

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4510

Referee Robert W. McAllister

Docket Number 4476

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

STATEMENT OF CLAIM:

1. NJTRO violated Article 16, Section 3, Paragraph (a) of the unratified agreement when it failed to grant claimant ten (10) calendar days advance notice of the original trial date and the postponement date.
2. NJTRO violated Article 16, Section 1, Paragraph (d) of the unratified agreement by administering a discipline trial procedure against the claimant which failed to adhere to established procedures which were in effect on the effective date of the unratified agreement, nor which were made in agreement with the PBA Business Representative.
3. NJTRO violated its own rules and regulations of the N.J. Transit Rail Operation Police Department, General Order 1.5 requiring claimant to submit to a discipline trial procedure which is still yet to be written or established.
4. NJTRO violated Article 16, Section 1, Paragraph (a) of the unratified agreement because the conduct of the hearing officer was prejudicial, suppressive, opinionated, and overbearing, thereby refusing the claimant a fair and impartial trial.
5. NJTRO further violated Article 16, Section 1, Paragraph (a) of the unratified agreement by the carrier's hearing officer refusing to submit to cross examination by the PBA as the official issuing the notice of trial, thereby refusing the claimant a fair and impartial trial.
6. NJTRO further violated Article 16, Section 1, Paragraph (a) of the unratified agreement by the carrier failing to produce essential documents, i.e., the alleged memo's between Sgt. Richard's and Capt. Hempel, and between Capt. Hempel and the carrier's hearing officer; and the carrier further failed to produce Capt. Hempel as an essential witness involved in the investigative process resulting in the trial of the claimant. The series of questions which were prepared by the hearing officer employed as a Trainmaster having no knowledge of police department procedures or employee's demonstrates obvious pre-trial contact between the hearing officer and police department personel, thereby refusing the claimant a fair and impartial trial.

7. NJTRO further violated Article 16, Section 1, Paragraph (a) of the unratified agreement by the carrier's hearing officer acting as prosecutor and hearing officer, thereby refusing the claimant a fair and impartial trial.
8. NJTRO violated Article 6, Section 1, paragraph (a) of the unratified agreement by utilizing the same carrier official to issue the notice of trial and act as the hearing officer, thereby refusing the claimant a fair and impartial trial.
9. NJTRO violated Article 16, Section 1, Paragraph (a) of the unratified agreement by not having the decision officer present at the trial to effectively evaluate the credibility of the two witnesses conflicting testimony, thereby refusing the claimant a fair and impartial trial.
10. NJTRO violated the historical intent and past practice application of Article 16, Section 6, Paragraph (f) by imposing thirty (30) actual days suspension rather than a deferred suspension. Furthermore, a past record of discipline over one year expired was not expunged subsequently tainting the issuance of discipline in this matter.
11. NJTRO violated the Railway Labor Act, Section 2, Third by imposing subject discipline as a subterfuge to coerce and harass the claimant as Vice President of the PBA in reprisal for stalled contract negotiations, promoting NRAB Fourth Division Case No. 84-4-107, Docket 4379, and promoting litigation between the PBA and the carrier.

The PBA is the only NJTRO union which has not ratified a collective bargaining agreement with NJTRO since NJTRO's inception on January 1, 1983. The afore mentioned pending dispute before a Fourth Division referee would adversely affect seniority in various NJTRO Police classes of Captain Hempel and Sergeant Richards, who collaborated to investigate this matter which eventuated into trial and suspension. Lastly, the PBA is a plaintiff in a civil law suit which would disrupt NJTRO's budget by paying overtime to all employee's who work over forty (40) hours per week. The matter would in fact create a substantial major financial burden with all 22 NJTRO unions.

12. NJTRO failed to meet their responsibility as the trier of the facts to satisfy the carrier's burden of proof to justify a guilty verdict against the claimant.
13. NJTRO violated Article 16, Section 6, Paragraph (a) of the unratified agreement by failing to grant the PBA a Director's Level appeal as requested in writing.

14. NJTRO violated the fifteen (15) day time limitation in issuing the written notice of discipline to claimant pursuant to Article 16, Section 5, Paragraph (a).
15. The thirty (30) day suspension imposed upon the claimant should be declared void for the above procedural defects and insufficient merit.
16. The thirty (30) day suspension imposed upon the claimant should be expunged from the claimant's personnel record without prejudice for the above procedural defects and insufficient merit.
17. Claimant should be reimbursed for all straight time wages, overtime wages, holiday wages and medical fringe benefits for the duration period of his suspension based upon the above procedural defects and insufficient merit.

OPINION OF BOARD: The Claimant was issued a thirty (30) day actual suspension as a result of an incident occurring at Penn Station, Newark, New Jersey. Claimant reported to work at 6:00 A.M. on Saturday, January 19, 1985, and was scheduled to work Post No. 8, which is a floater-relief position. Several Officers were not present, and Tour Supervisor Sgt. Richards reassigned the Claimant to Post No. 4, which is the Main Waiting Room. Claimant took exception to this assignment and, after his 7:00 A.M. coffee break, pursued the issue with Sgt. Richards. This series of exchanges between the Claimant and Sgt. Richards resulted in the Claimant leaving the office and, apparently, going home.

Prior to discussing the merits, there is a threshold issue which must be resolved concerning the jurisdiction of this Board. As evidenced in the Organization's Statement of Claim there was no ratified agreement between the Organization and the Carrier at the time of this dispute. Since this Board's jurisdiction is limited by statute to disputes growing out of grievances or out of the interpretation or application of agreements between carriers and their employes, there is no basis for proceeding before this Board and the Claim must be dismissed. See Fourth Division Awards 2511, 2348 and 4478, the latter of which dismissed a dispute between these same parties.

Had we not been precluded from reaching the merits, the Claim would nevertheless, have been denied. In essence, the Organization argued that when Sgt. Richards purportedly told the Claimant that if he did not like the way he (Richards) ran the tour he (Claimant) could go home, Richards was issuing a valid oral order. We disagree. This Board's evaluation of the record leads us to several conclusions. The Claimant objected to the change in his assignment. Words were exchanged. Then the point arrived where Sgt. Richards had had enough protest from the subordinate and uttered the words now characterized by the Organization as permission to choose whether or not to stay at work. Given the totality of circumstances, including the fact Sgt.

Richards was shorthanded, we find little support for this strained characterization of the events of January 19, 1985. A preponderance of probative evidence clearly establishes the Claimant overstepped the prerogatives of a Police Officer, challenged his superior, was discourteous, insubordinate, and did not conduct himself in keeping with generally recognized standards of conduct.

FINDINGS:

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

The Carrier and the Employes involved in this dispute are respectively Carrier and Employes 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 waived right of appearance at hearing thereon.

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.