

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33474
Docket No. SG-33257
99-3-96-3-729**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the National Railroad Passenger Corporation (NRPC-N):

Claim on behalf of R. H. Young to be reinstated to service with his record cleared of all charges in connection with an investigation conducted on August 4, 1995, and to be made whole for all time and benefits lost as a result of his dismissal from service, account Carrier violated the current Signalmen’s Agreement, particularly Rule 58, when it did not provide the Claimant with a fair and impartial investigation and assessed harsh and excessive discipline against him in this matter.” Carrier’s File No. NEC-BRS(N)-SD-713D. BRS File Case No. 9856-NRPC(N).

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.

By letter dated August 11, 1995, Claimant, R. H. Young, was dismissed from service after an Investigation on the charge that he engaged in conduct unbecoming an employee on May 31, 1995. Specifically, Claimant was alleged to have made a sexually suggestive gesture to a 12 year old girl while on duty, and with intimidating and creating an extremely hostile atmosphere for the girl and her mother.

At the time of the alleged incident, Claimant was assigned and working as a Signal Maintainer in New London, Connecticut. He had 12 years of service with the Carrier without any prior discipline.

By letter dated July 12, 1995, Claimant was notified that a formal Investigation would be conducted on the following charges:

“Charge 1:

Development of the facts and determination of your responsibility, if any, in that on May 31, 1995, at approximately 8:30 p.m., while on duty, and while at a Mobil Station (Boston Post Road and Minor Avenue) in Waterford, Connecticut, you made a sexually suggestive gesture to a 12 year old girl. Such conduct was unbecoming an employee.

Charge 2:

Development of the facts and determination of your responsibility, if any, in that on May 31, 1995, while on duty and while at this Mobil Station in Waterford, Connecticut, you were intimidating and created an extremely hostile atmosphere for a woman and her 12 year old daughter:

- by attempting to engage the 12 year old in conversation despite the mother’s commentary and objection;
- by following them around the store;
- by placing yourself between the mother and daughter;
- and, by distinctly glaring at the young girl.

This was conduct unbecoming an employee.

Charge 3:

Development of the facts and determination of your responsibility, if any, in that on May 31, 1995, while on duty, and while at this Mobil Station in Waterford, Connecticut, your contrary behavior in connection with a woman and her daughter subjected Amtrak to criticism and loss of good will."

An Investigation of these charges was conducted on August 4, 1995. By letter dated August 11, 1995, Carrier advised Claimant that he had been found guilty of all of the charges except that portion of Charge 2 that alleged that he followed the young girl and her mother around the store. The letter further notified Claimant that his employment was terminated immediately.

The incident precipitating Claimant's dismissal occurred on the evening of May 31, 1995, at a Mobil Gas Station in Waterford, Connecticut. Claimant, while on duty, was paying for gasoline for his company vehicle inside the station when a woman, identified as "Jeannie" in the transcript of the Investigation, and her 12-year old daughter entered to buy a bottle of soda. Jeannie testified that the station was very small, and that Claimant was blocking the single aisle leading from the front to the back of the store where the refrigerators were located. When her daughter attempted to walk past him, he made a "pelvic thrust movement" toward the girl, and then positioned himself between Jeannie and her daughter. Jeannie quickly joined her daughter in the back of the store. Claimant then moved to the end of the counter and proceeded to stare at her daughter from the neck down, and attempted to engage her in conversation. After Jeannie confronted Claimant, he continued to stare at her daughter for a couple of minutes before leaving the store. Jeannie stated that Claimant's conduct was sexually intimidating to her daughter, and that the incident was extremely uncomfortable for them both.

Claimant testified that when Jeannie entered the store, he did not notice her daughter since she was "below his field of vision." He estimated that the girl was approximately three feet tall. He further stated that he did not realize at first that they wanted to move past him, and that he moved out of the way as soon as he realized that they wanted to go to the back of the store. According to Claimant's testimony, he has

a torn hamstring which he favors, and that Jeannie may have misinterpreted this for a lewd movement. He denied making a pelvic thrust or staring at the 12-year old girl. He stated that two other customers came into the store while the mother and daughter were there, causing him to move to the back of the store so the customers could stand at the counter. He admitted speaking to Jeannie and her daughter about a problem the station clerk was having with his credit card, but denied any inappropriate behavior.

The Organization argues that the Carrier violated Rule 58 when it failed to provide Claimant with a fair and impartial investigation, and by imposing harsh and excessive discipline. The Organization further submits that the Carrier failed to prove the charges against Claimant.

First, the Organization contends that any misunderstanding of the nature of Claimant's movements in the Mobil Station were simply a function of the small size of the store. The Organization maintains that the Carrier's proof of the charges against Claimant was based solely on the inconsistent and contradictory testimony of Jeannie. The Organization further submits that the Carrier failed to call the daughter as a witness, hindering the Organization's defense of the Claimant. Moreover, the hearing officer improperly allowed hearsay testimony from both parents regarding how the incident affected their daughter.

Finally, the Organization argues that the Carrier improperly considered two letters that were not made part of the record at the Investigation. In denying the Organization's appeal of Claimant's dismissal, the Carrier found that the discipline was appropriate considering the "serious nature of the incident and past letters of 1991 and 1993 concerning Mr. Young's behavior in other places of business." The Organization asserts that inasmuch as these letters were not part of Claimant's record and were not introduced at the Investigation, the use of the letters as a basis for upholding the discipline against Claimant was arbitrary, capricious and unreasonable.

The Carrier submits that it fully complied with the requirements of Rule 58. Thus, Claimant was notified of the charges against him and was afforded a fair and impartial Investigation. Based on the evidence adduced at the hearing, Claimant was properly found guilty of the serious charges against him. In view of the serious nature of Claimant's conduct, his dismissal was appropriate.

Upon full consideration of the record and the arguments raised by the parties, this Board finds that there is sufficient evidence in the record to satisfy the requisite degree of proof to support a finding that Claimant engaged in conduct unbecoming an employee of the Carrier. It is the Carrier's burden to adduce substantial evidence to prove the charges against Claimant. Here, the Carrier produced direct testimony by an eyewitness that Claimant, while on duty, made a sexually suggestive body movement at a 12-year old child, and stared at the child in an intimidating and inappropriate manner. This testimony was credited by the hearing officer, and it is not the function of this Board to disturb findings of credibility by the hearing officer. See, Third Division Awards 27476 and 28888.

Having found sufficient evidence that Claimant engaged in conduct unbecoming an employee of the Carrier, the Board must now consider whether the degree of discipline was arbitrary, unreasonable, or capricious. We agree with the Organization that the Carrier erred when, in denying Claimant's appeal of his dismissal, it considered two prior complaints against Claimant that were not part of the record on the property. The fact remains, however, that Claimant was found guilty of engaging in sexually suggestive and intimidating conduct toward a child while on duty. In view of the serious nature of the offense, this Board cannot find that the Carrier acted unreasonably, arbitrarily or capriciously when it terminated his employment.

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 22nd day of September 1999.