

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 986

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
NATIONAL RAILROAD PASSENGER CORPORATION
(AMTRAK) - NORTHEAST CORRIDOR**

Case No. 204

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
that:

1. The dismissal of Track Inspector Foreman J. Moore for alleged violation of Carrier's 'Standards of Excellence' in that he claimed more time than worked on July 25, August 4, 1995, May 21, 30, June 13, July 5, November 30, December 26, October 10, 17, November 5, 7, 14, December 5, December 19, 1996, January 4, 16, March 20, 1997 and May 6 24, 1997, and failed to comply with Railroad Worker Protection Procedures as lone worker or submission of track inspection reports without proper inspection of entire designated territory on May 24, 1997, was arbitrary, capricious, without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File NEC-BMWE-SD-3880D).
2. The Claimant shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS:

Claimant was employed by the Carrier as a Track Inspector on the Philadelphia Subdivision with an assigned work week of Monday through Friday, 7:00 a.m. to 3:30 p.m.

On June 1, 1998, the Claimant was notified to appear for a formal hearing after the Carrier investigated the Claimant's time cards. The hearing was held on September 23,

1998, and the Claimant was found guilty of dishonesty when he claimed more time than he actually worked or was entitled to on his time cards for July 25, August 4, 1995, May 21, 30, June 13, July 5, November 30, December 26, October 10, 17, November 5, 7, 14, December 5, December 19, 1996, January 4, 16, March 20, and May 24, 1997. The Claimant also allegedly failed to comply with the Railroad Worker Protection Procedures as the lone worker by allegedly submitting track inspection reports without performing a proper inspection of the entire designated territory on May 24, 1997.

The Organization filed the instant claim on behalf of the Claimant contending that the Claimant followed the accepted practice of track inspectors of marking down one hour of overtime in exchange for a meal period and adding one hour of overtime when he had to complete paperwork after his tour of duty. In January of 1998, the track inspectors received notice from Track Supervisor Hammond to stop this practice and the Claimant then stopped charging overtime hours in exchange for meal periods and for completing paperwork. The Organization also argues that the Carrier did not afford the Claimant his rights when the Carrier refused Claimant's request to have a representative present when he was being interrogated by the Carrier's special agents and Carrier also allegedly denied Claimant's request to remove personal work diaries from his locker to have them to refer to during the interrogation.

The parties being unable to resolve the issue at hand, this matter now comes before this Board.

This Board has reviewed the procedural arguments raised by the Organization and we find that Carrier did not act properly during the investigation of the charges against the Claimant. The Carrier's action in failing to allow the Organization the ability to review the underlying documents upon which the charges were based, greatly hampered the Organization in its ability to represent the Claimant at the investigation. Therefore, because of those procedural violations, the claim must be sustained.

Rule 68 states that employees must not be suspended or dismissed from service without a fair and impartial hearing. Moreover, Rule 71(c) states that the Carrier must supply the Organization five days prior to the hearing with all documents that are to be used during the investigation. The major problem with the investigation in this case was that the Carrier failed to turn over to the Organization's representative the Inspector General's Reports which contained the underlying facts that were developed during the investigation of the Claimant which led to his eventual removal. Every time the Union representative requested to review the report which contained all of the information that was gathered during the lengthy investigation of the Claimant, the Carrier took the position that it was a "confidential report" and it would not be turned over to the Claimant or his representative. This wrongful action on the part of the Carrier was compounded by the fact that the Organization had already challenged the timeliness of the issuance of the charges of the Claimant and the Carrier's defense was that it only received the Inspector General's Report on May 20, 1998. The Carrier produced the cover sheet of that

Inspector General's Report to show that date stamped on the cover. However, no other portion of that Inspector General's Report was produced for the Union.

It is fundamental that although the Carrier holds these investigatory hearings utilizing its own staff as a hearing officer, these investigations must be fair and impartial. It is clear from a thorough reading of the transcript that the hearing officer had some question in his mind as to whether or not it was fair to proceed without the Carrier turning over the Inspector General's Report. As a matter of fact, on page 11 of the transcript when the Union requested the documentation to be made a part of the record as exhibits, the hearing officer indicates, "I think that would make a lot of sense". However, when the Inspector General's Report became an issue, the Carrier continued to take the position that it was a confidential report and it would not be turned over. The hearing officer stated, "...I don't know where else you're going to go with this Mr. Manning [the Union representative], they [the Carrier] are not going to give up the report. You have got it in the record. I suggest we move on..."

This Board finds that the Organization properly objected on numerous occasions to the clear procedural violations by the Carrier and its refusal to comply with the requirements of Rule 68 and Rule 71. We find that the hearing officer wrongfully did not order the Carrier to turn over the Inspector General's Report, even if the Carrier had to partially redact it before giving it to the Organization. This Board finds that as a result of that, the Union was greatly hampered in its ability to defend the case being brought

against the Claimant. Consequently, when the Claimant was found guilty of the charges and he was dismissed, it was all based on a hearing that did provide for the required due process guarantees set forth in the Agreement.

When this Board is faced with a record that contains such serious procedural violations, we have no choice but to sustain the claim. Although there may be evidence in the record that supports the Carrier's charges against the Claimant that he was claiming hours of pay from Amtrak when he was in fact working for another company, this Board cannot even reach the substantive issue because of the failure of the hearing officer to provide a fair due process hearing for the Claimant.

For the procedural reasons set forth above, this case must be sustained. This Board orders that the Claimant be reinstated with full backpay and other benefits restored.

AWARD:

Claim sustained. The Claimant shall be reinstated with full backpay.


 PETER R. MEYERS
 Neutral Member


 CARRIER MEMBER

DATED: 8/24/99


 ORGANIZATION MEMBER

DATED: 8/24/99

SPECIAL BOARD OF ADJUSTMENT NO. 986
CARRIER MEMBER'S DISSENT TO AWARD NO. 204

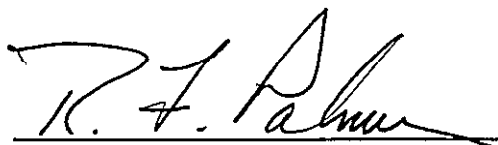
The majority opinion, that Amtrak violated Rules 68 and 71, by failing to furnish a copy of the Inspector General's Report, was in error.

As indicated in the record, Amtrak did not intend to use the report itself as evidence in the investigation and therefore, there was no requirement to provide a copy to the employees in advance of the investigation. Under these circumstances, there was no violation of Rule 71.

Furthermore, as set forth in the correspondence exchanged on the property and outlined in Amtrak's presentation to the Board, the reason the report in question was not used as evidence was due to the fact that it contained confidential information and references to investigations involving other employees that were not germane to the instant case. All evidence referred to in that report involving this case was provided to the employees in advance, as required by Rule 71 and, presented as exhibits at the investigation or related through testimony of the witnesses, including testimony and evidence regarding claimant's explanations for his actions. As the report's reference to this case was merely a summary of the information presented at the investigation and a conclusion drawn from that information, there was no need to present that document. In fact, had the report been used as evidence, the employee's would have argued that it constituted prejudgement and tainted the hearing officer's opinion.

The absence of that report had no impact on the employees' ability to prepare and present their defense and therefore, should not have been viewed as a fatal flaw. The record contained substantial evidence of claimant's dishonesty, as well as his admission to violation of FRA regulations. The facts should not have been ignored.

For this reason, we respectfully dissent to the majority opinion in this case.

A handwritten signature in dark ink, appearing to read "R. F. Palmer", written over a horizontal line.

R. F. Palmer - Carrier Member