

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24880
Docket Number MS-25095

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Eathen R. Martin, An Individual
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(National Railroad Passenger Corporation

STATEMENT OF CLAIM:

"PLEASE BE ADVISED that this letter is to serve as notice of E. R. MARTIN, service attendant for AMTRAK, to file a grievance with the National Railroad Adjustment Board Division 3 and have the ex-parte decision of the FORMAL INVESTIGATION BOARD dated June 25, 1982 and the Denial of the Appeal to the Corporate Director of Labor Relations dated January 18, 1983 set aside and have this matter reset for hearing, or in the alternative reinstate E. R. MARTIN with back pay and attorney fees.

OPINION OF BOARD: The incident out of which this claim arose occurred on April 24, 1982 at Ogden, Utah. Claimant was an Amtrak train attendant. He completed his assigned run and proceeded to the Ramada Inn where he presented his room voucher to the desk clerk. Being informed that his voucher entitled him to a room which he would share with another train crew member, he requested a single non-smoking room. Advised by the clerk that there would be an extra cost for this type of accommodation, claimant became argumentative and stated he would sleep in the lobby if his request for a private room was not honored. He proceeded to remove sleeping materials from his luggage in the lobby in view of other hotel patrons creating a disturbance and subjecting the hotel to discredit and a loss of good will.

The hotel management notified the carrier of the incident whereupon the following notice dated May 24, 1982 was sent via certified mail to claimant's reported address:

"Mr. E. R. Martin
5329 South Harper
Chicago, IL 60615

Dear Mr. Martin:

You are hereby directed (sic) to appear for a formal investigation as indicated below.

CHARGE: Your alleged violation of Rules "I", "J" and "Y" of the Amtrak Rules of Conduct in that on April 24, 1982, you caused a disturbance in the lobby of the Ramada Inn Hotel in Ogden, Utah which brought discredit to the Company and loss of good will.

At this investigation you may produce witnesses as you so desire and you may be accompanied by a representative as provided in your current and governing agreement without expense to the National Railroad Passenger Corporation.

PLACE: Amtrak Commissary Building, 1500 South Lumber Street, Room 204,
Chicago, Illinois

"DATE: Thursday, June 3, 1982

TIME: 10:00 a.m."

The craft of class of employees including train attendants employed by Amtrak is represented for purposes of collective bargaining under the Railway Labor Act, by Dining Car Employees Local No. 43, functioning through the Brotherhood of Airline and Railway Clerks. As a result of intervention by his union representative the investigation hearing was postponed by letter of June 7, 1982. That letter was also sent to claimant via certified mail to his recorded address. The letter follows:

"Mr. E. R. Martin
5329 South Harper
Chicago, IL 60615

Dear Mr. Martin:

Your investigation which was scheduled for Thursday, June 3, 1982 at 10:00 a.m. was postponed at the request of your Union Representative, Mr. E. Davis due to your unavailability.

The investigation has been rescheduled for Monday, June 14, 1982 at 10:00 a.m. at the Amtrak Commissary Building, 1500 South Lumber Street, Room 204, Chicago, Illinois."

Claimant's Organization representative again interceded with the carrier asking for a second postponement. This postponement was granted by letter of June 14, 1982, which was hand delivered to Claimant by Richard Jones, Carrier official at 4:50 PM on June 15, 1982. The body of the letter is set forth below:

"Mr. E. R. Martin
5329 South Harper
Chicago, IL 60615

Dear Mr. Martin:

Your investigation which was scheduled for Monday, June 14, 1982 at 10:00 a.m. was mutually agreed to be postponed with your Union Representative Mr. E. Davis.

This is to advise that the investigation has been rescheduled for Tuesday, June 22, 1982 at 1:00 p.m. at the Amtrak Commissary Building, Room 204, Chicago, Illinois. There will be no further postponements regarding this investigation. If you fail to appear, it will be held in your absence."

The hearing was held by the Carrier at 1:15 PM on June 22, 1982. Claimant did not appear. Efforts which had been made to assure he was properly notified of the hearing were reviewed and made a part of the hearing record. Claimant was represented at the hearing by his union representative, E. E. Davis, General Chairman who again requested the hearing be postponed "until such time as he can appear in person". His request was declined by the hearing officer. Mr. Davis stated it was against principles of the union to participate in absentia proceedings. His request to be excused from the hearing was granted and the hearing proceeded.

During the period Organization Representative Davis participated in the hearing it was established that Claimant Martin was in the vicinity and scheduled to depart Chicago on Train 21 that same date. His reporting time for the job was 3:15 PM. Dialog establishing this fact occurred early in the hearing before it was completed at 1:30 PM. Thus, it must be recognized that Claimant was aware of the hearing, having been duly notified, and chose to absent himself of his own volition. In the circumstances we find no merit in the contention that Claimant did not receive proper notice of the hearing or that Carrier was not justified in holding the hearing in absentia. The efforts of the Carrier and the Organization to notify him continued for nearly one month from May 24 until June 22, 1982. Both the Carrier and the Organization took all reasonable actions to assure Claimant a fair and impartial hearing on the charges.

It has long been established that an employee cannot frustrate the hearing process by absenting himself from his reported address or in some other way delaying response to a duly served notice sent by mail without providing a reasonable explanation. In this case certified mail was used for two of the notices; the third notice was hand delivered. He failed to provide any explanation for his actions. Therefore, we conclude that his wilful avoidance of service and his failure to attend the hearing do not warrant a finding that he was denied a fair and impartial investigation. Third Division Awards substantiating this conclusion are 13757, 13941, 15007, 15575, 15059 and 15735.

Third Division Award 13941 deals in particular with circumstances closely related to the situation here, and is quoted as follows:

"There must be a termination to an adversary proceeding and the parties bear the responsibility of protection of their respective interests. The situation herein presented is analogous to a party failing to appear at a trial in a civil action set for a day certain, whereupon the court enters judgment on the pleadings or ex parte evidence. We find, in the light of the facts of record, Carrier did not violate the Agreement in proceeding to decision in the absence of Claimant."

It is also noted that Claimant's counsel requested a hearing before the referee for the purpose of presenting oral argument as set forth in his Petition For Review to National Railroad Adjustment Board. A date for such hearing was set for May 23, 1984 at 1:00 PM and counsel was duly notified. Representatives of the Board together with the Referee were present at the appointed time at the Board offices at 10 West Jackson Blvd., Chicago, Illinois but Counsel and Claimant did not make an appearance. The hearing continued until 1:35 PM awaiting their appearance and when they failed to appear within a reasonable time, the hearing was closed.

The circumstances of claimant's conduct at the motel have not been refuted. His actions were reported to the Carrier the following morning by telephone by the clerk who dealt with him. The clerk was asked to make a written report which was made a part of the hearing record. His report is as follows:

"Mr. E. R. Martin was told he had double occupancy voucher and that he must share a room with the other Amtrak crew member. He then said he wanted a non-smoking room by himself. They offered him a room at the discounted rate of \$17.00. He refused and said if couldn't have a separate room, he would sleep in the lobby. He then proceeded to remove his sleeping material from his suitcase and set them down in the lobby. Being a detraction to the hotel and causing a distrubance, (sic) I felt the best thing rather than cause any immediate problems, was to get him out of the lobby and into a room. I did this despite the very full conditions in the hotel. An injustice was done and needs to be corrected for future problems like this not to occur. (Signed) Chuck D. Scott, Night Auditor."

The Rules of Conduct which claimant was charged with violating are "I", "J" and "Y" and are set forth as follows:

- "I. Employees will not be retained in the service who are insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner that the Company will not be subjected to criticism and loss of good will.
- J. Courteous conduct is required of all employees in their dealing with the public, their subordinates and each other. Boisterous, profane or vulgar language is forbidden. Violence, fithting (sic), horseplay, threatening or interfering with other employees or while on duty is prohibited.
- Y. Employees must obey instructions from their supervisor in matters pertaining to their respective branch of the service, and employees whose duties require them to conform with instructions issued by various departments must familiarize themselves therewith and be governed thereby."

All of the above rules, when analyzed and related to Claimant's actions under question, show his conduct to be in clear violation. It must also be noted that carrier is fully within its rights in requiring employees to conduct themselves in a manner which does not subject the company to criticism or loss of good will. In this case Claimant's conduct was sufficiently disturbing that the motel management found it necessary to report to Claimant's supervisor in an effort to prevent a repetition. In view of the facts surrounding we do not question carrier's right to take disciplinary action. Moreover, when the circumstances of this incident are related to the fact that he was disciplined on six separate occasions previously, the Board finds no basis to overrule Carrier action in dismissing Claimant from service. Claimant's prior record of discipline is set forth as follows:

**"DISCIPLINE RECORD OF TRAIN ATTENDANT
E. R. MARTIN**

<u>Date</u>	<u>Offense</u>	<u>DISCIPLINE</u>
8/16/76	Violation of Rules 'K' and 'L'	Waived Investigation 5-day Suspension (held in abeyance)
9/28/79	Violation of Rules 'A' and 'K'	15-day Suspension
12/11/79	Violation of Rules 'I', 'K' and 'L'	Waived Investigation 15-day Suspension
11/28/80	Violation of Rule 'K'	30-day Suspension
7/06/81	Violation of Rules 'H' and 'Y'	Waived Investigation 90-day Suspension
6/25/82	Violation of Rules 'I', 'J' and 'Y'	Dismissed

Additional Rules of Conduct for which Claimant was previously disciplined
are:

- "A. Employees must render every assistance in carrying out the rules and special instructions and must promptly report to their supervisor any violation thereof.
- H. Employees must take every precaution to guard against loss and damage to the Company property from any cause. The rules and instructions governing fire prevention and fire protection must be fully complied with.
- K. Employees must report for duty at the designated time and place, attend to their duties during the hours prescribed and comply with instruction from their supervisor.
- L. Employees shall not sleep while on duty, be absent from duty, exchange duties or substitute others in their place, without proper authority."

On the basis of evidence adduced during the hearing, carrier discharged the claimant from service on June 25, 1982 by letter quoted below:

"After reviewing the transcript of your investigation which was held on Tuesday, June 22, 1982, I find the charges to be substantiated in their entirety.

A review of your personal record was conducted prior to the assessment of discipline. Accordingly, you are hereby TERMINATED from the employ of Amtrak effective immediately."

Following the discharge action, General Chairman Davis of the Brotherhood, appealed the decision on July 9, 1982 to Mr. M. J. Hagan, Regional Manager-Labor Relations. This appeal was based on the following grounds:

"Kindly accept this as an appeal in behalf of Mr. E. R. Martin, Train Attendant, who was accorded an investigation Tuesday, June 22, 1982, in 'absentia,' at which time he was charged with violation of Rules of Conduct: 'I', 'J', and 'Y', which resulted in a decision, dated June 25, 1982, of his termination from the service of your company, effective immediately.

We, the Organization, disagree with the decision on the grounds that Mr. Martin was not present at the investigation proceedings, to allow a proper defense to be mounted in his behalf, and therefore was unable to defend himself during the aforementioned 'absentia', proceedings.

Further, we do not feel that the weight of the Company's charges was sufficient to warrant dismissal, and that our member, Mr. Martin was, not accorded a fair and impartial investigation as our current and governing agreement guarantees all employees in Amtrak's service. We, therefore, request that Mr. Martin be returned to service immediately with all seniority, vacation, health and welfare, and all other rights restored, unimpaired. Should you disagree with our entreaties, we ask for conference. Date and time may be set by your office."

Following review, Mr. Hagan denied the appeal by letter of August 11, 1982. His denial was appealed further by the Brotherhood to the highest officer of the Carrier designated to handle such disputes. That appeal was made on behalf of Claimant by the Organization in the name of the Amtrak Service Workers Council, an affiliate of the AFL-CIO and the Railway Labor Executives Association. A conference on this appeal was held by a Organization representative with Carrier officials during the period December 28-29, 1982. The appeal was denied by J. W. Hammers, Jr., Corporate Director Labor Relations by letter of January 18, 1983 as follows:

"During conference on this and other matters December 28-29, 1982, your Organization based its appeal solely on the contention that the charge was not proved, and even if it had been proved discipline of dismissal is disproportionate to the proven misconduct. For this reason you asked that Claimant be reinstated with seniority and vacation rights unimpaired and paid for time lost.

The Carrier disagreed and noted that its examination of the record of the investigation discloses there was sufficient evidence contained therein to support the finding of Claimant's guilt of the charges. The Carrier further noted that due to the seriousness of the charges, and the Claimant's past record which shows that he has been disciplined on six previous occasions, discipline of dismissal, assessed in this case, is fully justified."

The record indicates that following Mr. Hammer's denial, Claimant selected private Counsel for his appeal to this Division. The Division received a notice dated April 11, 1983 from the firm of Timpone & Rickelman Ltd., of intention to appeal. Since that date further appeal efforts were made by Claimant's Counsel.

The evidence shows claimant was accorded full rights of due process and that he received a fair and impartial hearing. His violations of Rules of Conduct are well documented by clear and convincing evidence. In the circumstances reviewed herein, the action of the Carrier in dismissing Claimant was fully justified.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the 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 Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

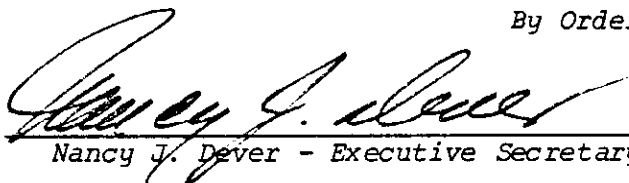
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984