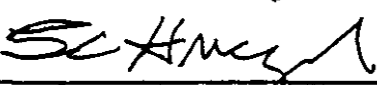
dible evidence in the record to support the Carrier's determination that those were the comments which the Claimant directed at Mr. McNally. The Carrier's Project Engineer heard some of this profanity directed at McNally and the Carrier's Equipment Manager also heard comments of this vulgar and profane nature directed at McNally. This Board cannot consider those remarks as merely "shop talk". They were abusive, antagonistic, profane and quarrelsome. In fact, those words inspired and instigated the quarrel.

The record also reflects that the Claimant was not invited to follow Supervisor McNally into the office. McNally did not direct him into the office nor did he take him by the arm and lead him into the office. McNally threatened to take the Claimant out of service and the Claimant, obviously in a fit of pique, followed McNally into the office. Although the Organization has attempted to categorize what went on inside the office as an accidental bumping into a chair and/or a desk, the more persuasive evidence of record indicates that the Claimant kicked the chair and grabbed or pushed the Manager of Construction. This Board needs to go no further in determining what went on subsequent to those events. The use of profanity and the laying of hands on a supervisor certainly justified the Carrier's imposing discipline.

There is no showing in the record that the discipline was not commensurate with the offenses committed. The Carrier had the right to credit the testimony of eye witnesses and to believe the testimony of its Manager of Construction.

In these circumstances we will deny the claim.

AWARD: The claim is denied. The Claimant shall be reinstated without back pay, without benefits but with seniority unimpaired.



L. C. Hriczak,
Carrier Member



W. E. LaRue,
Organization Member



Richard R. Kasher
Chairman and Neutral Member

August 3, 1985
Philadelphia, PA