

NATIONAL RAILROAD ADJUSTMENT BOARD  
FOURTH DIVISIONAward Number 4508  
Referee Herbert L. Marx, Jr. Docket Number 4525

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 IN ARTICLE 16, SECTION 1, PARAGRAPH (A) OF THE APPLICABLE AGREEMENT DENIED 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 unratified agreement.

POINT NO. 2 - Claimant did not receive notice in writing of the specific charges on which he was to be tried, and the time and place of the trial.

POINT NO. 3 - A hearsay tape recorded statement alleged to be taken from Claimant used in the application of discipline submitted by a hearsay witness should be deemed inadmissible and unreasonable as evidence in violation of Article 16, Section 2, Paragraph (c) of the applicable agreement.

POINT NO. 4 - Use of tape recorded statement by Claimant in the application of discipline inadmissible by Carrier because Claimant was not afforded two days advance notice of the statement in violation of Article 16, Section 2, Paragraph (a) of the applicable agreement.

POINT NO. 5 - Use of tape recorded statement by Claimant in the application of discipline inadmissible by Carrier because Claimant was denied privilege (sic) of consulting a union representative by a Carrier official in violation of Article 16, Section 2, Paragraph (a).

POINT NO. 6 - Claimant's Constitutional right to due process was denied when Carrier official denied Claimant access to a union representative in violation of the 5th and 14th Amendment's of the U. S. Constitution.

POINT NO. 7 - Hearing Officer's use of opinionated question's of Carrier witness inappropriate conduct and should be deemed inadmissible.

POINT NO. 8 - Carrier failed to satisfy its burden of proof as it failed to produce any evidence the Claimant possessed cocaine.

POINT NO. 9 - Carrier failed to satisfy its burden of proof when it failed to produce a qualified witness to verify the alleged substance was cocaine.

POINT NO. 10 - Witness Burkreis' statements during trial should be deemed inadmissible as incredible testimony based upon contradictory statements in affidavits to be submitted by the PBA which discredit his testimony.

POINT NO. 11 - Carrier failed to satisfy its burden of proof that the Claimant violated Article 7.1 of the NJTROPD Patrol Guide.

POINT NO. 12 - Carrier failed to satisfy its burden of proof that the Claimant violated Article 7.2 of the NJTROPD Patrol Guide.

POINT NO. 13 - Carrier failed to satisfy its burden of proof that the Claimant violated Article 7.11 of the NJTROPD Patrol Guide.

POINT NO. 14 - Claimant was disciplined on the basis of three joint charges. Insufficient evidence to support any one of the charges should set aside the entire discipline.

POINT NO. 15 - Claimant's Constitutional right to remain silent violated by Carrier's requirement for him to participate in an administrative trial without the offering of use immunity prior to the disposition of the criminal matter.

POINT NO. 16 - Decision Officer biased and prejudiced himself by participating in the pretrial investigation and removing Claimant from service based upon a prejudicial rule.

POINT NO. 17 - Carrier officials concealed material evidence known to support the affirmative defense of the Claimant.

POINT NO. 18 - PBA denied the right of appeal before Director - Labor Relations as required in Article 16, Section 6, Paragraph (a) of the applicable agreement.

PART II - CLAIMANT'S DISCIPLINE SHOULD BE VACATED FOR THE ABOVE REASONS AND ORDERED THE FOLLOWING DAMAGES PAID BY THE CARRIER.

POINT NO. 1 - All straight time wages lost during period of dismissal.

POINT NO. 2 - All overtime wages lost during period of dismissal which Claimant would otherwise be entitled under the provisions of the applicable agreement.

POINT NO. 3 - All holiday wages lost during period of dismissal which Claimant would have otherwise been entitled under the provisions of the applicable agreement.

POINT NO. 4 - All medical benefits lost during period of dismissal which the Claimant would have otherwise been entitled under the provisions of the applicable agreement.

POINT NO. 5 - All vacation lost during period of dismissal which the Claimant would have otherwise been entitled under the provisions of the applicable agreement.

OPINION OF BOARD: The Claimant was subject to an Investigative Hearing under the following charge:

"On Friday July 12, 1985 at approximately 1330 Hours (1:30 PM), P.O. Louis A. Hart was placed under arrest at 307 Martin Luther King Drive, Jersey City, N. J. by members of the Hudson County Prosecutor's Office and charged with violation of New Jersey Statute 24:21-20 A1, 'Possession of a Controlled Dangerous Substance.'

In connection with this matter you are charged with the alleged violation of the following articles contained in the NJTRO Police Patrol Guide: 7.1 Conduct Unbecoming an Officer, 7.2 Criminal Conduct, and 7.11 Improper Association."

Following the Hearing, at which the Claimant was not present, the Carrier dismissed the Claimant from service.

The record shows that there was no ratified Collective Bargaining Agreement in effect between the Organization and the Carrier at the time of this dispute. This is confirmed by the Organization in its Submission, which states that the Organization's Submission of the dispute to the Board "should not be construed as acceptance of the Board's authority in this matter, or acceptance of the unratified agreement."

In Award No. 4478, the Board recently considered an identical situation involving the same parties. In Award No. 4478, the Board stated:

"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."

Upon consideration of the record herein, the Board has no basis to reach a conclusion differing from that in Award No. 4478.

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.

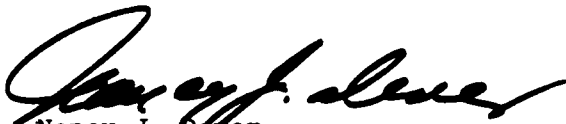
The parties to said dispute were granted the privilege of appearing before the Division, with the Referee sitting as a member thereof, to present oral argument.

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 19th day of February 1987.