

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39377
Docket No. CL-39928
08-3-NRAB-00003-070099
(07-3-99)

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

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

STATEMENT OF CLAIM:

**“Claim of the System Committee of the Organization (GL-13174)
that:**

- (1) Carrier acting arbitrarily and capriciously violated Rule 19 of the A.S.W.C. Agreement and other related rules, when on December 9, 2005, it assessed the discipline of termination from service in all capacities against Claimant Elaine Webster-Bouyer.**
- (2) Carrier shall now be immediately required to reinstate Claimant to service with seniority rights unimpaired and compensate her an amount equal to what she could have earned, including, but not limited to daily wages, holiday pay and overtime, had she not been held from service and dismissed from service.**
- (3) Carrier shall now be required to reimburse Claimant for an out-of-pocket medical, dental or amounts paid by her for medical, surgical or dental expenses to the extent that such payments would be payable by the current insurance provided by the Carrier under the terms of the governing Agreement.**

- (4) Carrier shall now expunge all references to the charges and discipline from Claimant's record."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

At the time of the incident leading to her discharge, Claimant Elaine Webster-Bouyer was working as a Train Attendant on May 19, 2005 aboard Train 6. While on this train, the Claimant tripped over a 66-year old passenger. According to various accounts, the Claimant became angry with the passenger and physically attacked her. As a result the Claimant was withheld from service.

By letter dated June 15, 2005, the Carrier notified the Claimant that she was to attend a formal Investigation on June 20, 2005 to address the following charges and specifications:

"Charge I: Safety . . .

* * *

Charge II: Trust and Honesty . . .

* * *

Charge III: Attending to Duties . . .

* * *

Charge IV: Professional and Personal Conduct . . .

* * *

Specifications:

In that while assigned as a train attendant on train 6 of May 19, 2005 you allegedly tripped over a 70-year old female passenger while she was seated in your assigned coach. You also allegedly physically shoved her into her seat. It is further alleged that you used profane language while in the presence of the passenger. You also allegedly struck the passenger in the face/nose area with a set of keys that you were carrying, causing injuries to her. Furthermore, you allegedly failed to adhere to safety Rule 2023-f which states: 'Look for and avoid any opening, tripping, falling, or slipping hazard.'"

After postponements, the Hearing took place on November 30, 2005 pursuant to which, in a letter dated December 8, 2005, the Claimant was notified that she was terminated effective immediately.

By letter dated January 5, 2006, the Organization appealed the decision specifying that the Carrier did not meet its burden of proof and that the discipline assessed in the case was unwarranted and excessive. On June 22, 2006, Labor Relations Director L. D. Miller denied the appeal. On June 30, 2006, the matter was appealed to the Third Division.

According to the Organization, the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. The Organization claims that the Carrier has been arbitrary and capricious in its treatment of the Claimant, that the Carrier has abused its

discretion, and that the Carrier's determination to discipline the Claimant was based on inconclusive evidence, thus rendering the discipline harsh and excessive. In addition, the Organization claims that the Claimant was denied a fair and impartial Investigation because the Investigation was held when the Claimant was unable to attend due to health reasons. The Organization asserts that the Carrier should now be required to overturn the dismissal and make the Claimant whole for all losses.

Conversely, the Carrier takes the position that it has met its burden of proof. The Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript developed during the Hearing makes it clear that the Claimant is guilty as charged. In addition, the evidence shows that the Carrier made numerous attempts to accommodate the Claimant's medical situation, but to no avail. According to the Carrier, the Claimant could have attended the Investigation, but ultimately chose to not do so. Based on the instant offense, dismissal is the appropriate penalty.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

The Board found substantial evidence in the record to uphold the Carrier's position in whole. We note that the Carrier has proven that the Claimant did violate Amtrak's Standards as identified in the charges listed above. Based on the instant offense, we have determined that dismissal is an appropriate penalty. In addition, we cannot find that the Organization has been successful in proving that the Claimant did not receive a fair and impartial Investigation. We find that the Carrier went to great efforts to accommodate the Claimant's medical situation.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of December 2008.