

**Special Board of Adjustment 928**

Award no. 498

**Parties to the Dispute:**

**Brotherhood of Locomotive Engineers and Trainmen**

**and**

**National Railroad Passenger Corporation (AMTRAK)**

**(M. Schulthies – Claimant)**

**Statement of Claim:**

Claim presented on behalf of the Brotherhood of Locomotive Engineers and Trainmen on behalf of Passenger Engineer Mark Schulthies for rescinding the imposed discipline of: "termination of your employment with the National Railroad Passenger Corporation as stated in the discipline letter dated January 10, 2007, under the signature of Steve Shelton, General Superintendent – Pacific Division and with full compensation for time lost, full credit toward vacation entitlement and health and welfare credits during the period held out of work, and clearing of Claimant's record as to any record relative to the alleged violation.

**Findings:**

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934. Special Board of Adjustment 928 has jurisdiction over the parties and the dispute involved herein.

At the time of the incident that led to the suspension in this matter, Claimant had worked since 1980 in the rail industry – first with another Carrier and he began service with the Carrier in 1992 as a Fireman and became qualified as a locomotive engineer in 1992.

A review of the facts in the instant matter shows that Claimant sent an email to Eugene Skorpowski, Managing Director of the Capitol Corridor Joint Powers Authority ("CCJPA") on October 29, 2006. The CCJPA is a creation of the State of California and is solely funded by the state government. In that email, Claimant discussed possible disruption of the Capitol Corridor Service. The Carrier is the provider of service on this line and the contract with the CCJPA is worth approximately 27 million dollars per annum

to the Carrier in direct payments from the CCJPA. Claimant copied the hierarchy of the Organization in his email to Mr. Skorpowski.

Mr. Skorpowski forwarded Claimant's email to Carrier management with comments indicating his displeasure and the desire to seek another service provider if there was a work disruption. Letter was sent to Claimant on November 3, 2006, notifying him to appear for an investigation into three charges related to the email. After a postponement, a hearing was held on January 3, 2007, in which B. Heilman served as the charging officer and P. Gallagher served as the hearing officer. In a letter dated January 10, 2007, Hearing Officer Gallagher notified Claimant that he had been found guilty of the three charges. Claimant was assessed the discipline of termination in a letter from District Superintendent Steve Shelton in a letter date January 10, 2007. The parties were unable to resolve the matter and it proceeded to hearing before this Board.

The Organization argues a procedural violation in this matter because the Claimant was denied a fair and impartial hearing by the hearing officer. In support of this argument, the Organization maintains that the hearing officer improperly sustained objections, prohibited the Organization from developing a defense and conducted a hearing that was combative and unfair to the Claimant and the Organization.

The Organization continues that the discipline is excessive given Claimant's long and unblemished history with the Carrier. When these factors are considered, the discipline of dismissal is excessive.

The Carrier counters that Claimant was afforded a fair and impartial hearing that complied with the requirements of Due Process. As to the merits of the instant matter, the Carrier points out that Claimant committed the infractions when he sent an email to Mr. Skorpowski and threatened him with a disruption of service. The Carrier maintains that the discipline was appropriate given the nature of the infraction – an email threatening service disruption to a third party service contractor.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

As the first step in the analysis, the Board notes the strong and vociferous arguments of both the Carrier and the Organization in the instant matter. This Board has spent a considerable amount of time and effort analyzing the evidence and the arguments. It is obvious to the most casual of observers that the labor-management issue underlying

this matter is of critical import to both parties. However, that issue is not before this Board, the discipline of Claimant is at issue.

A Claimant is entitled to a fair and impartial hearing under the Agreement. Numerous awards discuss that a fair and impartial hearing is not necessarily a perfect hearing. While perhaps somewhat flawed, the hearing must ultimately be fair and impartial in order to afford the Claimant the rights under the Agreement. The hearing in the instant matter is very far from perfect. After a review of the record, the Board finds that the Claim must be sustained because Claimant was not afforded a fair and impartial hearing as required by the agreement.

This Board notes that Hearing Officer Gallagher plainly denied the Organization an opportunity to ask virtually any questions in order to develop a theory of defense. He sustained objections to nearly every single question asked by the Organization representative. Of critical impact to the Organization's claim that the hearing was unfair and biased, the Organization was prohibited from asking any meaningful questions of Mr. Skorpowski. This matter was high profile. Rather than striving to provide a fair and impartial hearing, Hearing Officer Gallagher acted to protect Mr. Skorpowski from having to answer any Organization questions beyond basic foundational inquiries. He clearly skewed the hearing away from an impartial investigation. Indeed, Mr. Skorpowski has been involved in railroading since the early 1970s and is clearly a sophisticated individual. This Board doubts that Mr. Skorpowski would have had any difficulty answering any question posed by the Organization as they tried to cross examine him or develop a theory of defense.

There was no need to restrict the questioning of the witness as was done by Hearing Officer Gallagher in this matter. Indeed, the behavior of the Hearing Officer in sustaining Organization questions on relevance grounds - when the questions were clearly relevant, and on asked and answered grounds - when the questions had neither been asked nor answered, prohibited the Organization from testing the Carrier's case or developing a theory of defense. The actions of the Hearing Officer were so egregious that Claimant was denied a fair and impartial hearing.

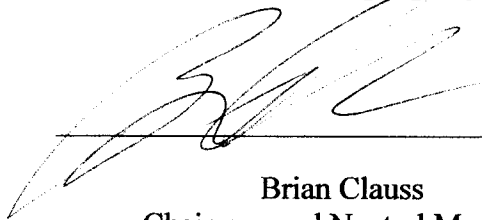
This Board also notes that many of the partisan actions of Hearing Officer Gallagher would not have occurred but for a number of baseless objections by Charging Officer Heilman. He objected on relevance grounds when questions were clearly relevant to the development of a defense. He also objected on the grounds that a question had been asked and answered when the question had neither been asked nor answered. While this Board cannot fault a Charging Officer for strong advocacy on behalf of the

Carrier, the Board also notes that the Carrier was not well-served by the actions of Mr. Heilman or Hearing Officer Gallagher.<sup>1</sup>

Claim sustained.

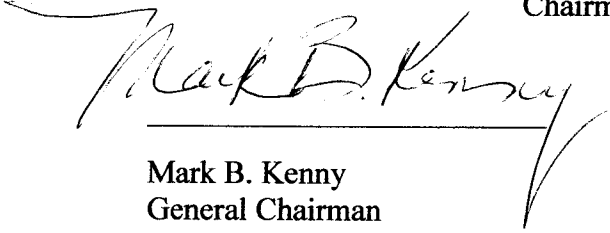
**Order**

**This Board, after consideration of the above dispute, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective within thirty days of receipt of the properly executed award.**



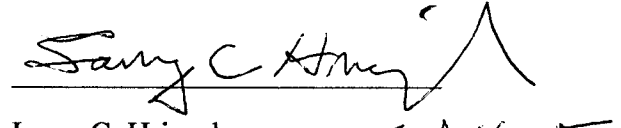
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Brian Clauss  
Chairman and Neutral Member



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Mark B. Kenny  
General Chairman  
BLET  
Organization Member



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Larry C. Hriczak  
Director, Labor Relations  
AMTRAK  
Carrier Member

F DISSENT

Dated this 28<sup>th</sup> day of OCT 2008

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<sup>1</sup> While not part of the record in the instant matter, and therefore clearly not considered here, the Board does note that Mr. Heilman was removed from his managerial position in a later matter unrelated to this case. (See SBA 928 Award 499)