

The Third Division consisted of the regular members and in addition Referee Carol J. Zamperini when award was rendered.

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

STATEMENT OF CLAIM:

"(Carrier's File No. TCU-D-3292/Organization's File No. 393-DO-014-D)

Claim of the System Committee of the Brotherhood (GL-10472) that:

1. Carrier acted in an arbitrary and capricious manner and violated Rule #24 of the Agreement, when by notice of January 25, 1990, it assessed discipline of 'termination from service' against Claimant Molina.

2. Carrier shall now reinstate Claimant to service with seniority rights unimpaired and compensate Claimant an amount equal to what he could have earned, including but not limited to daily wages, overtime and holiday pay had discipline not been assessed.

3. Carrier shall now expunge the charges and discipline from Claimants record.

4. Carrier shall now reimburse Claimant for any amounts paid by Claimant for medical, surgical or dental expenses to the extent that such payments would be payable by the current insurance provided by Carrier."

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 employes involved in this dispute are respectively carrier and employes 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.

The Claimant served as a Ticket Clerk at the Carrier's station in Pomona, California, a position he had held since his initial employment on February 19, 1980. On March 22, 1989, he was working when a 12 year old boy who was running alongside a moving train nearly ran into him. He yelled at the boy to stop running and get back from the train. His exact words are in dispute. The boy claimed during telephonic testimony that the Claimant said, "Quit f..... around the train, I don't want to spend all damn night filling out a death report." The Claimant, on the other hand, denied using profane language.

When the boy reported the Claimant's actions to his father, who was nearby, he approached the Claimant. When he questioned the Claimant about his conversation with his son, the Claimant at some point said, "If you can't control your kids, don't come to the station."

On March 26, 1989, four days later, the boy's father directed a letter to the Carrier complaining of the treatment he and his son had received from the Claimant. He asked for a written apology. This request was never communicated to the Claimant.

The District Supervisor called the Claimant on April 6, 1989, to discuss the incident. On April 21, 1989, the Claimant was sent a notice to appear at a formal Investigation to be held on April 20, 1989. On April 24, 1989, he was sent a corrected notice which set the formal Hearing on April 28, 1989. The Hearing was postponed several times and eventually held on January 16, 1990. The purpose of the Hearing was to address the following charge:

"Violation of Rule F, Section 1 of the National Railroad Passenger Corporation Rules of Conduct, in that you allegedly used profane and vulgar language directed to a child . . . by saying 'Quit f..... around the train, I don't want to spend all damn night filling out a death report', and you allegedly exhibited rude behavior to Mr. . . . (the child's father) when you told him, 'If you can't control your kids, don't bother coming to the station', while on duty as a Ticket Clerk at Pomona, California on March 22, 1989."

After reviewing the transcript from the Hearing, the Carrier notified the Claimant that he was terminated.

The Organization appealed the matter through the appropriate levels on the property and subsequently to this Board.

The Organization argues that the Claimant was not provided a full and fair Hearing in accordance with Rule 24. It was unfair that the child, who was actually the accuser, was not present to testify, but was permitted to testify over the phone. No one could tell if it was actually the child who was testifying. Besides, the child's testimony is suspect when one considers he was running by a moving train within two cars of the engines and he testified there was no noise.

Also, it is obvious the Carrier prejudged the Claimant and never advised him that the only thing the father requested was a written apology and the matter would be closed.

Finally, the Organization contends the circumstances under which the Claimant yelled at the child should be taken into consideration. The child, along with other children were placing pennies on the rails. They were doing this with the knowledge of the father. Anyone familiar with small objects on tracks knows the injuries which can occur if those objects are thrown by moving trains. Add to this, the inappropriateness of the child running alongside a moving train, and one can easily see the predicament the Claimant was in. He was merely trying to control a situation which was very dangerous and could have been very costly.

The Organization concludes that if the Claimant used the language attributed to him, it was inappropriate, but did not warrant his termination.

The Carrier holds that the Claimant had been dismissed in 1988 for using profane and boisterous language toward a fellow employee. Although the discipline was reduced in Award No. 8, SBA 1024, the Referee noted: "A suspension of 60 days should be sufficient to impress upon Claimant that such misconduct will not be tolerated and if repeated, could result in termination." The Claimant was given a full and fair Hearing. His behavior constituted a serious offense which could have cost the Carrier paying customers. His actions discredited the Carrier. The penalty was appropriate.

We conclude that although it was not of the best quality, there was sufficient evidence presented by the Carrier to support the charges against the Claimant. Telephonic testimony is not preferential, but, in this case it was supported by the presence and testimony of the boy's father.

The Carrier was correct in questioning the Claimant's credibility. Considering his employment record, the Claimant had much to gain by remembering the incident in a way which would be to his advantage. On the other hand, there was no obvious reason why the customers would lie to get the Claimant into trouble. Besides, as brought out in the evidence, their only objective was to solicit a written apology from the Claimant. That done they were willing to drop the matter.

The other side of the story is the behavior of the father and the children. For someone who testified he knew the dangers of trains, the father was totally errant in watching his children place objects on the tracks without stopping them. This certainly indicates a willingness on his part to "play loose" with the safety of his children and others who were at the train station. In light of this, it cannot be denied, the Claimant was required to quell the actions of these children, even though he unfortunately handled the matter in a very unprofessional, inappropriate manner.

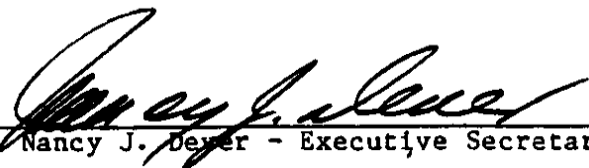
In light of all this, the Board believes the Claimant should be afforded one last chance. He should be reinstated with seniority and all other rights unimpaired, but without compensation for time lost.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 24th day of September 1991.