

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 928

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

and

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

)
) Case No. 349
)
) Award No. 349
)

Martin H. Malin, Chairman & Neutral Member
M. B. Kanny, Employee Member
L. C. Hricak, Carrier Member

Hearing Date: January 18, 2002

STATEMENT OF CLAIM:

Claim of Amtrak Passenger Engineer Hector Durazo for the rescinding of the discipline imposed of "[T]ermination from service effective immediately" as stated in the decision letter of May 15, 2001 under the signature of Assistant General Manager Southwest Chief - Gregg Konstanzer, and restoration to service with full seniority and vacation rights unimpaired, with full compensation for time lost, full credit toward vacation entitlement and health and welfare benefits during the period held out of work, and clearing Claimant's personal record as to any reference to the alleged violation.

FINDINGS:

Special Board of Adjustment No. 928, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On January 26, 2001, Claimant was directed to report for an investigation on February 1, 2001. The notice, as revised January 29, 2001, charged Claimant with violating Amtrak Standards of Excellence, Safety, Discrimination, Attending to Duties and Professional and Personal Conduct, in that it was alleged that he became involved in an altercation with fellow employee Kenneth Galusha on January 24, 2001, resulting in Mr. Galusha sustaining a personal

injury, delays to Trains 4 and 3, and impeding the safe operation of Train 4. The hearing was postponed four times and begun on May 8, 2001. It concluded on May 9, 2001. During the investigation, Carrier withdrew the allegation that Claimant's conduct caused the delay to Train 3. On May 15, 2001, Carrier advised Claimant that he had been found guilty of the charges and had been dismissed from service.

The Organization has raised several procedural arguments. We have considered them carefully and concluded that they do not provide a basis for overturning the discipline. Accordingly, we will resolve this matter on the merits.

A number of facts are not in dispute. On January 23, 2001, Claimant was assigned to operate Train No. 4 in the second engineer position. Claimant was not qualified on the territory. Mr. Galusha was assigned in the first engineer position. Mr. Galusha was operating the train. At approximately Milepost 609, Mr. Galusha asked Claimant to operate the train and Claimant refused. An incident occurred between Claimant and Mr. Galusha. At 1:25 a.m., near Goffs, California, Mr. Galusha radioed the conductor asking him to have the police meet the train at the Needles, California stop. At Needles, the police attempted to dissuade Mr. Galusha from pressing charges but Mr. Galusha insisted on a citizen's arrest of Claimant for allegedly striking Mr. Galusha in the ribs. Claimant then insisted on a citizen's arrest of Mr. Galusha for allegedly threatening him. Both employees were arrested, processed and released. Meanwhile, Train No. 4 was delayed at Needles until Train No. 3 arrived so that one of the engineers from Train No. 3 could operate Train No. 4. Claimant and Mr. Galusha were informed by the Conductor that they had been removed from service. Claimant rode Train No. 3 back to Los Angeles. Mr. Galusha rode Train No. 4 to Kingman, Arizona, where he was treated at the hospital and released.

Claimant and Mr. Galusha gave conflicting accounts of the incident. Claimant maintained that Mr. Galusha was smoking constantly in violation of Carrier policy, that Mr. Galusha refused Claimant's requests that he take a break from smoking, that the cab was filled with tobacco smoke and that Claimant became ill. Claimant told Mr. Galusha that he was feeling ill and would not operate the train. According to Claimant, Mr. Galusha cursed him and threatened "to kick your fucking ass," to which Claimant responded, "You try it you fucking asshole," after which Mr. Galusha radioed the Conductor to call the police.

Mr. Galusha maintained that he asked Claimant to relieve him. Claimant refused. Mr. Galusha said, "Okay. That figures," after which, Claimant approached Mr. Galusha cursing and telling Mr. Galusha to fight. Mr. Galusha maintained that he told Claimant he did not want to fight as he had a train to operate and Claimant punched him in the ribs on his left side, causing him considerable pain. Mr. Galusha then radioed the Conductor to call the police and concentrated on bringing the train safely into Needles.

The conflicting evidence was not limited to the statements and testimony of the two protagonists. The Conductor testified that he could not see any mark on Mr. Galusha's body. The speed tape reflected no unusual handling of the train. One of the two Deputy Sheriffs who responded to Needles testified that he observed a raised redness on Mr. Galusha's body which he

termed a welt, but was unable to say that the mark was consistent with a blow.

On the other hand, the medical records from the hospital in Kingman indicated that Mr. Galusha was treated for bruised ribs. Furthermore, as the Hearing Officer observed in his decision, Mr. Galusha immediately radioed the Conductor to summon police and at Needles he was insistent on processing a citizen's arrest for battery of Claimant even though the responding officers explained to him that it was likely Claimant would also seek a citizen's arrest against him and the matter could endanger his job. It is unlikely that Mr. Galusha would have behaved as he did had he not been struck.

This case thus presents a classic situation where an appellate body should defer to the findings of fact made on the property. The hearing officer observed the witnesses and was in the best position to resolve the conflicts in the evidence. The hearing officer's reasoning concerning the likelihood that Mr. Galusha would have reacted as he did had he not been struck is logical and persuasive. Accordingly, we conclude that Carrier proved the charges against Claimant by substantial evidence.

We turn to the penalty imposed. We note that Claimant was initially hired by the Santa Fe Railroad on December 29, 1971, as a coach cleaner/fuel laborer, established Fireman's seniority on July 25, 1974, transferred his engine service seniority as a Fireman to Carrier with Carrier's takeover of service in Zone 12 in the Western Region on November 5, 1986, and established his Passenger Engineer's seniority with Carrier on May 29, 1992. Prior to the incident in question, Claimant's record was exemplary.

Nevertheless, striking a fellow engineer while he is operating a train at a high rate of speed is an extremely serious offense. Under most circumstances Claimant's length of service and outstanding prior record standing alone would not mitigate against the seriousness of the offense. This case, however, is atypical. The Board is troubled by the disparate treatment Carrier afforded Claimant and Mr. Galusha.

In a separate investigation, the same Hearing Officer exonerated Mr. Galusha of all charges against him. He found that there was insufficient evidence and a lack of corroborative testimony to support the charges. He further found that it was reasonable to believe that Mr. Galusha's injury was caused by a blow from Claimant and that Mr. Galusha could not be held accountable for circumstances that were beyond his control and that testimony relative to allegations of discriminatory remarks was inconsistent, vague and ambiguous.

It appears that the Hearing Officer believed that he was required to credit Claimant's version of the events in its entirety or credit Mr. Galusha's version in its entirety. We see no evidence that the Hearing Officer considered the possibility that Claimant struck Mr. Galusha after being provoked by Mr. Galusha. That is, it certainly is reasonable that Claimant's testimony concerning Mr. Galusha's cursing and threats was accurate but Claimant's denial of striking Mr. Galusha was not. Indeed, even if one credits Mr. Galusha's testimony, one has to find that Mr. Galusha behaved in at least a mildly provocative manner when he commented, "It

figures," in response to Claimant's refusal to operate the train. Moreover, the same reasoning employed by the Hearing Officer to conclude that Claimant struck Mr. Galusha, also leads to the conclusion that Mr. Galusha cursed and threatened Claimant. That is, just as it is very unlikely that Mr. Galusha would have asked for the police to be called and would have been so insistent that Claimant be arrested had he not been struck, we find no evidence that would make it likely that Claimant would have struck Mr. Galusha without any significant provocation.

We are unable to uphold Claimant's dismissal in light of the absence of any discipline assessed against Mr. Galusha. We find this case strikingly similar to NRAB, First Division Award No. 23496. In that case, an engineer and a brakeman exchanged words twice during the day. Later, the engineer confronted the brakeman while he was coupling air hoses and struck the brakeman. Claimant was dismissed from service but the brakeman was not disciplined. The Board overturned Claimant's dismissal. It found sufficient evidence to implicate the brakeman as being partially responsible for the incident and held that the claimant could not be singled out as the sole cause of the ensuing altercation. Noting that the claimant had more than eight years of service, during which time he had been assessed a total of only 90 demerits, that the brakeman was not injured seriously, and that the claimant had not been found guilty of any prior assaults, the Board reduced the claimant's dismissal to a 60 day suspension and ordered the carrier to compensate claimant for time out of service in excess of 60 days.

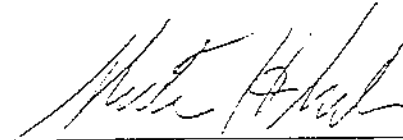
Comparing the instant case with Award No. 23496, we find that Claimant's tenure is much longer and his record far superior. However, Claimant's offense, striking a fellow engineer while he was operating a passenger train at a high rate of speed, is much more serious. Nevertheless, as in Award No. 23496, we can find no reasonable basis for Claimant's dismissal in light of the absence of any discipline assessed Mr. Galusha. Carrier's determination that Claimant was the sole cause of the incident is not supported by substantial evidence. Therefore, we shall order that Claimant's dismissal be reduced to a lengthy suspension equal to time held out of service. Claimant is to be reinstated to service with seniority unimpaired but without compensation for time held out of service. Claimant's reinstatement shall be on a last chance basis. Any future violation of Carrier's rules or Standards of Excellence, upon being established in a proper investigation, shall be cause for Claimant's permanent dismissal.

AWARD

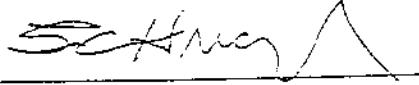
Claim sustained in accordance with the Findings.

ORDER

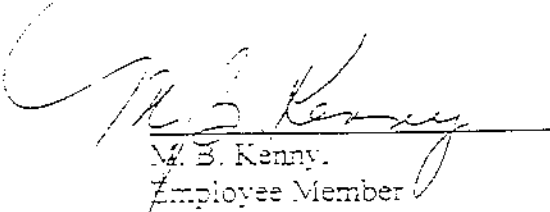
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



L. C. Hriczak,
Carrier Member



M. B. Kenny,
Employee Member

Dated at Chicago, Illinois, May 23, 2002.