AWARD NO. 3
Case No. 3

Organization File No.
Carrier File No.

PUBLIC LAW BOARD NO. 5586

PARTIES) UNITED TRANSPORTATION UNION
)
TO)
)
DISPUTE) NATIONAL RAILROAD PASSENGER CORPORATION

STATEMENT OF CLAIM:

The UTU requests that this Board require Amtrak to permit Conrail Trainman Peter Strange to exercise his seniority against a junior employee on Amtrak in accordance with Article V of the November 8, 1982 Section 1165 Agreement (1165 Agreement). Additionally, the UTU requests that Claimant be granted any lost earnings resulting therefrom.

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated May 4, 1994, this Board has jurisdiction over the dispute involved herein, and that the parties were given due notice of the hearing held.

The Northeast Rail Service Act of 1981 had the effect of transferring responsibility for the operation of inter-city passenger service in the Northeast Corridor from Conrail to Amtrak, effective January 1, 1983. To accomplish this transfer, Carrier, Conrail and the Organization negotiated an agreement, commonly known as the 1165 Agreement, to provide for the transfer of employees. Under the terms of this Agreement, affected employees were afforded certain rights to transfer between carriers. Article V of the 1165 Agreement provides, in part, as follows:

V. EXERCISE OF AMTRAK SENIORITY

(a) Conrail employees with Amtrak Seniority shall be entitled to exercise such seniority under the following circumstances:

* * *

(2) On June 1 and December 1 of each year, by written notice by the employee to Amtrak and Conrail at least 15 days in advance thereof. An employee who is absent from duty during the entire period specified for submission of written notice because of vacation, medical disability, leave of absence or suspension may exercise his Amtrak seniority if he returns to active Conrail service prior to June 1 or December 1.

Claimant first entered train service on April 21, 1967, and was subsequently promoted to Conductor. He was then a successful applicant for an advertised position when Carrier commenced operation of the inter-city passenger service on January 1, 1983. Pursuant to Article IV of the 1165 Agreement, Claimant exercised his seniority back to Conrail on June 1, 1985. He attempted to return to Amtrak on December 1, 1992, but withdrew his application after he apparently was talked out of it by Amtrak supervisors. He again attempted to transfer to Amtrak under Article V on December 1, 1993. Carrier has rejected his application on the basis he is ill-suited for passenger service as evidenced by his disciplinary record for insubordination and revenue violations. At issue is whether Claimant's right to return to Amtrak is unconditional, or whether Carrier may exercise discretion over whom it allows to return.

Carrier argues it has the right to screen applicants to ensure that they meet the Carrier's employment standards. It relies upon Award Nos. 1 and 2 of Public Law Board No. 4879, involving these parties. Each of those cases involved an employee who had not previously worked for Amtrak. It was found that Carrier had required such "first-time" transfers to submit employment application

forms, and that Carrier had rejected at least two other Conrail train service employees. The Board, in Award No. 1, held:

> Carrier has an inherent managerial right and responsibility to review "first-time" applicants who request transfer from Conrail under the provisions of Article V(a)(2) of the November 8, 1982 Implementing Agreement. Any other action by the Carrier would be a dereliction of its responsibility and could well have a deleterious effect on the honesty of other employees and on the confidence of the public in the federally subsidized passenger service operations.

It is clear to us that Public Law Board No. 4879 limited the application of this Award (as well as Award No. 2, which merely adopts the decision in Award No. 1) to "first-time" applicants. Because Claimant had previously worked for Amtrak under the 1165 Agreement, we do not find these decisions to be persuasive.

Carrier also cites Award No. 1 of Public Law Board No. 4971, which also involved a Conrail employee attempting to make his first transfer to Amtrak. Carrier rejected him because he failed to complete a pre-employment drug test. In upholding the Carrier's position, the Board wrote:

> Obviously Claimant would come to Amtrak as an employee with seniority. This distinguishes him from a new hire and an applicant who was rejected off the street. But the preservation of seniority rights does not *per se* negate a Carrier's right to set standards for all new employees. NERSA does not prevent a potential carrier from determining if job applicants can meet reasonable standards. This is not a denial of Claimant's right to transfer. However, his failure to return to complete his physical examination is the equivalent to being physically unable to perform. . . .
>
> There must be an inherent right of an employer to determine whether a prospective transferee can meet some basic and reasonable minimal standards. The intent of the statute is to provide a means by which employees can flow over -- neither its purpose nor its intent was to define the precise moment a transferee becomes a new employee of the other Carrier. . . .
>
> The bottom line is that Claimant was not automatically an Amtrak employee because he was a successful bidder. A Carrier has the right to set pre-employment

> standards before constructive or formal acceptance. If its criteria are unreasonable, they will be disregarded and the transfer will be recognized as binding. . . . It is eminently unreasonable and unfair to cast a blind eye on all pre-employment requirements and simply declare that the transfer is complete at the moment of the Award on the bids. . . .
>
> In effect, Conrail's position states that under no circumstances can a Carrier in Amtrak's position deny employment status to a successful bidder. Such a conclusion is completely alien to a potential employer's inherent managerial right to determine if an applicant, off the street or as a bidder, can meet reasonable pre-employment criteria. The statutes here never intended otherwise.

Although Carrier avers the Claimant in Award No. 1 of Public Law Board No. 4971 had also previously worked for Amtrak, we can find no evidence of this in either the Award or the documentation submitted to the Board in this dispute. Nevertheless, we do not find this Award to be as limiting as the Awards of Public Law Board No. 4879. The thrust of this Award is that the Carrier is entitled to make some determination as to whether or not the employee attempting to exercise seniority meets certain employment criteria. The exercise of seniority under the 1165 Agreement, therefore, is not a totally unlimited right. The Carrier, however, must exercise its discretion in a reasonable manner. It may not reject an employee unless there is a clear showing that the reasonable employment criteria have not been satisfied.

There is, certainly, a difference between Claimant's case and those involved in the three cited Awards. As noted above, the claimants therein had never worked for Amtrak, while Claimant had. It must be presumed, therefore, that when Claimant had exercised his seniority back to Conrail, he was considered an Amtrak employee in good standing. While the Board recognizes that there were some significant deficiencies in his performance, as reflected by his discipline record, the fact remains

that Amtrak had not chosen to dismiss him. This, then, becomes the starting point for any evaluation. Claimant's prior record with Amtrak alone cannot be a consideration.

The presumption of Claimant's acceptability, however, is a rebuttable one. Carrier may examine Claimant's service with Conrail, as well as other relevant factors reasonably related to his suitability. In Claimant's case, it had been eight and one-half years since he last performed service for Amtrak. The longer the period of time since the last Amtrak service, the more the Carrier is privileged to look at what the employee has been doing in the intervening time. In other words, the strength of the presumption of acceptability is inversely proportional to the length of the break in Amtrak service.

Turning to the particulars of Claimant's case, we find that he had been disciplined on four occasions during his most recent tenure with Conrail. Significantly, he had two suspensions for insubordination; one of them being 75 days in length. Under the circumstances, we cannot find that the Carrier acted unreasonably in rejecting Claimant's transfer. The Agreement was not violated.

AWARD: Claim denied.

Barry E. Simon
Chairman and Neutral Member

W. A. Beebe
Employee Member

R. F. Palmer
Carrier Member

Date: OCTOBER 19, 1994
Arlington Heights, Illinois

PUBLIC LAW BOARD NO. 4879

UNITED TRANSPORTATION UNION (C & T)

vs.

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 1

CASE NO. 1

STATEMENT OF CLAIM:
"The UTU requests that Conrail train service employee J. A. Peterson be permitted to exercise his seniority to Amtrak in accordance with Article V of Section 1165 Agreement, dated November 8, 1982."

FINDINGS:
This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board was duly constituted by agreement of the parties dated February 23, 1990; and that this Board has jurisdiction over the dispute involved herein.

The operative facts of this case show that Claimant J. A. Peterson is presently, and was at the time of this dispute, employed in freight train service by Consolidated Rail Corporation. By letter dated October 27, 1989, Claimant Peterson made a request to transfer to passenger train service with Amtrak effective December 1, 1989, in accordance with the provisions of Article V(a)(2) of the Section 1165 Agreement dated November 8, 1982. Subsequently, by letter dated November 30, 1989, Claimant's request to transfer to Amtrak was rejected because:

> "It is our understanding that you were recently involved in improper handling of revenue during your employment with the Metro-North Commuter Rail operation. On that basis, you will not be considered as eligible to transfer to Amtrak."

This decision by Amtrak was appealed on Mr. Peterson's behalf by his representative Organization through the normal grievance procedures on the Amtrak property and, failing a satisfactory resolution thereon, has come to this Board for final adjudication.

The so-called 1165 Agreement of November 8, 1982, is an implementing agreement made by and between the Employees represented by the United Transportation Union, National Railroad Passenger Corporation (Amtrak) and Consolidated Rail Corporation (Conrail) pursuant to Section 1165 of the Northeast Rail Service Act of 1981, and established procedures for the exercise of seniority rights by employees between the Conrail freight service operations and the Amtrak passenger service operations in the Northeast Corridor intercity passenger operations.

In this case , we are concerned specifically with Article V(a)(2) of the implementing agreement. This Article V(a)(2) reads in pertinent part as follows:

> "V. EXERCISE OF AMTRAK SENIORITY
>
> (a) Conrail employees with Amtrak Seniority shall be entitled to exercise such seniority under the following circumstances:
>
> (1) * * * * *
>
> (2) On June 1 and December 1 of each year, by written notice by the employee to Amtrak and Conrail at least 15 days in advance thereof. An employee who is absent from duty during the entire period specified for submission of written notice because of vacation, medical disability, leave of absence or suspension may exercise his Amtrak seniority if he returns to active Conrail service prior to June 1 or December 1.
>
> * * * * * *."

Claimant Peterson, in this instance, was a "first-time" applicant to transfer to Amtrak from Conrail. It is on this point that the present controversy arises. Petitioner argues that since the inception of the 1165 Agreement, Amtrak has never screened the "first-time" transfer applications of train service employees from Conrail. Amtrak, on the other hand, contends that they have always subjected such "first-time" transfer applications to all of their pre-employment standards prior to being accepted for employment on Amtrak. They point out that, in fact, at least two (2) other Conrail train service employees (V. Cross and A. Lawson) were rejected due to their failure to meet Amtrak's employment standards. Carrier further contends that they have required all such transfer applicants to complete employment application forms and have terminated individuals who have falsified such application forms. In this case,

Carrier contends that their actions were both reasonable and necessary especially in a situation which involved improprities of revenue handling.

This Board has considered all of the material which has been submitted by the parties and has considered all of the oral presentations which have been advanced.

It is true that this Board is not a court of equity. However, this is not an equity situation. Rather it is a situation in which there is no restriction either stated or implied in the 1165 Agreement which in any way restricts the Carrier in its obligation to insure that those individuals who are taken into its employ are of such quality to properly perform the work for which they will be responsible, and to exclude those who are not fit for such service. This principle was clearly enunciated in Award No. 39 of Special Board of Adjustment No. 928, when it ruled:

> "A critical aspect of the Organization's case is its contention that under Section 1165 and the Implementing Agreement nothing can be construed to give the Carrier the right to deny an engineer his statutory right to exercise his seniority on the basis of criteria normally applied to newly hired employees. The Organization contends therefore - - - - the Carrier had no right to reject Mr. Terry's exercise of his passenger service seniority.
>
> We find that Amtrak has an inherent managerial right to have each employee transferring into its service fill out an application form. Nothing in Section 1165 or the Implementing Agreement prohibits such a basic right. * * * We disagree with the Organization's position that a policy established for information gathering purposes cannot properly apply to diminish Claimant's statutory right to employment. * * * * This misconduct diminished the the Claimant's statutory right to employment; and the Carrier had the right to abrogate its contract of hire with Mr. Terry accordingly."

Carrier has an inherent managerial right and responsibility to review "first-time" applicants who request transfer from Conrail under the provisions of Article V(a)(2) of the November 8, 1982 Implementing Agreement. Any other action by the Carrier would be a dereliction of its responsibility and could well have a deleterious effect on the honesty of other employees and on the confidence of the public in the federally subsidized passenger service operations.

The request as outlined in the Statement of Claim supra is hereby denied.

James E. Mason
Chairman and Neutral Member

Joseph M. Fagnani, Carrier Member

William A. Beebe, Employee Member

Issued at Palm Coast, FL
April 20. 1990

PUBLIC LAW BOARD NO. 4879

UNITED TRANSPORTATION UNION (C & T)

vs.

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 2

CASE NO. 2

STATEMENT OF CLAIM:

"The UTU requests that Conrail train service employee Dennis Price be permitted to exercise his seniority to Amtrak in accordance with Article V of Section 1165 Agreement, dated November 8, 1982."

FINDINGS:

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board was duly constituted by Agreement of the parties dated February 23, 1990; and that this Board has jurisdiction over the dispute involved herein.

The operative facts of this case show that Claimant Dennis Price is presently, and was at the time of this dispute, employed in freight train service by Consolidated Rail Corporation. By letter dated November 10, 1989, Claimant Price made a request to transfer to passenger train service with Amtrak effective December 1, 1989, in accordance with the provisions of Article V(a)(2) of the Section 1165 Agreement dated November 8, 1982. Subsequently, by letter dated November 30, 1989, Claimant's request to transfer to Amtrak was rejected because:

> "It is our understanding that you were recently involved in improper handling of revenue during your employment with the Metro-North Commuter Rail operation. On that basis, you will not be considered as eligible for transfer to Amtrak."

This decision by Amtrak was appealed on Mr. Price's behalf by his representative Organization through the normal grievance procedures on the Amtrak property and, failing a satisfactory resolution thereon, has come to this Board for final adjudication.

The Agreement provisions, as well as the arguments and contentions of the parties in this case are the same as those involved and contained in Award No. 1, Case No. 1 of this Board. They need not be repeated here. They are, by reference, made a part of this Award.

Our Board has considered all of the material which has been submitted by the parties and has considered all of the oral presentations which have been advanced.

Because of the similarity in facts and arguments, the opinions expressed and the decision reached in Award No. 1, Case No. 1 of this Board are, by reference, made a part of this Award.

The request as outlined in the Statement of Claim supra is hereby denied.

James E. Mason
Chairman and Neutral Member

Joseph M. Fagnani, Carrier Member

William A. Beebe, Employee Member

Issued at Palm Coast, FL
April 20, 1990

PUBLIC LAW BOARD NO. 4971

AWARD NO. 1
NMB CASE NO. 1
CONRAIL DOCKET NO. CRT-6529
A. LAWSON

PARTIES TO DISPUTE:

UNITED TRANSPORTATION UNION

and

CONSOLIDATED RAIL CORPORATION (CONRAIL)

and

NATIONAL RAILROAD PASSENGER
CORPORATION (AMTRAK)

STATEMENT OF CLAIM:

What is the employment status of Trainman A. Lawson?

FINDINGS:

After Hearing upon the whole record and all evidence, the Board finds that the parties herein are Carriers and Employee within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement dated June 13, 1990 between the parties.

That agreement calls for a four (4) member panel, one each from the parties and a fourth neutral member to act as Chairman. The parties here stipulated that the Award was to be executed solely by the Chairman.

This claim concerns the attempt of a Conrail employee to transfer to Amtrak. Conrail maintains that the transfer was effected, and that the employee, A. Lawson (hereafter "Claimant"), is now a medically disqualified Amtrak Train Service employee. Amtrak asserts that the Claimant failed to meet its pre-employment standards for transfer. The basic facts and applicable agreements are not in dispute.

Passenger service was established between Philadelphia, Pennsylvania and Atlantic City, New Jersey in or about 1989, and Amtrak needed manpower. Claimant was a Conrail employee at the time with a seniority date of August 4, 1978 on the Conrail District "G" Roster of Train Service employees. He filed an application to work with Amtrak after seeing one of many Amtrak bulletins posted on March 20, 1989 at various Conrail locations under the authority of a November 8, 1982 Agreement among UTU, Conrail, and Amtrak. The genesis for this was the Northeast Rail Service Act of 1981 ("NERSA"). Section 1165 reads:

> "INTERCITY PASSENGER SERVICE EMPLOYEES
> Sec. 1165. After January 1, 1983, Conrail shall be relieved of the responsibility to provide crews for intercity passenger service on the Northeast Corridor. Amtrak, Amtrak Commuter, and Conrail, and the employees with seniority in both freight and passenger service shall commence negotiations not later than 120 days after the date of the enactment for the right of such employees to move from one service to the other once each six-month period. Such agreement shall ensure that Conrail, Amtrak, and Amtrak Commuter have the

right to furlough one employee in the same class or craft for each employee who returns through the exercise of seniority rights. If agreement is not reached within 360 days, such matter shall be submitted to binding arbitration."

Section VII of the November 8, 1982 Agreement reads:

"VII. ADDITIONAL AMTRAK EMPLOYEES
(a) After January 1, 1983, if a need develops in Amtrak Northeast Corridor service for additional train service employees, Amtrak will furnish Conrail a sufficient number of copies of a bulletin offering employment to Conrail employees with seniority in the NEC Seniority District to be posted at the locations where employees report for work.

(b) Applications will be accepted by Amtrak from employees with prior right seniority in the NEC working zone in which additional employees are needed in the order of their prior right seniority. Successful applicants will be transferred to Amtrak on the first day of the month following the award."

The bulletin stated, in part:

"Awards to this advertisement will be posted on or about Friday, March 31, 1989, and will become effective 12:01 A.M., Wednesday, April 5, 1989."

Amtrak's Award Bulletin dated March 30, 1989 indicated that Claimant was one of several successful bidders, and it, too, contained the words that Awards will "...become effective 12:01 A.M., Wednesday, April 5, 1989." Amtrak thereupon notified Claimant to report on or before April 5, 1989 for a

physical examination and to complete some paperwork. He failed to appear and was notified by an Amtrak supervisor on April 14, 1989 that he was required to take a physical examination including a drug screen. Claimant appeared at the Amtrak dispensary on April 17, 1989. At that time he signed a drug screening consent form which read, in part:

> "I FURTHER UNDERSTAND THAT REFUSAL TO PROVIDE A SAMPLE OR ANY ATTEMPT TO IMPROPERLY INFLUENCE TEST RESULTS WILL BE TREATED THE SAME AS A CONFIRMED POSITIVE RESULT AND I WILL NOT BE CONSIDERED FOR EMPLOYMENT WITH AMTRAK."

Claimant's urine sample was rejected as cold because it was less than his body temperature. He was told to drink water and return to provide another sample in two (2) or so hours. Claimant left and never returned (and he has apparently not been heard from since by either Amtrak or Conrail). Amtrak notified Claimant by April 26, 1989 letter that he "...failed to complete his required flow-over physical examination" and that he was not accepted for employment.

Conrail maintained that Claimant was a successful applicant on the bid and is an Amtrak employee, who is medically disqualified. Conrail argues that Claimant became an Amtrak employee when Amtrak awarded the position to him. It emphasizes that Section VII (b) of the November 8, 1982 agreement which

states that "Successful applicants will be transferred to Amtrak on the first day of the month following the Award." Thus, so states Conrail, the statute, the Implementing Agreement and the Supplemental Agreement, the language of the advertising bulletin, and the Award bulletin all support its conclusion that Claimant's transfer was fully effected without qualification or condition.

Obviously Claimant would come to Amtrak as an employee with seniority. This distinguishes him from a new hire and an applicant who was rejected off the street. But the preservation of seniority rights does not per se negate a Carrier's right to set standards for all new employees. NERSA does not prevent a potential carrier from determining if job applicants can meet reasonable standards. This is not a denial of Claimant's right to transfer. However, his failure to return to complete his physical examination is the equivalent to being physically unable to perform. (His apparent disappearance is certainly no less.) Passing a drug screen in this context is not an unreasonable standard, and under the Hours of Service Law Claimant could not be hired, if he failed such a test. Failing to complete the physical examination is the equivalent to failing the test. Conrail states, in effect, that even if all of this is so, Claimant became an Amtrak employee who was simply not qualified to work.

There must be an inherent right of an employer to determine whether a prospective transferee can meet some basic and reasonable minimal standards. The intent of the statute is to provide a means by which employees can flow over -- neither its purpose nor its intent was to define the precise moment a transferee becomes a new employee of the other Carrier. The fact that Amtrak's trainmaster phoned Claimant to direct him to appear on another date is not proof that Amtrak considered him an employee. In the least, the Drug Screening Consent form rebuts any argument that Amtrak considered Claimant an employee before he submitted to the test.

The bottom line is that Claimant was not automatically an Amtrak employee because he was a successful bidder. A Carrier has the right to set pre-employment standards before constructive or formal acceptance. If its criteria are unreasonable, they will be disregarded and the transfer will be recognized as binding. In this instance, Claimant's drug screen was critical because his employment would deal with providing transportation to the traveling public. Such a pre-employment requirement was a valid condition precedent to the attainment of employment status. It is eminently unreasonable and unfair to cast a blind eye on all pre-employment requirements and simply declare that the transfer is complete at the moment of the Award on the bids, particularly with an applicant who immediately

requires a medically disqualified classification because of drug abuse. Furthermore, a persuasive argument can be made that Claimant was not eligible in the first instance under the Hours of Service Law because of his failure to give a second urine sample, which was the equivalent to failing the drug screen.*

In effect, Conrail's position states that under no circumstances can a Carrier in Amtrak's position deny employment status to a successful bidder. Such a conclusion is completely alien to a potential employer's inherent managerial right to determine if an applicant, off the street or as a bidder, can meet reasonable pre-employment criteria. The statutes here never intended otherwise.

AWARD

Claimant is not an Amtrak employee in any capacity.

LOUIS E. SELTZER
Chairman and Neutral Member

Date: February 27 ,1991

* It was not relevant to take into account any evidence that Amtrak had previously rejected Claimant's application for employment for failure to meet medical standards, a claim, in any event, denied by Conrail.