

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4478

Referee Lamont E. Stallworth Docket Number 4504

PARTIES TO DISPUTE: New Jersey Transit Policemen's Benevolent Association, Local 304
New Jersey Transit Rail Operations, Inc.

STATEMENT OF CLAIM: PART I - CLAIMANT'S FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL TRIAL REQUIRED BY ARTICLE 16, SECTION 1, PARAGRAPH (A) OF THE APPLICABLE AGREEMENT VIOLATED FOR THE FOLLOWING REASONS:

- POINT NO. 1 - Trial procedures utilized by the carrier were not made in agreement with the PBA business representative in violation of Article 16, Section 3, Paragraph (d) of the applicable agreement.
- POINT NO. 2 - Notice of trial was not received within ten days advanced notice of trial date in violation of Article 16, Section 3, Paragraph (a) of the applicable agreement.
- POINT NO. 3 - Trial was not scheduled within thirty days of managements knowledge of the alleged offense by the carrier unilaterally granting itself a continuance of the trial because a carrier witness failed to appear in violation of Article 16, Section 3, Paragraph (b) of the applicable agreement.
- POINT NO. 4 - Claimant's Constitutional privilege of due process violated by hearing officer by not permitting claimant's union representative and attorney to be present at the same time knowing Claimant was a defendant of a criminal charge of Aggravated Assault. This denial violated the Claimant's legal and contractual rights guaranteed (sic) by the Constitution and Article 16, Section 2, Paragraph (a) of the applicable agreement. Such conduct was also unreasonable and violative of Article 16, Section 2, Paragraph (c) of the applicable agreement.
- POINT NO. 5 - Contractual right to have union representative present during trial denied by hearing officer because Claimant's attorney remained present. This denial violated Article 16, Section 3, Paragraph (d) of the applicable agreement. Such conduct was also unreasonable and violative of Article 16, Section 2, Paragraph (c) of the applicable agreement. This denial also violated Claimant's Constitutional right to due process.

- POINT NO. 6 - Use of hearsay verbal statement taken by a carrier official from the Claimant without two days notice and a PBA representative present violated Article 16, Section 2, Paragraph (a) of the applicable agreement.
- POINT NO. 7 - Carrier's hearing officer violated Claimant's Constitutional and contractual right to remain silent (knowing Claimant was a defendant in a pending criminal matter) by ordering Claimant to testify without granting use immunity to Claimant in violation of Article 16, Section 2, Paragraph (a) of the applicable agreement.
- POINT NO. 8 - All possible applicable Constitutional rights of the Claimant were violated by carrier's hearing officer by advising Claimant's attorney the U.S. Supreme Court and the U.S. and New Jersey Constitutions have no bearing in this matter inclusive of the Claimant's right to due process protective within Article 16, Section 2, Paragraph (a) of the applicable agreement.
- POINT NO. 9 - Conduct of hearing officer replete with bias, prejudice, opinion and adversity.
- POINT NO. 10 - Dual role of issuing officer acting as hearing officer or prosecutor suspect of bias.
- POINT NO. 11 - Decision officer not present to effectively evaluate credibility of the witnesses.
- POINT NO. 12 - Admissability (sic) of hearsay evidence as only basis for charge and ultimate guilty decision insufficient to satisfy carrier's burden of proof.
- POINT NO. 13 - Hearing conducted on adversary basis by carrier refusing to acknowledge discovery request of union implied by Claimant's privilege to a fair and impartial trial, Claimant's Constitutional right to due process, and the carrier's responsibility to expose all facts in the matter.
- POINT NO. 14 - Decision officer's ability to determine guilt tainted by his prejudicial action of removing Claimant from service without pay pending a trial permissible by Article 16, Section 1, Paragraph (b) if the carrier considers the Police Officer guilty of the offense.

POINT NO. 14 (sic) - Hearing reporter not being license (sic), certified or sworn is not qualified to transcribe testimony of the hearing. The reporter's omission of certain testimony from his record tainted the validity of the entire record. Such actions violate the Claimant's right to a true copy of the record required by Article 16, Section 3 of the applicable agreement.

PART II - CARRIER'S CHARGE UNFOUNDED BASED UPON PRESENTATION OF OWN WITNESSES

POINT NO. 1 - Testimony of accuser and carrier's expert witness supported Claimant's actions to be in sufficient compliance with the alleged violated rule to require not guilty verdict.

OPINION The Claimant was hired by Carrier on February 27, 1984, received
OF BOARD: approximately four months instruction in police procedures, criminal law and use of weapons; and, began regular service as a New Jersey Transit Rail Police Officer.

On June 20, 1985, Carrier terminated Claimant for violating departmental rules and regulations and failing to exercise sound judgment in the use of deadly force against other human beings in a shooting incident occurring on April 27, 1985.

Although the Organization contends there has been a violation of Claimant's fundamental rights encompassed within an unratified Collective Bargaining Agreement, it is the Board's opinion that it lacks jurisdiction.

In the absence of a ratified contractual agreement between the parties that covers Claimant's employment, the Board has no contractual basis upon which to rule. Therefore, the Claim must be dismissed.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

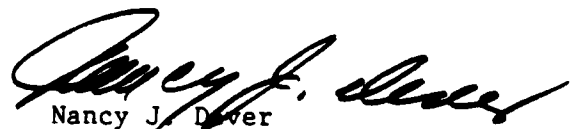
The parties to said dispute were granted the privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:


Nancy J. Dover
Executive Secretary

Dated at Chicago, Illinois, this 18th day of September 1986.

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 4478

DOCKET NO. 4504

NAME OF ORGANIZATION: (New Jersey Transit Policemen's Benevolent
(Association, Local 304

NAME OF CARRIER: (New Jersey Transit Rail Operations, Inc.

As background, the instant dispute involves the June 20, 1985 termination from employment of New Jersey Transit Police Officer Richard M. McQuestion for violating Article 7.1 of the Rules and Regulations of the NJTRO Patrol Guide, Article 8063-G of the NJTRO Police Department Safety Rules, and Departmental Policy governing the discharge of firearms at or from a moving vehicle. From this initial determination, this matter has been before the National Railroad Adjustment Board, three times before the United States District Court for the District of New Jersey, twice before the United States Court of Appeals for the Third Circuit, and now is again before the Board.

On January 1, 1983, New Jersey Transit (Carrier) took over certain commuter rail lines that had been previously operated by Consolidated Rail Corporation (Conrail) as authorized by the Rail Passenger Service Act as amended by the Northeast Rail Service Act of 1981 (hereafter the "Act") 45 U.S.C. §§586, 588 (1981). The Act required the Carrier and the employees' representatives to negotiate an Implementing Agreement that would govern the transfer of former Conrail employees to New Jersey Transit and the retention of their seniority rights. The Act also required these Parties to enter into new Collective Bargaining Agreements by September 1, 1982. *Id.* at §590(a). If the Parties were unable to reach an agreement, a Presidential Emergency Board constituted under the terms of the Act could make a non binding selection of one of the final offers with employees retaining the right to strike. This procedure was the "exclusive means" for resolving disputes related to the formation of an initial collective bargaining agreement. Pursuant to the statute, New Jersey Transit negotiated with the

International Brotherhood of Teamsters (hereafter the "Teamsters" or "I.B.T.") which, at that time, was the bargaining representative of Police Officers transferring from Conrail. Although the Teamsters and the Carrier reached an Agreement, the membership failed to ratify it. Pursuant to Section 590 of the Act, a Presidential Emergency Board constituted to resolve the dispute recommended that the Teamsters adopt the agreement it had previously negotiated. The Teamsters rejected the recommendation and was then at liberty to strike if it so chose. The members, however, continued to work after January 1, 1983 without ratifying the proposed agreement even though the previous contract between Conrail and the Teamsters had expired on December 31, 1982. In August 1983, the Policemen's Benevolent Association (hereafter the "Organization") replaced the Teamsters as bargaining representative of the Carrier's employees. In the fall of 1983, the Organization requested mediation of the impasse by the National Mediation Board. However, the request was untimely and an impasse continued.

On September 26, 1986, the New Jersey Public Employment Relations Commission (hereafter the "PERC") denied the Organization's petition for compulsory interest arbitration. The PERC ruled that the federal Northeast Rail Service Act (NERSA) of 1981 applied, and preempted state law. See, New Jersey Transit Corporation, 12 NJPER 17280 (September 26, 1986).

Claimant McQuestion began employment as a New Jersey Transit Police Officer in 1984. In June 1984, he attended a two-week training class conducted by an officer of the New Jersey Transit Police. The training class included instruction on police use of force and deadly force. In the class, the Police Officers were instructed that Police Officers were generally prohibited from discharging a firearm at or from a moving vehicle except under exceptional circumstances.

On April 27, 1985, at approximately 9:00 P.M., McQuestion was driving north on the New Jersey Turnpike to work at Penn Station, located in Newark, New Jersey. McQuestion was driving his own automobile and was dressed in civilian clothes. As he drove, McQuestion noticed a speeding automobile being driven in a reckless manner, cutting off other vehicles. McQuestion pulled up next to the vehicle on the passenger side, turned on the dome light inside of his car, showed his badge, and motioned to the driver to pull over. Instead, the driver allegedly attempted, more than once, to run McQuestion off the road.

McQuestion remained next to the other vehicle because there were other vehicles behind him. The passenger in the other automobile shouldered and

pointed an object at McQuestion. McQuestion believed that this object was a rifle or shotgun. As he noticed the object, McQuestion heard a loud bang.

The vehicles were still moving. McQuestion fired four rounds at the occupants of the other vehicle and shot the driver in the neck. The driver in the other vehicle then pulled over. At that time, the parties were approximately one-tenth of a mile from a tollbooth located further north on the Turnpike.

McQuestion removed the occupants from the vehicle. He detected the smell of alcohol and requested help from the State Police. He then pat searched the vehicle's occupants and also searched their vehicle. He found beer bottles and a 36 inch long cylindrical piece of wood.

McQuestion was taken to State Police Headquarters, where he was advised of his Miranda right to remain silent. The State Police notified Lieutenant C. R. Johnson of the Carrier's Police Department, through Sergeant J. A. Dunn also of the Carrier's Police Department. Johnson, Dunn, NJT Chief Investigator R. Buckreis, and NJT Director of Police Slawsky arrived at State Police Headquarters. Johnson spoke with McQuestion about the incident and prepared a report from information he had received from McQuestion and Dunn. Neither Johnson nor Dunn gave McQuestion a Miranda warning, nor did they inform him of the provision under Article 16(2) of the unratified Agreement regarding a Police Officer's right to two days' notice before giving a formal investigation statement where such statement may result in discipline. Nor did they advise McQuestion that he had a right to have an Organization representative present. Sergeant Dunn, McQuestion's immediate supervisor and an Organization representative, left the State Police Headquarters and, after his shift, returned in the capacity of Chief Local Delegate of the Organization. Chief Investigator Buckreis met with McQuestion, and asked if he would give a statement as to the incident. McQuestion replied that he would rather not, because a State Police officer had already issued him the Miranda warning, and he wanted to wait for legal counsel. Director of Police Slawsky told McQuestion that he was being removed from service pending the results of the investigation.

McQuestion received a Notice of Trial from the Carrier dated May 1, 1985, notifying him that Trial on the incident was set for May 10, 1985. The Notice of Trial charged McQuestion with violating Article 7.1 of the Rules and Regulations of the NJTRO Patrol Guide, Article 8063-G of the NJTRO Police Department Safety Rules, and Departmental Policy governing the discharge of firearms at or from a

moving vehicle. Trainmaster W. B. Wagner signed the Notice of Trial. By letter dated May 8, 1985, McQuestion was notified that the Carrier had postponed the Trial to May 24, 1985.

The Trial was held on May 24, 1985, with Wagner serving as the Hearing Officer. Due to the illness of witness Lieutenant Johnson, the Trial was recessed and completed on June 14, 1985. During the Trial, McQuestion's attorney objected to Wagner's attempt to question McQuestion on direct examination. Wagner notified McQuestion that a refusal to answer could subject him to a charge of insubordination, and proceeded to question McQuestion. However, McQuestion's attorney directed him not to answer. McQuestion ultimately testified under examination by his attorney and by Wagner.

By Notice of Discipline dated June 20, 1985, Director of Police Slawsky terminated McQuestion from his employment with the Carrier. By letter dated June 22, 1985, Chief Local Delegate Dunn appealed the decision to Director-Labor Relations J. S. Baker pursuant to Article 16(3)(c) of the Parties' unratified Agreement. By letter dated June 24, 1985, Dunn corrected the notice of appeal to reflect that such was taken in accordance with Article 16(6)(a) of the Parties' unratified Agreement and Article 16(6)(a) of the I.B.T. 732 Agreement.

The appeal hearing was held on June 26, 1985. By letter dated July 24, 1985, Director-Labor Relations Baker upheld McQuestion's dismissal and denied his claims that the Trial was procedurally defective. Baker wrote that the disciplinary Trial was held as outlined in the Notice of Discipline dated June 20, 1985. As to the Organization's major procedural arguments, the Carrier concluded that Article 16 - Discipline of the unratified NJTRO-PBA Agreement dated January 1, 1983 was the appropriate governing rule and was properly adhered to in the conduct of the Trial and the resultant discipline assessed. The Carrier further noted that during the Trial, Police Training Officer R. Dailey testified that a Police Officer may use deadly force under exceptional circumstances, such circumstances being when the "officer feels that his life or well-being is threatened or that the well-being of others is being threatened, provided that all less severe remedies are exhausted or manifestly inappropriate." The Carrier concluded as follows:

"The preponderance of the testimony concerning the circumstances of this case rather than exonerating Officer McQuestion sufficiently indicates the fact that Officer McQuestion did not exercise sound judgment. Less severe measures, clearly not

manifestly inappropriate were available to bring the occupants of the other vehicle to justice.

We have reviewed the record of the case and conclude that it does contain sufficient evidence to support the charge.

In light of the seriousness of the offense which was committed, we are unwilling to make any change in the discipline imposed."

The State's investigation into the incident progressed separately from these proceedings. On July 26, 1985, McQuestion was indicted by the Essex County Grand Jury on a charge of aggravated assault.

Under date of November 12, 1985, then Chief Representative J. A. Dunn filed the Organization's Notice of Intent appealing Claimant McQuestion's termination to the Board. On June 20, 1986, a Referee Hearing was held before the Board with Referee Lamont E. Stallworth participating. Claimant McQuestion was present and represented by NJTPBA Representative T. M. McCarthy, Esq. The Carrier was represented by Director-Labor Relations J. S. Baker and Manager-Labor Relations W. B. Murphy.

In its September 18, 1986 decision the Board concluded:

"Although the Organization contends there has been a violation of Claimant's fundamental rights encompassed within an unratified Collective Bargaining Agreement, it is the Board's opinion that it lacks jurisdiction.

In the absence of a ratified contractual agreement between the parties that covers Claimant's employment, the Board has no contractual basis upon which to rule. Therefore, the Claim must be dismissed."

On September 16, 1988, the Claimant, thru his attorney, T. M. McCarthy, filed a petition for review in the United States District Court for the District of New Jersey of the Board's determination that it lacked jurisdiction over his claim. See, McQuestion v. New Jersey Transit Rail Operations, Inc., Civil Action No. 88-4037. On March 22, 1989, the Claimant's petition was consolidated with another petition (Hart v. New Jersey Transit Rail Operations, Inc., Civil Action No. 89-0660) filed by

the Organization on behalf of another former New Jersey Transit Police Officer, Louis A. Hart, in which the Organization sought to set aside the Board's determination that it lacked jurisdiction to consider Hart's claim as more fully set forth in Fourth Division Award 4508. The Organization's petition asserted that the Board's February 19, 1987 ruling was arbitrary and capricious.

On May 17, 1989, the District Court dismissed the consolidated petitions for review on the grounds that McQuestion and Hart had not been parties to the Board's proceedings, and under the Railway Labor Act as non parties, they could not obtain review of the Board's decisions. On June 9, 1989, the Organization appealed the District Court's decision to the United States Court of Appeals for the Third Circuit. On January 4, 1990, the Third Circuit reversed the District Court's decision and remanded the matter to the District Court for further proceedings. McQuestion v. New Jersey Transit Rail Operations, Inc., 30 F.3d 388 (3rd Cir. 1994).

On July 23, 1993, the District Court again dismissed the consolidated petitions. The District Court held that the Board had properly dismissed the claims because it did not have jurisdiction to hear disputes that did not involve the interpretation of a ratified Collective Bargaining Agreement. McQuestion v. New Jersey Transit Rail Operations, Inc., Civil Action No. 88-4037 (consolidated). On July 6, 1994, the Third Circuit again reversed the District Court's decision. The Third Circuit held that even though the Parties did not have a ratified Collective Bargaining Agreement, the Parties had put the grievance procedure into effect without question. The Third Circuit concluded that a de facto Agreement existed between the Parties and the Board had jurisdiction to decide the claims. The Third Circuit remanded the matter to the District Court for further proceedings consistent with its decision. See, McQuestion v. New Jersey Transit Rail Operations, Inc., 30 F.3d 388 (3rd Cir. 1994).

The case mistakenly was closed in the District Court. On August 3, 2001, the District Court entered an Order reopening the case and remanding the matter to the Board for proceedings consistent with the Third Circuit's July 6, 1994 decision. McQuestion v. New Jersey Transit Rail Operations, Inc., Civil Action No. 88-4037. The District Court further ordered the Board to employ the standards regarding employee discipline set forth in Article 16 of the unratified Agreement of the Parties.

On remand, the McQuestion and Hart grievances were reassigned to separate panels, just as they were initially. On December 10, 2003, the Parties presented oral argument before the Board.

POSITION OF THE ORGANIZATION:

The Organization contends that the Carrier violated the Claimant's right to a fair and impartial Trial required under Article 16(1)(a) of the unratified Agreement. In support of its contention, the Organization presents the following arguments:

(1) The use of the procedures contained in Article 16 renders the entire Trial procedurally defective, and the Carrier should not be allowed to impose any discipline resulting from such Trial.

(2) The Carrier violated the Claimant's right to receive Notice of Trial ten days in advance thereof as Article 16(3)(a) requires. According to the Organization, although the Trial was set for May 10, the Claimant received the Notice of Trial on May 2, 1985, less than ten days in advance thereof.

(3) The Carrier violated the Claimant's right under Article 16(3)(b) to have the Trial scheduled within 30 days of management's knowledge of the alleged offense. According to the Organization, the language of Article 16(3)(b) which reads "... shall be scheduled to begin within thirty (30) calendar days" intends that the Claimant has the right to have the case heard within that time frame if he is to be held out of service.

(4) The Carrier violated the Claimant's Constitutional due process rights and his rights under Article 16(2)(a) and (c) when the Hearing Officer refused to permit both the Claimant's Organization representative and attorney to be present during the Trial at the same time, even though the Hearing Officer knew that a criminal charge also was pending against the Claimant. The Organization contends that the Hearing Officer's refusal to allow Organization representative Dunn to be present during the Trial violated Article 16, the U.S. Constitution, and the New Jersey State Constitution.

(5) The Carrier violated the Claimant's Constitutional due process rights and his rights under Article 16(3)(d) and (2)(c) when the Hearing Officer did not allow the Claimant to have an Organization representative present during the Trial.

(6) The Carrier violated the Claimant's rights under Article 16(2)(a) when the Hearing Officer allowed hearsay verbal statements taken by a representative of the Carrier without having given the Claimant two days' notice and the opportunity to have an Organization representative present at the time of the interview with the Carrier representative. According to the Organization, Lieutenant Johnson interviewed the Claimant on the night of the incident and submitted a police investigation report based on the interview. The Organization contends that Lieutenant Johnson failed to advise the Claimant of his Miranda rights or of his rights under Article 16(2)(a). Specifically, Lieutenant Johnson failed to advise the Claimant of his right to remain silent under the Fifth and Fourteenth Amendments of the U.S. Constitution and of his legal right to have an attorney present under the Sixth Amendment of the U.S. Constitution. Johnson also did not give the Claimant two days' notice before taking his statement, and did not permit the Claimant to contact an Organization representative. Accordingly, the Organization contends that the police investigation report was inadmissible and, because it was used as a basis for a finding against the Claimant, the decision must be vacated.

(7) The Carrier violated the Claimant's Constitutional right to remain silent when the Hearing Officer ordered the Claimant to testify without first granting the Claimant use immunity in violation of Article 16(2)(a) and in violation of his right under N.L.R.B. v. Weingarten, 416 U.S. 969 (1974) to the presence of an Organization representative.

(8) The Carrier violated the Claimant's Constitutional rights when the Hearing Officer advised the Claimant's attorney that decisions of the United States Supreme Court, the U.S. Constitution, and the New Jersey State Constitution have no bearing on the matter, including the Claimant's right to due process under Article 16(2)(a). The Organization asserts that without having been afforded use immunity, the Claimant had a legal right under Article 16(2)(a) to remain silent.

(9) The Hearing Officer's conduct demonstrated bias, prejudice, opinion, and adversity. The Organization argues that the Hearing Officer signed the May 1, 1985 Notice of Trial and acted as Hearing Officer at the Trial. According to the Organization, the Hearing Officer was a material witness, but he refused to be

questioned. According to the Organization, such refusal denied the Claimant a fair and impartial Trial as required under Article 16(2)(a).

(10) The Hearing Officer improperly acting as both issuing officer and as prosecutor demonstrates bias. The Organization contends that such a procedure is inherently biased and reversible error. According to the Organization, the Hearing Officer cannot both issue the Notice of Trial and act as Hearing Officer.

(11) The Decision Officer was not present to evaluate the credibility of the witnesses. The Organization contends that this is reversible error.

(12) The Hearing Officer admitted hearsay evidence and such evidence is the only basis for the charge against the Claimant. Such evidence is insufficient to support the Carrier's burden of proof. The Organization argues that Captain Hempel admitted that he had no personal knowledge of the incident and his knowledge was based only on hearsay. Additionally, over the Organization's objection, the Hearing Officer admitted the Information Report, which Lieutenant Johnson admitted did not contain all of the information that he received from the Claimant, and includes information he received from Sergeant Dunn. According to the Organization, this ruling requires reversal of the Claimant's discipline.

(13) The Carrier violated the Claimant's Constitutional right to due process when it failed to provide the Claimant with discovery in response to his request therefore. According to the Organization, fairness required the Carrier to provide the Organization with the evidence that it intended to use during the Trial when requested, and the Carrier's failure to do so hindered its ability to formulate the Claimant's defense. According to the Organization, this failure is reversible error.

(14) The Hearing Officer had removed the Claimant from service without pay pending Trial under Article 16(1)(b) demonstrating his bias against the Claimant. According to the Organization, Slawsky's discussions with the Claimant, Chief Investigator Buckreis, and Lieutenant Johnson on the night of the incident led him to the presumption that the Claimant was guilty and to his removal from service without pay pending Trial.

(15) The Carrier violated the Claimant's rights during the Trial by using a Hearing Reporter who was not licensed, certified, or sworn. Additionally, the Hearing Reporter omitted certain testimony from the record, thereby tainting the

validity of the Trial record. The Organization contends that such action violates the Claimant's right to a true copy of the record under Article 16(4).

(16) The Carrier's charge is unfounded based upon the testimony of its own witnesses. According to the Organization, the testimony of the Carrier's witnesses, including that of its expert witness, supports the Organization's position that the Claimant's actions were in sufficient compliance with the Rule that he allegedly violated so as to require a finding of not guilty.

For all of the above reasons, the Organization requests that the Carrier's decision and the resultant discipline imposed on the Claimant be reversed.

POSITION OF THE CARRIER:

The Carrier asserts that the issue before the Board is whether the Carrier's termination of the Claimant is supported by the record. The Carrier maintains that despite the Organization's allegations that the Carrier violated the Claimant's Constitutional rights, the Board should focus on the fact that the Claimant, while driving on the New Jersey Turnpike, fired four shots and wounded one of the occupants of another moving vehicle. The Carrier acknowledges that termination is the ultimate discipline in the employment setting, but argues that the Claimant's behavior was the most egregious and reckless in which a Police Officer can engage. The Carrier argues that there is no dispute regarding the Claimant's misconduct on the New Jersey Turnpike on the night of the incident, and that there is nothing in the record that suggests that the Claimant did not discharge his weapon. The Carrier argues that the Claimant's actions were not justified by the circumstances and clearly violated the Carrier's policies and regulations. Accordingly, the Claimant's dangerous conduct justified his termination. The Carrier requests that its decision to terminate the Claimant be upheld.

FINDINGS:

The Board carefully considered the facts, evidence, and arguments presented by the Parties. For the following reasons, the Board denies the instant claim based on the facts and circumstances of the instant dispute.

(1) The Organization first contends that the use of the procedures contained in Article 16 renders the entire Trial procedurally defective, and the Carrier should not be allowed to impose any discipline resulting from such Trial. The Board has

no choice but to reject this argument. In McQuestion v. New Jersey Transit Rail Operations, Inc., the Court of Appeals for the Third Circuit concluded:

“[9] Based on the less than complete record here, it is apparent that although the January 1, 1983 agreement was not ratified by the union, N. J. Transit and the union put its grievance provisions into effect. These provisions formed the basis for the employment relationship between the union and N. J. Transit in the more than two-year interim before the McQuestion and Hart claims arose.

Neither the union nor N. J. Transit have ever questioned that an agreement existed to the effect that an officer could not be dismissed except for ‘just cause’ and only after ‘a fair and impartial trial’ - the essential issues in the grievances presently before us. In addition, both the union and N. J. Transit scrupulously followed the procedures set out in the January 1, 1983 agreements in processing the two claims.

* * *

In short, in the scenario we have discussed, there was a de facto (‘implied in fact’) agreement on certain aspects of the employment relationship between the union and N. J. Transit. The fact that these particular matters were not incorporated into a formal, ratified contract that included many other terms not relevant to the dispute at hand does not deprive the Adjustment Board of jurisdiction. As noted earlier, the prerequisite ‘agreement’ is not limited to specific terms of a formal collective bargaining agreement, but may instead include evidence of past practices and customs such as those which seemingly exist here.” (Emphasis added)

McQuestion v. New Jersey Transit Rail Operations, Inc., 30F.3d 388, 396 (3rd Cir.1994).

The Court concluded:

“In our view, the record establishes an agreement between the union and N. J. Transit on the conditions under which employment

could be terminated and the grievance procedures to be followed by a discharged employee. In such circumstances, the Adjustment Board would have jurisdiction to arbitrate the disputes. However, because the parties did not fully focus on this aspect of the Adjustment Board's jurisdiction, they may require a hearing and an opportunity to present further evidence to clarify the record.” Id. at 397.

In accordance with its reasoning, the Third Circuit reversed the District Court's decision and remanded the matter to the District Court for proceedings consistent with the Third Circuit's decision. Id. On remand, the District Court remanded the McQuestion and Hart grievances to the Board. See, McQuestion and Hart v. New Jersey Transit Rail Operations, Inc., Civil Action No. 88-4037 (August 6, 2001). The District Court stated:

“Defendant fails to proffer any evidence which, if developed at a hearing, would undermine the appellate court's conclusion that there exists a de facto agreement between the parties to grievance provisions which include the requirement that a police officer such as either of the plaintiffs could not be dismissed except for ‘just cause’ and only after a ‘fair and impartial trial.’

* * *

The Court also determines that the plaintiffs' suggestion, that upon remand of this matter to the National Railroad Adjustment Board, pursuant to the aforementioned decision of the Third Circuit, the Board should employ Article 16 of the 1983 Agreement as the source of standards for its hearing, is one that is well taken. It is better for this Court to determine the source of such standards, rather than have it left to further arguments before the National Railroad Adjustment Board regarding whether the provisions of the Conrail or New Jersey Transit agreement should be invoked.”

Id.

Accordingly, the District Court remanded the matter to the Board for proceedings consistent with the decision of the Third Circuit in McQuestion v. New Jersey Transit Rail Operations, Inc., and with the District Court's Order that “3. In

conducting those proceedings, pursuant to the de facto agreement determined to be present herein, the National Railroad Adjustment Board shall employ the standards regarding employee discipline set forth in Article 16 of the unratified January 1, 1983 Agreement." See, McQuestion and Hart v. New Jersey Transit Rail Operations, Inc., Civil Action No. 88-4037 (August 6, 2001).

The Third Circuit concluded that at the time of the grievance proceedings at issue in this matter, a de facto Agreement existed between the Parties, and the District Court instructed the Board to employ the standards regarding employee discipline set forth in Article 16 of the unratified Agreement. Accordingly, it is not true that application of those provisions by the Carrier in the proceedings that resulted in the Claimant's termination rendered the proceeding ineffective. Quite the opposite is true. The Carrier applied the standard that the Courts determined to be proper.

The Board next addresses generally the Organization's contentions that the Carrier violated the Claimant's rights under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution, U.S. Supreme Court decisions, and unspecified provisions of the New Jersey State Constitution. In the order presented by the Organization, those arguments are:

(4) The Carrier violated the Claimant's Constitutional due process rights and his rights under Article 16(2)(a) and (c) when the Hearing Officer refused to permit both the Claimant's Organization representative and attorney to be present during the Trial at the same time, even though the Hearing Officer knew that a criminal charge also was pending against the Claimant. The Organization contends that the Hearing Officer's refusal to allow Organization representative Dunn to be present during the Trial violated Article 16, the U.S. Constitution, and the New Jersey State Constitution. The Organization's argument encapsulates its claim that as an employee of New Jersey Transit, he is a public, not a private, employee.

(5) The Carrier violated the Claimant's Constitutional due process rights and his rights under Article 16(3)(d) and (2)(c) when the Hearing Officer did not allow the Claimant to have an Organization representative present during the Trial.

(6) The Carrier violated the Claimant's rights under Article 16(2)(a) when the Hearing Officer allowed hearsay verbal statements taken by a representative of the Carrier without having given the Claimant two days' notice and the opportunity to have an Organization representative present at the time of the interview with the

Carrier representative. According to the Organization, Lieutenant Johnson interviewed the Claimant on the night of the incident and submitted a police investigation report based on the interview. The Organization contends that Lieutenant Johnson failed to advise the Claimant of his Miranda rights or of his rights under Article 16(2)(a). Specifically, Lieutenant Johnson failed to advise the Claimant of his right to remain silent under the Fifth and Fourteenth Amendments of the U.S. Constitution and of his legal right to have an attorney present under the Sixth Amendment of the U.S. Constitution. Johnson also did not give the Claimant two days' notice before taking his statement, and did not permit the Claimant to contact an Organization representative. Accordingly, the Organization contends that the police investigation report was inadmissible and, because it was used as a basis for a finding against the Claimant, the decision must be vacated. In support of its argument, the Organization cites N.L.R.B. v. Weingarten, 416 U.S. 969 (1974).

(7) The Carrier violated the Claimant's Constitutional right to remain silent when the Hearing Officer ordered the Claimant to testify without first granting the Claimant use immunity in violation of Article 16(2)(a) and in violation of his right under N.L.R.B. v. Weingarten, 416 U.S. 969 (1974) to the presence of an Organization representative.

(8) The Carrier violated the Claimant's Constitutional rights when the Hearing Officer advised the Claimant's attorney that decisions of the United States Supreme Court, the U.S. Constitution, and the New Jersey State Constitution have no bearing on the matter, including the Claimant's right to due process under Article 16(2)(a). The Organization asserts that without having been afforded use immunity, the Claimant had a legal right under Article 16(2)(a) to remain silent.

In support of its Constitutional arguments, the Organization cites N.L.R.B. v. Weingarten, 416 U.S. 969 (1974); Lefkowitz v. Turley, 414 U.S. 70 (1973); Uniformed Sanitation Men Association v. Commissioner of State of New York (Sanitation Men I), 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967); Uniformed Sanitation Men Association v. Commissioner of State of New York (Sanitation Men II), 462 F.2d 619 (2nd Cir. 1970); Banca v. Town of Phillipsburg, 181 N. J. Super. 109 (1981).

In support of its arguments that the Carrier did not violate the Claimant's rights, the Carrier cites the following cases: Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967); Gniotek v. City of Philadelphia, 808 F. 2d 241 (3rd Cir. 1986); D'Acquisto v.

Washington, 640 F. Supp. 594 (N.D. Ill. 1986); State v. LaCaillade, 266 N. J. Super. 522 (App. Div. 1993).

Approximately 45 years ago, the Board explained in Fourth Division Award 1339 that:

“ . . . As a quasi-judicial administrative agency, the Board was created by Congress to perform a limited function: To review and make final disposition of those disputes between railroad management and its employees which the parties themselves were unable or unwilling to adjust on the property. (Sec. 3, First, (i), Railway Labor Act.) It is too well established to require a citation of authorities, that in determining such disputes, we are confined to an interpretation and application of the terms of the effective and controlling agreement between the parties to the dispute. We do not act as a court of equity nor as a court empowered to decide questions of constitutionality. Our function under the Railway Labor Act is limited to deciding disputes in accordance with the provisions of the controlling agreement as they apply to the facts and evidence of record.”

Accordingly, the Board concludes that it lacks authority to rule on the above arguments insofar as they are predicated on the grounds that the Carrier violated the Claimant's rights under the U.S. Constitution or the New Jersey State Constitution. The Board is limited to deciding this dispute in accordance with Article 16 of the January 1, 1983 unratified Agreement. Whether the application of the provisions of Article 16 violates the Claimant's U.S. or New Jersey State Constitutional rights is a question to be answered by the federal or state courts. The Board will only determine whether the provisions of Article 16 were properly applied, and the Claimant received the process due him pursuant to Article 16 in the proceedings that concluded on June 14, 1985.

Having made such determination, the Board nevertheless further comments on the Organization's contention that the Carrier violated the Claimant's Weingarten rights to the presence of an Organization representative. The Organization makes this argument in two respects. First, the Organization argues that the Carrier violated the Claimant's Weingarten rights when representatives of its Police Department questioned McQuestion on the night of the incident. Under Weingarten, a party's right to Organization representation is violated if after

making a request for such, the request is denied. However, as the Carrier points out, the record does not contain evidence that McQuestion asked for such representation on the night of the incident. Moreover, as the Carrier further notes, Weingarten arose under and interprets the language of the National Labor Relations Act. A violation of this right constitutes an unfair labor practice. As already noted, the Board's jurisdiction arises under the Railway Labor Act. Accordingly, the Board does not have jurisdiction over such an issue. Under this same reasoning, the Board likewise does not have jurisdiction to decide whether the Claimant had a Weingarten right to have both an attorney and an Organization representative present at the same time during his Trial. The Organization does not claim that the Railway Labor Act provides such a right and the Board does not so find. As already stated, the Board can only decide whether, and to what extent, Article 16 provides the Claimant with a right to the presence of an Organization representative as claimed.

The Board now turns to the Organization's arguments that the Carrier violated the Claimant's rights under Article 16. Initially, the Board notes that in an investigation into whether a discharge was wrongful, as was at issue in the Trial at issue in the instant matter, the Carrier is not required to prove guilt beyond a reasonable doubt as in a criminal case, or by a preponderance of the evidence as in a civil case. The Carrier must show only that there is substantial evidence to support the dismissal. See, First Division Award 16735.

(2) The Organization argues that the Carrier violated Article 16(3)(a) because the Claimant did not receive at least ten days' notice of the Trial. According to the Organization, the notice set the Trial for May 10, but was dated May 1, 1985. Moreover, the Claimant did not receive the notice until May 2, 1985, giving him only eight days' advance notice of the original Trial date. In support of its argument, the Organization cites Fourth Division Awards 1415, 1588, 2764 and 3104.

Article 16(3)(a) provides:

"A police officer who is accused of an offense and who is directed to report for a trial therefor shall be given ten (10) calendar days advance notice in writing of the specific charges on which he is to be tried and the time and place of the trial."

The Board determines that the Claimant received appropriate notice of the Trial that commenced on May 24, 1985. Although initially McQuestion received a Notice of Trial from the Carrier dated May 1 notifying him that the Trial date was set for May 10, 1985, only eight days before the Trial, the Trial did not commence on May 10, 1985. Instead, it was postponed until May 24, 1985. McQuestion received notice of the new Trial date on May 8, 1985, sixteen days prior to the Trial. Accordingly, the Claimant received the notice required under Article 16(3)(a) and the Carrier did not violate the Claimant's right in this regard.

(3) The Organization next argues that the Carrier violated the Claimant's right under Article 16(3)(b) to have the Trial scheduled within 30 days of management's knowledge of the alleged offense. The Organization argues that the Carrier unilaterally continued the Trial to May 24, 1985. Additionally, according to the Organization, on May 24, 1985 the Carrier improperly extended the Trial to another date in order to allow the attendance of Lieutenant Johnson as its witness. The Organization contends that the Carrier should not be allowed to continue the Trial merely because a witness received short notice and was not able to attend on the scheduled Trial date. According to the Organization, the language of Article 16(3)(b) which reads ". . . shall be scheduled to begin within thirty (30) calendar days" intends that the Claimant has the right to have the case heard within that time frame if he is to be held out of service. In support of its position, the Organization cites First Division Awards 15902 and 20711 as well as Third Division Awards 3819, 5197, 6446, 6646, 7831, 8714, 11757, 12103, 12253, 16262, 19275 and 22162.

Article 16(3)(b) provides:

"Trials on matters which involve police officers held out of service shall be scheduled to begin within thirty (30) calendar days following the date on which the accused is first held out of service. If the trial is not so scheduled, the charge shall become null and void."

The Carrier argues that the language of this provision requires only that the Trial shall be scheduled to begin within 30 calendar days, as it did in the instant case. The Carrier argues that from a policy perspective interpreting the provision to require that the Trial be completed within 30 days would be detrimental to the parties as it would encourage the Organization to engage in delay tactics and push the Carrier to rush to judgment. The Board concludes that because the language of

this provision plainly states that the Trial must be scheduled to begin within 30 days, there is no basis for finding that the Trial must conclude by that date. Had the Parties so intended, they could have implemented language to that effect. In the instant case, the Claimant was held out of service beginning on April 27, 1985 and the Trial began on May 24, 1985. The Trial thus began within 30 days following the date on which the Claimant was held out of service in compliance with the requirements of Article 16(3)(b). Accordingly, the Carrier did not violate the Claimant's right in this regard.

(4) The Organization next contends that the Carrier violated Article 16(2)(a) and (c) when the Hearing Officer refused to allow the Claimant to have both an attorney and an Organization representative present at the same time during the Trial.

Article 16(2)(a) provides:

“A formal investigation statement taken from a police officer shall be subject to any legal rights he may have in this respect, and, where such statement may result in the application of discipline, the police officer will be given two days notice. The Officer may also, if he desires to be represented, be accompanied by a union representative.”

Article 16(2)(c) provides:

“The provisions of this Section shall be reasonably applied and shall not be used to harass police officers.”

The Board concludes that the Carrier did not violate Article 16(2)(a) and (c) when, first, McQuestion was questioned by members of the Carrier's Police Department on the night of the incident. As the Carrier points out, a "formal investigation statement" refers to a verbatim record of questions directed to an accused Police Officer and his responses thereto. The resulting statement is in writing, and is signed and sworn to by the Police Officer. McQuestion was not subjected to this process on the night of the incident. Therefore, the provisions of Articles 16(2)(a) and (c) were not implicated at that time.

(5) Similarly, the Organization contends that the Carrier violated Article 16(3)(d) and 16(2)(c) when the Hearing Officer refused to permit Organization

representative Dunn to be present during the Trial at the same time as the attorney representing the Organization. Article 16(3)(d) provides:

“If a police officer desires to be represented at such trial or in any further disciplinary proceedings under this Article 16, he may be accompanied by a union representative as that term is defined in Article 30 of this Agreement. The accused police officer or his union representative shall be permitted to question witnesses insofar as the interests of the police officer are concerned. The police officer shall make his own arrangements for the presence of the said representative and of any witnesses appearing on his behalf and no expense incident thereto shall be borne by NJT Rail.” (Emphasis added)

This Article clearly provides that the Claimant is entitled to have one Organization representative. The Claimant had one Organization representative present at the Trial in the person of New Jersey Transit Policemen’s Benevolent Association General Counsel A. G. Osterweil. The representative was permitted to question the witnesses insofar as the Claimant’s interests were concerned. The Hearing Officer did not violate the provision when he refused General Counsel Osterweil’s demand that another Organization representative be allowed to assist him in his representation.

With regard to Article 16(2)(c) the Board finds that the provision was reasonably applied. Further, the record shows no evidence of harassment.

With regard to the two arguments, the Board also has already disposed of the Organization’s contentions that these actions of the Carrier also violated rights guaranteed to the Claimant under the U.S. Constitution and the New Jersey State Constitution.

(6) The Organization next argues that the Carrier violated Article 16(2)(a) when the Hearing Officer admitted hearsay evidence of a verbal statement made by the Claimant when such statement was made without the required two days’ notice, and without an Organization representative being present at the time. Specifically, the Organization contends that Lieutenant Johnson interviewed the Claimant on the night of the incident and submitted a police investigation report based on the interview, but failed to first advise the Claimant of his Miranda right to remain silent under the Fifth and Fourteenth Amendments of the U.S. Constitution and of

his legal right to have an attorney present under the Sixth Amendment of the U.S. Constitution. The Organization further contends that the Carrier did not afford the Claimant his rights under Article 16(2)(a) to two days' notice before his statement was taken and to contact an Organization representative. The Organization also contends that, accordingly, the police investigation report was inadmissible and, because it was used as a basis for a finding against the Claimant, the decision must be vacated.

The Board again notes that it has already disposed of the Claimant's Constitutional arguments and does not now address the Claimant's Constitutional arguments with respect to this argument. Moreover, on the night of the incident, the New Jersey State Police advised McQuestion of his Miranda rights, and McQuestion informed NJT Chief Investigator Buckreis that he would rather not answer his questions but would wait for legal counsel. Presumably, McQuestion could have responded to Lieutenant Johnson in the same manner, but he chose to provide some information. Next, as the Board determined above, in the circumstances of this matter, no formal police investigation report was taken of the Claimant and the provisions of Article 16(2)(a) did not apply. As to the admissibility of the police investigation report itself, the report does not contain facts materially different than those provided by McQuestion in his own testimony during the Trial. There is no evidence that the report was used as a basis for a finding against the Claimant. That is to say, there is no evidence that statements contained in the report were determinative of the Trial outcome. The Board rejects this argument.

(7) The Organization next argues that the Carrier violated the Claimant's Constitutional right to remain silent when the Hearing Officer ordered the Claimant to testify without first granting the Claimant use immunity in violation of Article 16(2)(a) and in violation of his right to the presence of an Organization representative. As already discussed, the holdings in Weingarten are inapplicable in this matter. Additionally, as already explained, the Board does not have jurisdiction to consider the Claimant's Constitutional arguments. With respect to the Organization's assertions that the Carrier violated Article 16(a)(2) as already determined with regard to a previous argument advanced by the Organization, this provision applies to the procedures surrounding the taking of a formal investigation statement, to which the Claimant was not subjected. This provision clearly applies to taking a formal investigation statement, but says nothing suggesting that it also applies to Trial proceedings. Accordingly, the Hearing Officer was not required under Article 16(2)(a) to grant such use immunity to the Claimant, and therefore

there was no violation in this regard. As to the cases cited by the Organization, Uniformed Sanitation Men Association v. Commissioner of State of New York (Sanitation Men I), 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967) in support of this argument, the Carrier correctly notes that these cases address a Police Officer's Fifth Amendment rights in the context of criminal proceedings. The Trial at issue herein was a disciplinary Trial. It was not a criminal proceeding.

(8) The Organization contends that the Carrier violated the Claimant's Constitutional rights when the Hearing Officer advised the Claimant's attorney that decisions of the U.S. Supreme Court, the U.S. Constitution, and the New Jersey State Constitution had no bearing on the Claimant's right to due process protection under Article 16(2)(a). As previously stated, the Board lacks jurisdiction to determine the Claimant's Constitutional rights. Additionally, as determined above, Article 16(2)(a) applies in the context of taking a formal investigation statement and is not applicable to the Trial proceedings at issue herein.

(9) The Organization argues that the Hearing Officer's conduct was replete with bias, prejudice, opinion, and adversity. In particular, the Organization identifies rulings by the Hearing Officer on pages 4, 12, 13, 14, 15, 19, 20, 21, 23, 33, 43, 54, 61, 62, 83 and 84 as violative of the Claimant's rights to a fair Trial under Article 16(1). Such rulings concerned the following matters: the Hearing Officer, having signed and issued the Notice of Trial, did not allow himself to be cross-examined as to his contacts with Police officials and adversely impacted the Claimant's ability to properly develop all facts of the case; the Hearing Officer's overruling an objection based on his own opinion; the Hearing Officer's citation of Board cases that support the propriety of his dual role as Hearing Officer and Issuing Officer, while not citing cases that do not support his position; the Hearing Officer's failure to recognize the Trial as "a legal matter"; the Hearing Officer's "abandonment of the proper sequence of questioning witnesses" when he attempted to question the Claimant before any prosecution witnesses testified; allowance of hearsay testimony and evidence, while leading such witness through his testimony; leading witnesses through their testimony evidencing pretrial contact with the Carrier witnesses; the Hearing Officer's admission of Lieutenant Johnson's police investigation report; and the Hearing Officer's refusal to allow the defense to develop its theory regarding the validity of the unratified Collective Bargaining Agreement. The Organization asserts that it is a fundamental error for the Hearing Officer to suppress evidence or testimony based on his opinion or judgment that it is irrelevant. Moreover, the Carrier has an obligation to conduct a fair and impartial

Trial and seek out the truth by ensuring that all facts material to the charge are developed. The Organization contends that the discipline must be vacated on the basis of these procedural defects. In support of this argument, the Organization cites Third Division Award 17475.

This argument, which encapsulates most of the arguments that the Organization separately presented, is sufficiently disposed of in the Board's response to those separate arguments. Those separate arguments include: the propriety of allowing hearsay evidence in the Trial; the propriety of the Hearing Officer providing testimony as a witness; the propriety of the Issuing Officer also acting as Hearing Officer; the propriety of the Hearing Officer having contact with witnesses prior to the Trial; and the validity of the Collective Bargaining Agreement.

As explained in Public Law Board No. 6489, Award 3 (Referee Peterson) "... [a] hearing officer has a responsibility to conduct an investigation that will bring out all the facts." As did Referee Peterson, the Board repeats the admonishment of Referee Cluster in Award 1875 of Special Board of Adjustment No. 235 (UTU v. C&NW) against indulgence by the parties in a "Perry Mason complex," the essence of which:

"... seems to be that the investigation process is a game or competition in which the object is not to discover all the facts about the matter under investigation, as many Boards have supposed and stated, but to obscure, twist and restrict the facts and to indulge in supposed legal stratagems, technicalities and techniques to confound the other party and thus win the day."

As Referee Cluster further advised, the purpose of using the investigative process is to "... get at the truth, so that a just decision can be made in the first instance by the Carrier, or, if that decision is thought unjust by the Organization, on later review by this Board." Id.

The Board determines that the Claimant was not deprived of a fair Trial by virtue of the Hearing Officer's rulings and behavior at the Trial. It is the duty of the Hearing Officer to rule on objections and on the relevance of the evidence presented. In essence, the Organization complains that the Hearing Officer disagreed with its representative at the Trial. Having examined the record herein, the Board determines that the Hearing Officer's rulings were within his discretion

in attempting to bring out the facts relevant to the Trial at hand and did not prejudice the Claimant.

(10) The Organization maintains that the officer who issued the Notice of Trial improperly also acted as Hearing Officer or Prosecutor, evidencing bias against the Claimant. The Organization contends that the Hearing Officer should not have acted as both Hearing Officer and Prosecutor of the case. In doing so, the Carrier violated Article 16(1)(a) and (d) according to the Organization. In support of its argument, the Organization cites First Division Awards 10293, 10616 and 16699; Third Division Awards 5701, 6801 and 14496; Public Law Board No. 194, Award 23. The Carrier responds that the Board has clearly and consistently determined that in the absence of a negotiated provision to the contrary, there is no authority that prescribes who shall prefer charges or conduct the Trial. In support of its argument, the Carrier cites Third Division Awards 14573 and 16347.

Article 16(1)(a) provides:

“Police officers who have been in service more than one (1) year shall not be suspended or dismissed from service without just cause and without a fair and impartial trial.”

Article 16(1)(d) provides:

“The NJT Rail Police Instructions in effect on the date of this Agreement and as amended from time to time in agreement with the Business Representative shall be in full force and effect with respect to suitable procedures for the control and recording of discipline, and for the investigation and processing of complaints of violations of the rules and regulations governing the actions of all members of the NJT Rail Police Force.”

The Organization argues that the Hearing Officer had information before the Trial but stated that he had only signed the Notice of Trial and had no information and refused to be questioned by the Claimant's attorney. However, the Hearing Officer was in possession of Lieutenant Johnson's report and produced it during the Trial and questioned Lieutenant Johnson on the report. The Organization argues that Lieutenant Johnson's report contains the "very essence" of all the Carrier's information and possession of the report presumes knowledge of its contents. The Organization contends that it is a fatal defect for the Hearing Officer to attend any

pretrial meeting with any of the Carrier's witnesses; discuss the case or listen to such discussions; or be exposed to evidence or material that may be the subject of testimony.

This Board does not agree with the Organization. In Public Law Board No. 6489, Award 3 Referee Peterson stated:

". . . [t]hat the hearing officer had a discussion with a witness prior to the hearing did not impugn the fairness of the hearing. A hearing officer has a responsibility to conduct an investigation that will bring out all facts. It is not unusual for a hearing officer to confer with a witness in preparation for an investigation so as to determine that witness testimony will be relevant to the charge and that the witness has such documentation as may be appropriate in support of their testimony."

As to the Hearing Officer's refusal to be questioned by the Claimant's attorney, the Board has determined that if an officer of the carrier is to testify as a witness, he should limit his participation in the matter to that role. See First Division Award 8376. Accordingly, the Hearing Officer properly refused to give testimony. Moreover, the Organization does not identify any such discussions or meetings to which the Hearing Officer was privy and does not identify any evidence in the record that indicates that the Hearing Officer was biased because he had a copy of this report. Neither Article 16(1)(a) nor (c) precludes the Hearing Officer from acting as Prosecutor or from issuing the Notice of Trial, and such circumstances do not of necessity prejudice the Claimant as the Organization argues.

(11) The Organization also argues that the Claimant was denied a fair and impartial Trial because the decisional officer was not present at the Trial and cannot properly evaluate the testimony only from the transcript and without having seen the witnesses in order to make credibility determinations. In support of its argument, the Organization cites First Division Award 10293, as well as Third Division Awards 13180, 13240, 13482, 14031, and 14267. Suffice to say that the Board has not found such a requirement. See Third Division Award 16347. Furthermore, the Organization has not identified any provision of the Agreement that requires that the decisional officer be present. Accordingly, the Board does not find reversible error.

(12) The Organization next asserts that the Claimant's rights were violated when the Hearing Officer admitted hearsay evidence as the only basis for the charge; that such evidence is not sufficient to sustain the Carrier's burden of proof; and, accordingly, the discipline must be vacated. The Organization contends that Carrier witness Captain H. G. Hempel expressly stated that the only information he had regarding the incident he learned from hearsay. Likewise, Carrier witness Lieutenant Johnson admitted that some of the information he included in his report had been obtained from Sergeant Dunn, and he could not identify the information on the report that he learned firsthand and that which he obtained from Sergeant Dunn. The Organization contends that this information was the only evidence that the Claimant discharged his gun on the night of the incident. There is no need to address whether the Hearing Officer improperly admitted such hearsay evidence. During the Trial, the Claimant described his actions on the night of the incident, and recounted that he discharged his revolver at the other vehicle. Accordingly, it is patently untrue that there was no information provided by Captain Hempel and Lieutenant Johnson regarding whether the Claimant discharged his weapon, and the Claimant's rights were not so violated.

(13) The Organization further contends that the Carrier violated the Claimant's right to due process and Article 16(1)(a) when it refused to supply information in response to the Organization's pretrial request. The Organization contends that this refusal constituted adversarial behavior; interfered with the Organization's ability to prepare a defense; and violated the "American doctrine of fair play." The Organization maintains that the right to due process through discovery is a fundamental privilege required by the U.S. Constitution. In support of its argument, the Organization cites Third Division Awards 1688, 14069, 14187, 14448, 15927 and 17311.

The Organization has not identified any provision of the Agreement that requires the Carrier to provide such information. Accordingly, the Board determines that the Carrier did not violate the Agreement.

(14) The Organization argues that the Decisional Officer, Director of Police Slawsky, was biased, because he was at the State Police Headquarters on the night of the incident and had spoken with Lieutenant Johnson, Chief Investigator Buckreis, and the Claimant. He also removed the Claimant from service pending Trial. The Organization contends that Director of Police Slawsky had made some determination of guilt at that time and his acting as decisional officer constituted a fundamental denial of the Claimant's right to a fair and impartial Trial, and

therefore the discipline should be reversed. The Carrier argues that it did not violate the Agreement when Director of Police Slawsky removed the Claimant from service without pay, as the Agreement does not require otherwise. The Carrier argues that the Claimant's actions constituted a major offense according to Article 16(1)(b) and (c) and his removal was warranted. The Carrier contends that the Board has upheld removal in these circumstances. See Third Division Award 19043. Additionally, the Carrier contends that the Director of Police cannot be expected to isolate himself from such an incident involving one of his Police Officers before deciding whether to remove the Police Officer from service. The Carrier argues that the facts of the incident involving the Claimant required the Carrier to act to ensure public safety. Specifically, Article 16(1)(b) provides:

“When a major offense has been committed, a police officer considered by NJT Rail to be guilty thereof may be held out of service pending trial and decision.”

Article 16(1)(c) provides:

“As used in paragraph (b) above, a major offense is one such as, but not limited to, the following:

1. Use or possession of alcoholic beverages, intoxicants or narcotics
2. Insubordination
3. Stealing, cheating or dishonesty
4. Illegal, unlawful or immoral actions
5. Excessive use of force
6. Improper use of weapons
7. Any action that may unjustifiably imperil the safety of other employees, patrons, the offending employee or the property of NJT Rail.”

The Board determines that the Carrier was well within its rights under Article 16(1)(b) and (c) in removing the Claimant from service pending Trial concerning the incident. Article 16(1)(b) to which, as the Third Circuit held, the Parties by their actions agreed, is not a model of draftsmanship. Yet, however poorly drafted, the provision envisions a Trial to determine whether a Police Officer involved in a major offense is guilty of the offense, and allows the Police Officer to be held out of service until such determination is made. The Carrier argues that

because Director of Police Slawsky removed the Claimant from service under this provision, he must have already decided that the Claimant was guilty. The Board does not agree that this must be the case. The Claimant's actions on the night of the incident arguably violated items four through seven enumerated above in Article 16(1)(c) and, therefore, Director of Police Slawsky properly removed the Claimant from service pending Trial. The Claimant was afforded a full Trial before Director of Police Slawsky made his decision, and the Organization offered nothing more than an assertion that in these circumstances there must be bias. Moreover, as the Carrier argues, the Agreement does not require some other process, and the Carrier did not violate the Agreement.

(15) The Organization argues that the Claimant's right to a fair Trial was denied in that Hearing Reporter W. E. Houston was not licensed, certified or sworn. The Organization asserts that the Hearing Reporter stopped making stenographic recording of the proceedings at pages six and seven of the transcript, to which the Organization's representative objected, but which the Hearing Officer overruled. The Organization asserts that Article 16(4) of the Agreement provides that a true copy of the Trial record is to be furnished to the accused Police Officer and his representative. The Organization contends that the transcript and affidavits of Sergeant Dunn and the Claimant submitted by the Organization clearly indicate that the Hearing Reporter stopped recording the Trial. The Organization further notes that it made several pretrial requests that it be allowed to furnish a certified and licensed Court Reporter or be allowed to bring a recording device into the Trial, which requests the Carrier denied. The Organization argues that any defects in the transcript must be regarded as a fundamental denial error to provide a true copy of the record; must be considered prejudicial to the Claimant; and, accordingly, the discipline must be vacated. The Organization further claims that inasmuch as the Hearing Reporter was not licensed, certified, or sworn, there is a lack of guarantee that the Hearing Reporter, an employee of the Carrier loyal to its interests, did not tamper with the Trial record. In support of its argument, the Organization cites First Division Awards 5555, 8261, 8376, 11364, 16952, 19448, 20768 and 22292, as well as Fourth Division Award 1027.

Article 16(4) of the Agreement provides:

“A true copy of the trial record shall be furnished to the accused police officer upon his request.”

The Board agrees that the Claimant has a right to a true copy of the Trial record pursuant to Article 16(4). However, the Board also agrees with the Carrier that Article 16(4) does not require that the Trial be recorded by a licensed, certified, and sworn Court Reporter. As recorded at pages six and seven of the transcript, as the Hearing Officer began to read the Notice of Trial into the record, the Claimant's representative objected that the Hearing Reporter had stopped recording the proceedings. The Board examined the Trial transcript, and in particular pages six and seven cited by the Organization. The Board finds no evidence of any omissions or gaps in the record, and as the Carrier also correctly notes, the Organization has not identified any such specific facts or testimony. The Board will not find a violation or reverse the Claimant's discipline on the basis of mere unsupported accusations.

(16) The Organization next argues that the Carrier did not satisfy its burden of proof such that the Carrier's finding that the Claimant violated Carrier policy or that his actions constituted misconduct was justified. The Organization notes that the Claimant was charged with violating Article 7.1, Conduct Unbecoming Police Officer; Safety Rule 8063-G, which states that a Police Officer shall never discharge his or her weapon from a moving vehicle; and NJTRO Departmental Policy Section II (a)(3) which generally prohibits a Police Officer from discharging a weapon except under exceptional circumstances or when the use of deadly force is justified. The Organization notes that Safety Rule 8063-G uses the word "never," while the firearms' policy contains an exception thereto. The Organization argues that Police Training Officer Dailey testified that a Police Officer has a right to use deadly force to protect himself from bodily injury or death, and that pursuant to Departmental Policy rather than Safety Rules, Dailey does not train his Police Officers that they may never use such force. Moreover, the Claimant's testimony corroborates Dailey's testimony. The Organization further argues that Captain Hempel testified only that the Claimant's action was improper because it violated Safety Rule 8063-G, rather than Departmental Policy. Additionally, Captain Hempel testified that the Claimant should not be found in violation if he used deadly force to prevent his own death. The Organization further asserts that the Claimant's testimony clearly demonstrates that he believed his life was being threatened by both the driver of the other vehicle and the passenger in that vehicle, who shouldered what the Claimant believed to be a weapon. The Organization argues that the Carrier cannot enforce a Safety Rule which contradicts its official policy, and which was not taught to the Claimant in the training classes. The Organization contends that the record demonstrates that the Claimant's actions were permitted by the Carrier's policy, and therefore his actions were proper and did not reflect discredit upon himself.

The Organization asserts that a violation of Safety Rule 8063-G is not sufficient to sustain the Carrier's finding of guilt because it based its finding on the Claimant's guilt of all charges listed in the notice. The Organization argues that the Carrier failed to carry its burden of proof on all of the charges and the discipline must be vacated. In support of its arguments, the Organization cites Second Division Awards 2199, 3525, 3808, and Third Division Awards 2298, 6576, 7177 and 14225.

The Carrier asserts that the Claimant's total disregard of the Department's Rules and Procedures led to his decision to discharge his weapon at a moving vehicle on a busy highway; thereby creating a grave danger to the public. Furthermore, according to the Carrier, the Claimant's actions damaged the reputation of the Police Department and the Carrier. The Carrier further asserts that the Claimant's continued employment with the Carrier would pose a danger to the public and create a liability for the Carrier. According to the Carrier, the Claimant's actions were too severe and dangerous to merit anything less than termination. The Carrier asserts that the record demonstrates that the Claimant violated Article 7.1, Rules and Regulations of the NJTRO Patrol Guide, Article 8063-G of the NJTRO Police Department Safety Rules, and Section II(A) of Departmental Policy prohibiting the discharge of firearms at or from a moving vehicle. The Carrier maintains that the Claimant's testimony corroborates the account of his actions set forth in the police investigation report. The Carrier notes that the Claimant testified that he pulled up next to a vehicle that had passed him at a high rate of speed while cutting off other vehicles. When he pulled up to the vehicle, he showed his badge, at which time the passenger in the vehicle shouldered a long, cylindrical item while the driver of the vehicle attempted to run him off of the road. The Claimant testified that he then discharged four rounds from his weapon. Additionally, he testified that the two vehicles never made contact. The Carrier notes that the Claimant testified that he discharged his weapon the first time that he pulled up alongside of the other vehicle. Moreover, the Claimant testified that the other vehicle attempted to run him off of the road more than once. The Carrier contends that the testimony suggests that the Claimant could have attempted less severe alternatives to discharging his weapon from his moving vehicle. Additionally, the Claimant was only one-tenth of a mile from a toll booth. According to the Carrier, the Claimant could have stopped at the toll booth and reported the vehicle. The Carrier points out that although the Claimant stated that he believed the long, cylindrical object was a rifle or shotgun, the object actually was a piece of wood. The Carrier contends that this testimony is not credible, because the Claimant also testified that he was able to see the eyes of the occupants of the vehicle well enough to know that they saw and recognized his badge, but he

mistakenly thought that he saw the passenger raise a rifle and discharge the rifle at him.

The Organization asserts that the Claimant was disciplined on the basis of three joint charges, but that the evidence did not support a finding of guilt on all three charges. The Board disagrees. The Claimant was charged with having violated Article 7.1, Rules and Regulations of the NJTRO Patrol Guide, Article 8063-G of the NJTRO Police Department Safety Rules, and Section II(A) of Departmental Policy prohibiting the discharge of firearms at or from a moving vehicle.

Article 7.1 states:

“The commission of any specific act or acts of immoral, improper, disorderly or intemperate personal conduct which reflects discredit upon the officer himself, upon his fellow officers, upon the Police Department or upon NJ Transit.”

Safety Rule 8063-G provides that a Police Officer must:

“(g) Never fire from a moving vehicle.”

Section II from the Departmental Policy provides:

“A. Restrictions on the use of the firearm include its display, use of warning shots, surrender of the firearm, and certain statutory limitations.

* * *

3. Discharging a firearm at or from a moving vehicle is generally prohibited except under exceptional circumstances (when the use of deadly force is expressly justified).

* * *

- B. Sanctions governing the use of firearms include self-defense and the defense of others. A Law Enforcement Officer may purposely discharge a firearm if:

1. It is authorized by law (Ch. 3 of Title 2C);
2. And, it is immediately necessary;
3. And, all less severe alternatives have been exhausted or are manifestly inappropriate or ineffective;
4. And, it is for one of the following reasons:
 - (a) To protect himself/herself against imminent death or serious bodily injury; -OR-
 - (b) To protect an innocent person against death or serious bodily injury.
5. Under self-defense provisions, a Law Enforcement Officer is not obligated to retreat or desist when resistance is met; in fact, he may move forward to achieve his objective.

* * *

- C. Unless a different meaning is plainly required, the following definitions apply to this subject:

* * *

2. **DEADLY FORCE:** Such force which results in or creates a substantial risk of death or serious bodily injury.

* * *

4. **SERIOUS BODILY HARM:** (Injury) Any harm which creates a substantial risk of death or a serious/prolonged impairment of an organ, a body function or a permanent disfigurement."

As the Board has stated above, in an investigation into whether a discharge was wrongful, as at issue in the instant matter, the Carrier is not required to prove guilt beyond a reasonable doubt as in a criminal case, or by a preponderance of the evidence as in a civil case. The Carrier must show only that there is substantial evidence to support the dismissal. See First Division Award 16735. In this matter, it is undisputed that the Claimant discharged his weapon from a moving vehicle on

a busy highway. It is also undisputed that such action violates Safety Rule 8063-G. This Rule provides that a Police Officer must never discharge his or her weapon from a moving vehicle. However, the Carrier's Departmental Policy provides an exception to that Rule. Nevertheless, in order to come under the exception, the Claimant's actions must have occurred in such exceptional circumstances that he was warranted in discharging his weapon from his moving vehicle. The Claimant testified that he could see the eyes of the occupants of the other vehicle and could see that they recognized his badge; yet he could not see well enough to discern whether a piece of wood was a rifle and, therefore, he feared for his life. However, the evidence presented demonstrated that the Claimant took no other action other than discharging his weapon at the other vehicle. The evidence demonstrates that the Claimant was only one-tenth of a mile from a toll booth, at which he could have summoned assistance, and the Claimant never backed off of the other vehicle before discharging his weapon. The Carrier's Safety Rules address the protection of Police Officers and others who might be harmed. The Carrier determined from this evidence that the Claimant's actions risked the safety of others, even though there were alternatives available to the Claimant. Moreover, the Carrier's determination from the Claimant's testimony that he believed that the cylindrical object was a weapon lacked credibility is reasonable in light of the Claimant's testimony that he could see the eyes of the occupants in the vehicle and could discern that they understood that he was a Police Officer. On the evidence presented, the Board determines that the Carrier made the required showing that the Claimant's actions were not justified under its Section II. Because the Claimant did not satisfy the requirements of Section II, it follows as well that he violated Safety Rule 8063-G which absolutely prohibits a Police Officer from discharging his weapon from a moving vehicle. Additionally, the Board opines that there is a lack of basis on which to find that such action does not violate Article 7.1 as conduct unbecoming of a Police Officer as described therein. Accordingly, the Board denies the Organization's request that the Carrier's decision and the discipline that it imposed be reversed.

Referee Lamont E. Stallworth who sat with the Division as a Neutral Member when Award 4478 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of May 2004.