

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 28081  
Docket No. CL-28464  
89-3-88-3-263

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union  
(National Railroad Passenger Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10273) (Carrier's File No. TCU-D 2565, G. BOWEN) that:

1. Carrier acted in an arbitrary and unjust manner, violating Rule 24 and other related rules of the Agreement when, on October 21, 1987, it dismissed Claimant from service, and further did not furnish an accurate transcript.

2. Carrier shall now be required to reinstate Claimant to service with seniority unimpaired, compensate him for all time lost and cleanse his service record of any reference to discipline with respect to this matter."

FINDINGS:

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

The carrier or carriers and the employe or 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.

Parties to said dispute waived right of appearance at hearing thereon.

At the time of the incident that gave rise to this Claim, Claimant was a Ticket Clerk in Carrier's Sebring, Florida, passenger station with over fourteen years' seniority. Claimant had a clean past record and had been honored shortly before for his rescue of a two-year old child who was about to be struck by a train.

By letter dated July 17, 1987, Claimant was notified to appear for a formal investigation into his violation of Rule F, Amtrak Rules of Conduct, for his allegedly sexually assaulting (fondling) an eight-year old female left in his care.

The child's father reported an incident to the Florida Department of Health and Rehabilitative Services and an Intake Counselor interviewed the child. The child's statement was forwarded to the Sebring Police Department for investigation and Claimant was subsequently arrested.

In discussions before this Board, it was pointed out that following a formal administrative hearing conducted on June 16, 1988, by the same Florida State Department with which the charge had been originally filed, Claimant was found not to have sexually abused the child. This hearing revealed that while Claimant was watching the child, who had been left in his care by the child's grandmother, he brushed a part of the child's body that was close enough to her vaginal area to cause her to wonder if she had been touched where she should not have been. By the time she was through talking to her father and the Department Counselor, she was saying that Claimant had rubbed her vaginal area and her breast. The Hearing Officer concluded that Claimant was not guilty of sexual abuse of the child, defined as the intentional touching of the genitals or intimate parts. All police charges against Claimant were subsequently dropped.

This Board notes that the findings of the June 1988 administrative hearing were not a part of the record before this Board. Even if they were, Carrier, in its investigation, would not be bound by conclusions reached in that forum.

This Board has reviewed the entire record of this case, including the transcript of the Investigation. While we cannot fault Carrier for acting quickly, given the suspicion that sexual abuse of a child may have occurred, we do not find sufficient proof in the record to sustain a finding of guilt. Clearly, Carrier's burden was more difficult to meet because of the failure of the child to appear at the hearing, but more than what was adduced at the Investigation is required to sustain such a charge. Claimant shall be returned to service with full backpay and all other rights restored.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 11th day of September 1989.

CARRIER MEMBERS' DISSENT  
TO  
AWARD 28081; DOCKET CL-28464  
(Referee Charlotte Gold)

The Majority committed serious error on several points in rendering this decision.

The Claimant was charged with a violation of Rule F, Amtrak Rules of Conduct, i.e.:

"...conduct involving...immorality, or indecency is prohibited. Employees must conduct themselves on and off the job so as not to subject Amtrak to criticism or loss of goodwill."

in that while on duty, Claimant was alleged to have "sexually assaulted (fondled) an eight year old female" left in his care on July 7, 1987.

In the only substantive discussion in the Award, the Majority delved into matters which were acknowledged as not being in the record established on the property. Importantly, at the time of the Majority's impromptu review during oral argument of a June 16, 1988 State of Florida administrative hearing (conducted eight months following Claimant's dismissal), the different quantum of proof involved, the dissimilar rules for excluding evidence, and the violation of confidentiality in even discussing the subject matter of this new material was called to the Majority's attention.

CARRIER MEMBERS' DISSENT  
TO AWARD 28081  
Page 2

In essence, there was no discussion of the evidence contained in the October 14, 1987 Investigation transcript which clearly showed that the Claimant violated Amtrak Rule F. Substantial evidence of improper conduct came from the Claimant himself:

"...I walked over to her and grabbed her on the leg right there and when she said I slip my hand up between her legs that is incorrect. I took my hand off and I put it to her stomach right below the navel button...I don't even know why she said I slid - if I did, it just went up, but I never got near the area that I was charged...."

The Claimant's version, even if credible, was sufficiently egregious so as to warrant the discipline assessed. The record before the Board, however, showed that the child provided a detailed and more graphic description to both her father and a Senior District Intake Counselor of the Florida Department of Health and Rehabilitative Services. On the basis of that evidence, Claimant was arrested on Carrier's property by civil authorities and charged with lewd and lascivious assault on a child under the age of 16. Furthermore, as for that aspect of the charge relative to subjecting Amtrak to criticism or loss of good will, although strenuously argued, the Majority made no comment whatsoever to the derogatory article and the

CARRIER MEMBERS' DISSENT  
TO AWARD 28081  
Page 3

uniformed employee's photograph appearing in the July 15, 1987 issue of "The Sebring News."

Without a doubt, material which was not part of the record made on the property influenced the Majority's decision. Indeed, the Majority improperly considered material which was deemed confidential by Florida state law. Obviously, the substantial evidence that was legitimately in the record, including the Claimant's admission, was ignored.

For the foregoing reasons we dissent.

Michael C. Lesnik  
M. C. Lesnik

M. W. Fingerhut  
M. W. Fingerhut

Robert L. Hicks  
R. L. Hicks

P. V. Varga  
P. V. Varga

James E. Yost  
J. E. Yost