

SPECIAL BOARD OF ADJUSTMENT NO. 1081

Case No. 7
Award No. 7

PARTIES TO DISPUTE:

TRANSPORT WORKERS UNION OF AMERICA
RAILROAD DIVISION

-and-

PORT AUTHORITY TRANS-HUDSON CORPORATION

STATEMENT OF CLAIM:

Claim of Trackman Tony Richey for reinstatement to service.

FINDINGS:

This Board upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Board has jurisdiction over the dispute involved herein.

On February 10, 1995, the Claimant was working as flat man on Flat 27, a work train. The flat man provides crews working on a work flat train with necessary tools, equipment and safety supplies. Employee Astagne Avril was also working on Flat 27 as a Trackman.

The crew was engaged in breaking up concrete on February 10, 1995. Astagne Avril asked the Claimant if he had any ear plugs on the flat. When the Claimant responded that he did not have ear plugs, Mr. Avril became somewhat irate and accused him of not doing his job properly. The Claimant came down off the flat and he and Trackman Avril engaged in an argument. Foreman Woodrow Osbia intervened and told them both to get back to work whereupon the Claimant returned to the flat car.

Trackman Avril climbed on the flat and looked in the cabinet for ear plugs but did not find any. When Mr. Avril was leaving the flat, the Claimant asked him to stow the items he had removed from the cabinet while looking for ear plugs. These items were

strewn about the flat car. Mr. Avril refused to return the items and Foreman Osbia eventually stowed them in the cabinet.

After the Claimant returned to the flat car, Mr. Avril continued to complain about the lack of ear plugs loud enough for the work train crew, including the Claimant, to hear. Foreman Osbia heard Mr. Avril make a comment about the Claimant's mother. Following this comment, the Claimant came down from the flat and struck Mr. Avril twice in the face. Mr. Avril claimed he then grabbed the Claimant to protect himself. Trackman Avril was out of service for approximately three (3) weeks as a result of this incident.

The Claimant was removed from service on February 10, 1995, and notified to attend a hearing on March 6, 1995, for his reputed violation of Rule 7 of the PATH Book of Rules. Rule 7 prohibits employees from committing violent, disruptive or reckless acts. On March 22, 1995, the Claimant was dismissed from service. The Organization appealed the Claimant's termination. Following a hearing on April 6, 1995, the Carrier upheld the charge against the Claimant as well as his termination. The case was subsequently appealed to this Board for adjudication.

The Organization argues that the Claimant was not afforded a fair and impartial hearing on March 6, 1995, but this Board must respectfully disagree. He was given the opportunity to present evidence on his behalf as well as to examine the witnesses who testified at his hearing. The hearing officer also gave him wide latitude to make a statement in his own behalf. In this Board's opinion, the Claimant's hearing was full, fair and impartial.

That the Claimant's assault of Trackman Avril on February 10, 1995, violated Rule 7 of PATH's Book of Rules cannot be gainsaid. Nevertheless, several mitigating circumstances compel this Board to conclude that his termination was excessive. For instance, Trackman Avril provoked the dispute by complaining to the Claimant about the lack of ear plugs. However, ear plugs are considered personal protective equipment and the flat man is not responsible for providing them. Moreover, Mr. Avril admitted that he became a little irate when the Claimant told him he did not have any ear plugs. He continued to criticize the Claimant's work performance loud enough for the Claimant and other members of the work train crew to hear. Also, when the Claimant asked him to stow the items he had removed from the flat car while looking for ear plugs, Mr. Avril blatantly refused.

Trackman Avril also provoked the Claimant by making a comment about his mother. According to Foreman Osbia, he heard Mr. Avril make a comment to the Claimant about his mother and this was when the Claimant came down from the flat car and struck him. The Claimant considered the comment about his mother derogatory. It is noteworthy that Foreman Osbia was a

disinterested witness to the altercation between the Claimant and employee Avril.


It is also significant to note that at his March 6, 1995, hearing, the Claimant acknowledged his misconduct and openly apologized for it. Additionally, during his five (5) years of service with the Carrier, the Claimant has been given one written warning and a two one day suspensions. This is certainly not an onerous disciplinary record. Furthermore, although Trackman Avril was at least partly responsible for the altercation, he received no discipline.

Based on all the foregoing, this Board finds that the Claimant's termination was excessive and unreasonable. He must therefore be returned to service with his seniority unimpaired but without any back pay or benefits between February 10 and August 10, 1995. This Board considers such a suspension appropriate in the light of the severity of the Claimant's misconduct.

The Claimant is also directed to seek assistance from the Carrier's Employee Assistance Program for his physically abusive behavior and to demonstrate that he is fit to return to service with the Carrier. Before being returned to service, the Claimant must convince the Carrier that he is not a violent individual and that his return to service will not jeopardize his fellow employees. If the Claimant complies with these conditions, he shall be reinstated to his former position with his seniority unimpaired.

AWARD: Claim sustained to the extent indicated in the Findings.

Carrier is directed to make the within award effective on or before thirty (30) days from the date hereof.


Robert M. O'Brien, Neutral Member

Peter McMahon, Employee Member

Carmelo Gianino, Carrier Member

Dated: