

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 928

BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
and) Case No. 430
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)) Award No. 430

Martin H. Malin, Chairman & Neutral Member
M. B. Kenny, Employee Member
I. C. Hriczak, Carrier Member

Hearing Date: December 12, 2003

STATEMENT OF CLAIM:

Claim of Amtrak Passenger Engineer M. Lombardi (Claimant) for the rescinding of the discipline imposed of "immediate dismissal in all capacities from Amtrak" as stated in the decision letter dated July 11, 2003, under the signature of General Superintendent-Mid-Atlantic Division D. K. Pesce, and with restoration to service with full seniority and vacation rights unimpaired, with full compensation for time lost, full credit toward vacation entitlement, health and welfare benefits during the period held out of work, and clearing of Claimant's personal record of any reference relative 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 June 18, 2003, Claimant was directed to report for an investigation on June 23, 2003. The notice charged Claimant with violating NORAC Rules 4, 711(3) and 502. It specified that on June 16, 2003, while operating Train 190, Claimant allegedly overshot Aberdeen Station, made a reverse move back into the station without conducting a job briefing, without receiving a signal indication and without receiving permission to reenter a block in Rule 261 territory. The parties arrived for the hearing as scheduled but, as discussed below, the hearing was postponed to July 2, 2003. On July 11, 2003, Carrier advised Claimant that she had been found guilty of the charges and dismissed from service.

Rule 21(e)(1) of the Agreement provides, "The investigation must be scheduled to begin within seven (7) days from the date the Passenger Engineer received notice of the investigation." There is no dispute that commencing the investigation on June 23, 2003, would comply with the Rule. The Organization maintains, however, that when the parties arrived for the investigation, the Charging Officer stated that none of Carrier's witnesses were available and requested a postponement. The Organization further argues that when the hearing convened on July 2, 2003, the witnesses testified that they had not been contacted with respect to the June 23 hearing date. Thus, in the Organization's view, the investigation did not begin in earnest until July 2, 2003, outside the time limits of Rule 21(e)(1).

Carrier maintains that it complied with Rule 21(e)(1) by convening the hearing on June 23, 2003. Carrier further contends that if it violated the time limits, there was no prejudice to Claimant's ability to present a defense and that the brief postponement is not grounds for overturning the discipline. At most, in Carrier's view, Claimant is entitled to compensation for time held out of service between June 23 and July 2.

The transcript of the proceedings makes clear that the Charging Officer appeared on June 23, 2003, for the sole purpose of requesting a postponement. Moreover, at the July 2, 2003, hearing, the Charging Officer from the June 23 proceeding conceded in his testimony that "the Company didn't make proper arrangements to have the witnesses here in Washington at 10:00 a.m. on June the 23rd."¹ The witnesses testified that they were unaware of the June 23rd hearing. Thus, we agree with the Organization that the investigation did not begin in earnest until July 2, 2003. The pro forma opening of the hearing on June 23rd for the sole purpose of requesting a postponement did not comply with Rule 21(e)(1).

On June 23, 2003, the Charging Officer requested Claimant's representative and the UTU representative for the Conductor to agree to a postponement. The UTU representative replied:

I'm going to object to any postponement because we showed up here on time this morning prepared to go to trial, and Ms. Kirkland, the Conductor, is out of service and is losing money. Any my request would be if we could find somebody that if they have to postpone the trial that she be marked up until the new trial date since you can't give us a date.

The Charging Officer responded, "Alright. So noted."

Claimant's representative stated:

We go along the same lines as far as Ms. Lombardi's held out of service, and right now

¹On July 2, 2003, there was a different Charging Officer and the Charging Officer from the June 23rd hearing was called as a witness.

we have an undetermined amount of time that she's going to be held out waiting for a rescheduling.

Thus, both Claimant's representative and the UTU did not object to postponement per se, but rather objected to the employees being held out of service pending rescheduling. A reasonable person in the position of the Charging Officer would interpret their responses as indicating that there would be no objection to the postponement if the employees were paid for the time between June 23 and the new hearing date. Indeed, the Charging Officer did not reject that option – he merely indicated that the request that the employees be permitted to mark up was noted.

On June 28, 2003, the Organization sent a letter to Carrier protesting the violation and asserted for the first time that due to violation of Rule 21(e)(1), no discipline be assessed. However, June 28 was after the seven day period in Rule 21(e)(1) had expired. Had the Organization objected at the June 23 proceeding that the hearing be held within the seven day period, Carrier would have had an opportunity to react accordingly. Carrier might have attempted to contact the witnesses on June 23 or to reschedule the hearing by June 25. Instead, the Organization's sole protest at the June 23 hearing was to Claimant's continuing to be held out of service pending the new hearing date. Thus, Carrier could have reasonably concluded that its maximum liability for delay in the hearing would be to compensate Claimant for time held out of service between June 23 and the new hearing date.

In Case No. 235, Award No. 235, the Organization contended that discipline be set aside because the hearing was untimely. When the hearing, which was conducted by Conrail because the incident under investigation had occurred on Conrail property, began, no Amtrak officer was available to serve as co-conducting officer. The hearing was postponed until an Amtrak co-conducting hearing officer was available. We rejected the Organization's timeliness argument, stating, "[N]ot only did the Organization and Claimant fail to object at the hearing, they affirmatively agreed to postponement of the hearing to March 25, 1996."

In the instant case, the Organization and the UTU did object to postponement but only because Claimant and the Conductor were being withheld from service. They did not demand that the hearing be rescheduled within the time limits of their respective Agreement Rules. Their sole request was that Claimant and the Conductor be returned to service while a new hearing date was set. Under these circumstances, the remedy for Carrier's violation of Rule 21(e)(1) must be limited to an order that Carrier compensate Claimant for time held out of service from June 23, 2003 through July 2, 2003.

Turning to the merits, there is no dispute that Claimant overshot Aberdeen station. There also is no dispute that Claimant failed to hold a job briefing with the Conductor prior to making the reverse move. What is in dispute is whether, when Claimant overshot Aberdeen, she cleared the 651 Signal, thereby entering a new block. Under such circumstances, Claimant could not back up into the station without first obtaining permission from the Dispatcher. Claimant and the Conductor both maintained that the rear of the train had not cleared the 651 Signal and that,

accordingly, they operated in accordance with NORAC Rules by flagging the train back into the station.

Train 180 was following Claimant's train into Aberdeen. The evidence showed that Signal 672 for Train 180 automatically changed from approach to stop and proceed. The evidence further indicated that by backing up into the block that encompassed Aberdeen Station, Claimant would have triggered the automatic signal given to Train 180.

Evidence also indicated that it was 1002 feet from the north end of Aberdeen Station to the Signal 671 bridge and that Claimant backed up 1,385 feet to a point where two cars were in the station to allow passengers to board. This evidence indicated that Claimant's entire train had left the block encompassing Aberdeen station before she backed up to the station.

The Organization attacked the reliability of the Record of Train Movement and the download from the event recorder, on which much of Carrier's case was based. The Organization also offered an alternative explanation for the signal dropping in front of Train 180 and urged that Claimant and the Conductor were credible witnesses. However, it was for the Hearing Officer in the first instance to evaluate and weigh the conflicting testimony. The Hearing Officer did so and concluded that Carrier had proven the charges. Our sole basis for review is to determine whether a reasonable person in the position of the hearing officer could reach that conclusion.

After careful review of the record, we find that a reasonable adjudicator could credit the evidence that Claimant had left the block before she backed up and could reject the alternative explanation for the automatic change of Signal 672. Accordingly, we hold that Carrier proved the charges by substantial evidence.

We now turn to the penalty assessed. This was Claimant's second major operating rule violation in a seven month period. In November 2002, Claimant received a thirty-day certification revocation for passing a stop signal without authorization. Under these circumstances, we cannot say that the penalty of dismissal was arbitrary, capricious or excessive.

In summary, Claimant's dismissal shall stand. However, Carrier shall compensate Claimant for time held out of service from June 23, 2003, through July 2, 2003.

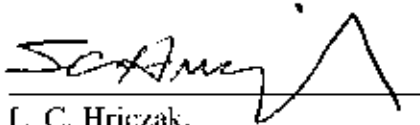
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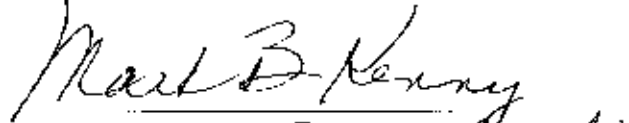
Claim sustained in accordance with the Findings.

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, *Dissent Attached*
Employee Member

Dated at Chicago, Illinois, February 25, 2004.

NATIONAL MEDIATION BOARD

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ORGANIZATION MEMBER'S DISSENT

Carrier's conduct in this case displayed nothing less than an egregious disregard, if not an utter disdain, for the collective bargaining agreement's time limit provision governing convening a formal investigation. When the investigation was convened on June 23, 2003, no Carrier witnesses were present and Carrier was granted a postponement over the strenuous objection of Claimant's representative. The record establishes, beyond refutation, that the Charging Officer at that proceeding falsely stated that the witnesses "said they couldn't be here and that was some of the witnesses; the others I have not heard from or seen today." Carrier's Division Manager of Labor Relations compounded this outrage by claiming, in a July 23, 2003 letter, that a "misunderstanding" had occurred, the result of which was that the absent witnesses "were on hand in Philadelphia," rather than Washington, where the investigation was held. This claim was similarly proven false when each and every Carrier witness who attended the reconvened proceeding on July 2, 2003, testified that he was never notified to attend a formal investigation on June 23, 2003, involving Claimant at any location.

To add insult to injury, Carrier argued before this Board, first, that the agreement was not violated because the record was opened on June 23, 2003 — a date within the time limit prescribed by Rule 21(e)(1) — and, in the alternative, that Claimant suffered no harm if the Board determined that Carrier, indeed, had violated the rule.¹ The majority has correctly found that the “*pro forma* opening of the hearing on June 23rd for the sole purpose of requesting a postponement did not comply with Rule 21(e)(1),” a holding with which I most heartily concur. At that point, the Board’s review of the matter should have ceased and a sustaining award issued on procedural grounds.

However, the majority failed to confront Carrier’s alternative “lack of harm” argument directly. As to this contention, it should initially be noted that the Hearing Officer’s July 11, 2003 Decision Letter never addressed the objection made by Claimant’s representative to the unilateral postponement of the investigation and the violation of Rule 21(e)(1). Furthermore, this issue also was ignored by Carrier’s highest designated official in his denial of the appeal filed on Claimant’s behalf. Nonetheless, a purported “lack of harm” is irrelevant, as we pointed out in our submission and also because, as Fourth Division Referee McAllister noted, “the time limit provisions are not intended to come into play only upon a showing of prejudice or being placed in a disadvantageous position. Rather, compliance with time limit requirements are mandatory for both parties.” NRAB 4-4592, citing NRA 3-18335, NRAB 3-19666 and NRAB 3-21966.

¹Carrier even waffled on this alternative argument, positing that, in the majority’s words, “[a]t most, in the Carrier’s view, Claimant is entitled to compensation for time held out of service between June 23 and July 7.” Ante at p. 2.

Instead of sustaining the claim on the basis of manifest, reversible procedural error and without conducting a review of the merits, as prescribed by a legion of arbitral precedent, the majority seized upon the qualification to Carrier's alternative argument as a "remedy" for what the majority has conceded was a violation of Rule 21(e)(1). Unfortunately, however, the Board's rationale in disposing of this admitted and blatant agreement violation fails to withstand scrutiny.

The majority claims that "both Claimant's representative and the UTU did not object to postponement *per se*, but rather objected to the employees being held out of service pending rescheduling" and that "the Organization and the UTU did object to postponement but only because Claimant and the Conductor were being withheld from service." Ante at p. 3. However, this assertion is belied by the majority's quotation from the UTU representative's statement that "I'm going to object to any postponement *because we showed up here on time this morning ... and Ms. Kirkland, the Conductor, is out of service,*" a statement with which Claimant's representative concurred. Id., at p. 2 (emphasis added). The quoted objection, taken as a whole, cannot be read as anything other than an objection *per se* to any postponement, to which a further qualification — the out-of-service status of the crew — was added.

The majority sidesteps this difficulty by stating that "[a] reasonable person in the position of the Charging Officer would interpret their responses as indicating that there would be no objection to the postponement if the employees were paid for the time between June 23 and the new hearing date. Indeed, the Charging Officer did not reject that option — he merely indicated that the request

that the employees be permitted to mark up was noted.”²² *Id.*, at p. 3. The majority’s venture into the mind of the Hearing Officer is not only highly irregular and improper, it is problematic, because neither the Hearing Officer nor Carrier’s highest designated officer bothered to take the time or trouble to address the objection in their findings. *See* p. 7, *supra*.

Compounding their error, the majority moves on to state that

“On June 28, 2003, the Organization sent a letter to Carrier protesting the violation and asserted for the first time that due to violation of Rule 21(c)(1), no discipline be assessed. However, June 28 was after the seven day period in Rule 21(e)(1) had expired. Had the Organization objected at the June 23 proceeding that the hearing be held within the seven day period, Carrier would have had an opportunity to react accordingly. Carrier might have attempted to contact the witnesses on June 23 or to reschedule the hearing by June 25.”

Ante at p. 3.

Not only did the Charging Officer on June 23rd state that he *had* attempted to contact the witnesses, a fact overlooked by the majority, the time limit requirement contained in Rule 21(e)(1) imposes an absolute duty upon Carrier, one which Carrier ignores at its sole peril. Nowhere in the text of the rule is this duty contingent upon any action by the accused employee and/or his representative, nor does the rule afford relief to Carrier as a result of any inaction by the accused employee and/or his representative. The majority exceeds its jurisdiction by essentially rewriting the rule to state that a time limit violation will be enforced against Carrier only if the Organization points out the potential violation prior to the expiration of the time limit and explicitly demands compliance.

²²We presume that the majority was referring to the Hearing Officer, rather than the Charging Officer, as it was the former who ultimately decided to recess the proceedings and who noted the objections for the record.

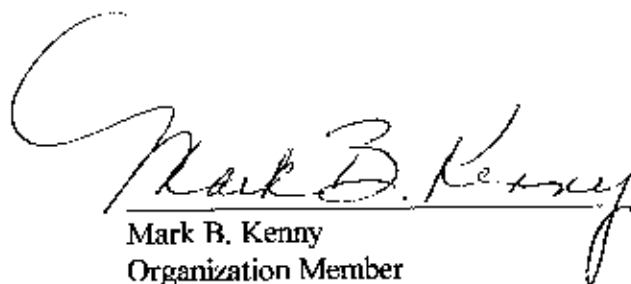
Under the tortured analysis provided by the majority here, Carrier is encouraged to schedule formal investigations to begin whenever it damn well pleases, and later argue that no violation was committed if the accused employee's representative did not file a written objection *prior to the expiration of the time limits* and demanding that the investigation date be advanced to within the required period. The majority has done nothing less today than to shift the burden of compliance with Rule 21(e)(1) from Carrier to the Organization.

Finally, the majority relies upon Award No. 235 of this Board in support of its holding. However, as the majority, itself, concedes, there was no objection at that investigation and "the Organization and Claimant ... affirmatively agreed to the postponement." *Id.* There simply is no basis in the record, even after improperly reading the Hearing Officer's mind, for a determination that the Hearing Officer concluded (a) that no objection had been made, or (b) that Claimant and her representative affirmatively agreed to the postponement.

The majority's outcome-driven holding gives aid and comfort to Carrier's ceaseless mantra that due process and Rule 21 safeguards are irrelevant when a potentially serious incident is under review, and is a most troubling development. It is a fact of life, and a reflection of the nature of their work, that Passenger Engineers typically are involved in more situations with a potential for serious or even tragic consequences than railroad workers in other crafts. To the extent that Carrier would argue that this is the reason Passenger Engineers "get the big money," I can only reply that this also explains why Passenger Engineers suffer far more serious disciplinary consequences, in the form of

lengthy suspensions and dismissals, at a significantly higher rate than their co-workers, not to mention the unique specter of revocation of certification.

Nevertheless, there is all the difference in the world between a system where the punishment fits the crime and one that affords different levels of due process protection based exclusively on the nature of one's employment. In none of the various American jurisprudence schemes – criminal, civil, regulatory or industrial – is due process afforded on the basis of such an arbitrary standard, and no scheme could rationally justify the existence of such an arbitrary standard. The majority has done grave injury to any reasonable notion of due process for Passenger Engineers and I am, therefore, compelled to respectfully dissent.



Mark B. Kenny
Organization Member

**SPECIAL BOARD OF ADJUSTMENT NO, 928
AWARD NO. 430 - CONCURRING OPINION**

The eleven (11) page vitriolic Dissent of the Organization Member of the Board to the decision in this case can not go unanswered. The Majority of this Board in rendering the decision in Award No. 430 was not dealing with any issue of first impression. It is understandable that when the merits of a case clearly establish an Appellant's guilt as here, the Organization must rely upon any procedural irregularity to obtain their desired outcome. However, where there is clear precedent of equal, if not greater weight, supporting the Board's decision than against it, then inflammatory invectives should be tempered.

It is well held that any procedural irregularities need to be materially prejudicial to a Claimant's substantive rights. Representative of the extensive line of awards that have so held is Third Division Award No. 23455 (Mikrut, Jr.), which cites *a priori* fourteen (14) other representative awards from the First, Second and Third Divisions of the National Railroad Adjustment Board.

Third Division Award No. 23455 (Mikrut, Jr.)

"Although Organization has alleged several procedural errors on the part of the Carrier in the handling of this matter, the Board is unable to ascertain any irregularity of a sufficiently serious nature which would have been materially prejudicial to claimant's substantive rights. (First Division Awards No. 15370, 16483, 17007, Second Division 4981, Third Division Awards 11170, 12243, 13,674, 14272, 15055, 16121, 16172, 16268, 20423 and 21228)"

In yet another of such awards in that line of awards, Second Division Award No. 9007 (Suntrup), the Referee cites *a priori* the Court of Appeals for the Fourth District which held that proceedings otherwise regularly held should not become a nullity because of the violation of a procedural provision of an Agreement.

Second Division Award No. 9007 (Suntrup)

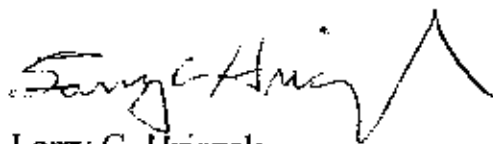
"Although the Board recognizes that procedural infractions against collective bargaining Agreements between parties and against the "usual manner" of handling cases of this nature, on appeal, as so stipulated by the Railway Labor Act, can be of such a grievous nature as to supercede any further consideration of the merits of the case, the Board also holds that this did not happen in this instance. The spirit of the collective bargaining Agreement between the parties was followed in a reasonable manner. And in this respect the Board cites the opinion of the Court of Appeals, Fourth District (No. 6723:-(210 F. (2d) 812) to the effect that:

“(t)he purpose of ... (any procedural provision of an Agreement) ... is to expedite the proceedings for which the rule provides, not to serve as a limitation upon their being held; and the remedy for violation of that provision is damages for any delay that may have occurred, not reinstatement with an unassailable record or damages for an indeterminate period on the theory that the proceedings otherwise regularly held were a nullity. Collective bargaining agreements like other contracts are to be given a reasonable construction, not one which results in injustice and absurdity.”

The breakdown in communications that occurred in the scheduling of the witnesses who were to testify to the merits of the incident under investigation resulted in that testimony occurring on July 2, 2003, rather than June 23, 2003, a delay of nine (9) days. Appellant and representative were present at the reconvened investigation on July 2, 2003, and afforded every right to present evidence and witnesses and to cross examine Carrier witnesses. Rule 21 and Appellant's due process safeguards were not found "irrelevant" by the Board as alleged in the Dissent but were given a reasonable construction consistent with well established precedent.

The Dissent in this case is a matter of the Organization Member's opinion to which he is entitled. However, that opinion is inconsistent with the well established precedent to the contrary as cited above. The Carrier Member believes that Award No. 430 is well reasoned and consistent with a long line of awards that have been similarly rendered.

I fully concur in Award No. 430 of this Board.



Larry C. Hriczak
Carrier Member