

**NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 928**

BROTHERHOOD OF LOCOMOTIVE ENGINEERS )  
 ) Case No. 438  
and )  
 ) Award No. 438  
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) )

Martin H. Malin, Chairman & Neutral Member  
M. B. Kenny, Employee Member  
L. C. Hriczak, Carrier Member

Hearing Date: April 30, 2004

**STATEMENT OF CLAIM:**

Claim of Amtrak Passenger Engineer W. C. Cutsinger ("*Claimant*") for the rescinding of the discipline imposed of "termination of your employment with the National Railroad Passenger Corporation in all capacities effective immediately" as stated in the decision letter dated January 23, 2004, over the signature of Superintendent Road Operations Central Division, Travis Hinton, and restoration to service with full seniority and vacation rights unimpaired, with full compensation for time lost, full credit toward vacation entitlement and health and welfare benefits during the period held out of work, and clearing of Claimant's personal record as to any reference relative to the alleged violation.

**FINDINGS:**

Special Board of Adjustment No. 928, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On December 8, 2003, Claimant was directed to report for an investigation on December 12, 2003. The notice charged Claimant with violating General Code of Operating Rules, CORA Rule 15.2. It specified that on December 3, 2003, while operating train #317 at milepost 19.8 on the Union Pacific St. Louis Division, Villa Grove Subdivision, Claimant entered track limits protected by a Form B work restriction without first contacting the track foreman, employee-in-charge for permission to do so.

The hearing was postponed to and begun on December 23, 2003. It was recessed to and concluded on January 13, 2004. On January 21, 2004, the Hearing Officer found that all charges were proven. Based on these findings, Carrier advised Claimant, on January 23, 2004, that he had been dismissed from service.

The record makes clear that on the date in question, Claimant did enter the Form B work limits without first contacting the UP track foreman. Claimant did call the track foreman twice but received no response. As testified to by the UP Senior Manager of Terminal Operations, when interviewed after the incident, Claimant stated that he had called the track foreman twice, received no answer and decided to "just ease around and see what I could see." The hearing officer found the Senior Manager of Terminal Operations's testimony to be credible and we see no reason to depart from our usual practice to defer to the credibility determinations made on the property because the hearing officer is in a better position than we are to evaluate credibility. Accordingly, we find that Carrier proved the charges by substantial evidence.

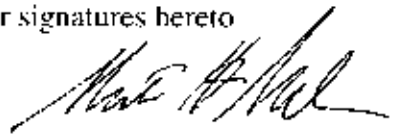
The critical question is the severity of the discipline. In contrast to Claimant who was dismissed, the conductor was afforded informal handling and a thirty-day suspension, while the assistant conductor was afforded informal handling and a ten-day suspension. Claimant, who began his service with Carrier in 1986, should be afforded one last chance to demonstrate that he can be a careful and safe employee who complies with all operating and other rules. We find that the penalty of dismissal is excessive. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service.

#### AWARD

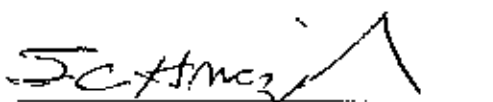
Claim sustained in accordance with the Findings.

#### ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto



Martin H. Malin, Chairman



L. C. Hriczak,  
Carrier Member

*DISSSENT*



M. B. Kenny,  
Employee Member

Dated at Chicago, Illinois, August 27, 2004.