

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36945
Docket No. CL-36962
04-3-01-3-615

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 Brotherhood (GL-12776)
that:

1. Carrier violated the provisions of Rule 19 when on September 9, 2000 it removed Claimant Earl Brown from service pending a disciplinary investigation.
2. Carrier acted in an arbitrary, capricious and unjust manner in violation of Rule 19 of the ASWC Agreement, when by notice sent by FedEx October 13, 2000 it assessed discipline of "termination with the National Railroad Passenger Corporation," against Earl Brown pursuant to an investigation held on October 3, 2000.
3. 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, holiday pay and overtime, had he not been held from service and had discipline not been assessed.
4. Carrier shall now expunge 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.

The Claimant was a Train Attendant with 15 years service and no prior disciplinary record at the time he was withheld from service by the Carrier on September 10, 2000 based upon a verbal complaint lodged by a female passenger of Train 2/22 when it arrived in El Paso, Texas, concerning an alleged assault that occurred the previous night on its run between Tucson and El Paso. By letter dated September 14, 2000, the Claimant was advised to attend an Investigation on allegations that he made unwarranted sexual advances and was discourteous and unprofessional toward this female passenger.

The Claimant's formal Investigation occurred on October 3, 2000. Three Carrier witnesses testified in person concerning their role in the Investigation and what was told to them, and complainant, Teresa Kahn, testified by telephone. She and the Claimant were the only witnesses with first hand knowledge of the events in issue. It was confirmed that Train 2/22 was nine to ten hours late at the time it left Tucson.

The record reveals that Kahn brought nothing to the attention of the Carrier's staff while she was on the train, and advised a Conductor upon arriving in El Paso about the incident with the Claimant. The Conductor informed the Service Manager, who spoke briefly to Kahn and referred her to William O'Dell, the Carrier's General Road Foreman who was present in El Paso at the time, and contacted the Union Pacific Railroad police, who sent an Officer to interview both parties and investigate the allegation. He filed a report finding the case unresolved due to lack of physical evidence of an assault and witnesses.

O'Dell testified that Kahn informed him that she had a coach ticket from Tucson to Houston and that she was approached by an employee in the coach area who took her back to the sleeping car, put her in a smaller room, gave her wine and a fruit plate, and engaged in conversation. O'Dell stated that he was told that Kahn indicated she had to leave and they retraced their steps, but as they got to one of the deluxe bedrooms with a bottle of wine sitting by the window, the Claimant grabbed her from the back and shoved her in the room. She asked what he was doing and told him to leave her alone or she would scream, and he left. According to O'Dell, Kahn stated that when she walked out of the doorway she observed another employee standing there who just smiled at her. In response to O'Dell's questions as to whether the Claimant made any sexual advances, Kahn told him that she could not understand where the conversation was going. O'Dell determined that Kahn would be put up in a hotel in El Paso that night and flown to Houston the following day. During their interview, O'Dell explained the Investigation and Hearing procedure involved with following through with this complaint, and Kahn indicated a willingness to come to Chicago and testify at a formal Investigation. O'Dell testified that he could tell Kahn was concerned and distraught, and she mentioned that she was having some personal problems.

Kahn's telephonic testimony was that she was unhappy with her first exposure to a Train Attendant who did not help her find a seat, and that this was her first train trip. She stated that she found a seat in coach, went for dinner in another car about four hours later, and when she returned her seat had been taken. Kahn said that she went into another car not knowing it was first class, wandered all the way to the end of it and asked the Attendant if it was okay if she sat there. Kahn recalled the Claimant saying that it was an area for personnel but that she could sit there. Kahn recalled the Claimant bringing her a plate of fruit and cheese and then a glass of wine, and sitting down in an area with other passengers while the Claimant was conversing with her. She indicated that she was happy for this but that the Claimant got a little too friendly at some point, although she did not make anything of it. Kahn stated that the Claimant offered to take her on a tour of the train and she accepted. She testified that they went in the sleeping area and the Claimant put his hands on her shoulders and practically pushed her into a room, causing her to be frightened and ask what he was doing. She recalled the Claimant stating that she did not have to be afraid and that he would not bite her, and replying that if he touched her she would scream. Kahn stated that the Claimant took off and she left the room, seeing another Attendant smile at her as she did so. Kahn stated that she assumed the other gentlemen was the Claimant's Supervisor as

she had seen him before and that his smile somehow indicated that this type of thing was common. She walked to the restaurant and sat reading for at least four hours before arriving in El Paso.

The Claimant testified that because the train was so late arriving in Tucson, the passengers were very upset and the Train Chief gave them options including spending the night in a hotel or in El Paso, and the staff was instructed to make them as comfortable as possible. The Claimant stated that he and others were doing service recovery and giving away food to a lot of people in his coach, which had handicapped passengers and others without money but who were very hungry. He recalls seeing Kahn as he was approaching his seat and noticing that she looked distraught and lost. He asked if he could help her and found out she was in the wrong car for her destination but agreed she could remain there if she wished and change to a forward car in El Paso or San Antonio. The Claimant stated that they conversed and Kahn indicated that she was upset as her sister had cancer. The Claimant had to service the handicapped people in his area and asked Kahn if there was anything he could get her. She questioned her choices, and selected a bottle of Zinfandel wine. The Claimant brought her a small bottle of wine and a fruit plate. According to the Claimant, Kahn asked if she could see a sleeper, he said he'd have to check to see if there was availability, he asked the Sleeping Car Attendant Curt if there was, found out there was no space but it was agreed that the Claimant could show Kahn Curt's room. The Claimant recalled Kahn following him back and showing her Sleeper No. 10. He testified that they made last call at that time, around 8:30 P.M., and he told Kahn he would be back to show her the other amenities as he had to complete his orders, and he left. The Claimant stated that when he returned from his work Kahn was back at the coach seating getting her belongings and he and Curt were standing there, when she said "you smiled at me." The Claimant said that Kahn left and never returned to that area and he did not see her for the balance of the trip. He admitted giving her a small bottle of wine and fruit because she looked distraught, and recalled that as she walked away he noticed that she had a large bottle of wine in her bag. The Claimant denied ever touching Kahn or making an improper advance, and when he was questioned in El Paso indicated that he was willing to take a lie detector or Drug and Alcohol test or do anything to prove his innocence. The Claimant expressed concern that the Carrier was not questioning other passengers or staff on the train as to what they had observed at the time when he was taken out of service.

As a result of the Investigation, the Hearing Officer found the testimony of the three Carrier witnesses to be credible and discredited the Claimant's evidence as being a self-serving attempt at fabricating a response in order to avoid the consequences. By letter dated October 11, 2000, he found the Claimant to have violated the Standards of Professional Conduct by engaging in actions compromising the well-being of one of the passengers, being discourteous and making unwarranted sexual advances to a female passenger. The Carrier determined that removal was the appropriate penalty. The Organization appealed this decision on November 6, 2000, a conference was held on April 17, 2001, and the Carrier denied the appeal on May 4, 2001.

The Carrier argues that there is substantial evidence in the Investigation to prove the charges against the Claimant, and that the seriousness of the allegations require the termination penalty. (See, Third Division Award 13116 and First Division Award 16785.) It avers that there is nothing preventing it from presenting Hearing testimony by telephone, which was necessary in this case as Kahn had begun a new job and could not make the trip. The Carrier asserts that there is no basis for the Board to overturn the credibility resolutions of the Hearing Officer, which are neither arbitrary nor capricious, relying upon Special Board of Adjustment No. 1060, Awards 36 and 37; Public Law Board No. 5312, Award 16; Public Law Board No. 4788, Awards 1, 54 and 61. It requests that the claim be denied based upon the very serious nature of the charges and the possible liability such conduct could subject the Carrier to.

The Organization contends that the Carrier failed to prove by a preponderance of evidence that the Claimant was guilty of the charges. It asserts that a higher standard of proof is necessary for alleged sexual misconduct which involves moral turpitude, as the stigma of a finding of guilt stays with the individual for a lifetime, citing Public Law Board No. 2037; Special Board of Adjustment No. 1000, Award 35; Special Board of Adjustment No. 1082, Award 13; Third Division Awards 21122 and 16154. The Organization argues that the Carrier denied the Claimant his due process rights to face his accuser by failing to produce Kahn in person and showing no reason why it could not have done so. It asserts that the Hearing Officer committed error and acted arbitrarily in crediting Kahn over the Claimant, considering that there were substantial conflicts between her telephonic testimony and her prior statements, and she was not present for the Hearing Officer to consider her demeanor, while the Claimant was consistent in his account and testified truthfully under oath. It relies upon Third Division Awards 31872 and

32890 in urging the Board to overturn such credibility resolution, and to find that the Carrier has not met its burden of persuasion with respect to its charges of sexual misconduct. The Organization notes that Kahn never claimed that the Claimant made sexual advances, merely that she did not know where his conversation was going, and contends that it is a far leap for the Carrier to conclude from such statements that the Claimant was guilty of such misconduct. The Organization argues that the Claimant, a 15-year employee with an exemplary service record should not be subject to removal from service for, at most, a misjudgment as to the extent of service recovery that was appropriate in an attempt to make a distraught passenger more comfortable.

Initially we note that this claim protests both the Carriers' action in removing the Claimant from service on September 10, 2000 pending a disciplinary Investigation, as well as the ultimate imposition of the penalty of termination. With respect to the removal from service on September 19, 2000, Rule 19(a) permits the Carrier the right to hold an employee out of service pending formal Investigation if his retention could be detrimental to another person or the corporation. Kahn alleged that the Claimant had improperly touched her, an action which could constitute assault or, as ultimately charged an inappropriate sexual advance. Under such circumstances, the Carrier could reasonably conclude that permitting the Claimant to remain on the train servicing passengers may be detrimental as the Carrier could incur liability for future similar actions. We are unable to fault the Carrier for taking this precaution when faced with an allegation of this type by a passenger. Thus, we find no violation in the Carrier's holding the Claimant out of service from September 10, 2000 until October 11, 2000, when it ultimately found him guilty of the charges after Investigation.

However, a careful review of the record convinces the Board that the Claimant's termination cannot stand. We agree that in a case involving a discharge for professional misconduct involving unwarranted sexual advances to a female passenger, the Carrier must be held to a higher standard of proof of guilt of the original charges by either a preponderance of the evidence or by clear and convincing evidence. Due process requires as much. (See Public Law Board No. 2037, Third Division Awards 21122 and 16154.) In this case, the only direct evidence of what occurred between the Claimant and Kahn is their statements, given initially to a UP Police Officer, O'Dell, and at the Investigation. The Police Officer interviewing both the Claimant and Kahn at the time of the initial report of the incident could find no corroborating evidence that an assault or sexual

misconduct occurred, although noting that Kahn was clearly upset. The Carrier did not see fit to question the other Attendant identified by Kahn as being present immediately after the alleged touching, and who smiled at her. The Claimant stated that the Attendant he was standing with when Kahn left was Curt, the Sleeping Car Attendant he had previously asked for permission to show Kahn his car. The absence of any Investigation by the Carrier into Curt's knowledge of the events, and its failure to call him as a witness at the Hearing, prevented any possibility that the surrounding circumstances could be put into context or corroborated.

Kahn's version of the incident as reported by O'Dell is different in a number of critical respects to her testimony at the Hearing. Kahn initially stated that the Claimant approached her and took her to the rear of the train, where he served her wine and fruit in a small sleeper room. At the Hearing, she stated that she wandered into the area at the back of the first class car on her own, was permitted to sit there, and consumed the alcohol and food in the presence of other passengers. When directly questioned about whether the Claimant made sexual advances, Kahn only replied that she did not like where he was going with his conversation. On the other hand, the Claimant's explanation as to why he gave Kahn food and drink without pay makes sense, as does his contention that she was upset and distraught about her personal family situation as well as the train's delay. It is quite possible that Kahn might have asked to see a sleeping car, as it was her first trip on a train and she was being treated to privileges in first class she would not ordinarily have received.

While the Board is mindful that we are an appellate body that gives due deference to findings of credibility made by a Hearing Officer, we also require that such credibility resolutions have some foundation in actual evidence presented at the Hearing. To accept Kahn's telephonic version of the facts, which differed from her previous account in certain respects, over the Claimant's consistent version of what occurred, in light of his 15 years of unblemished service with the public, because the Claimant's evidence was "self-serving" we find to be unreasonable and arbitrary under the circumstances of its receipt. (See Third Division Award 31872.) In all of the cases cited by the Carrier where the Board deferred to the Hearing Officer's credibility resolutions, the accuser or another eyewitness was present at the Investigation and could be observed during cross-examination. In this case, there is a direct conflict created by the Claimant's account and the version of Kahn, whose testimony was accepted without corroboration. As found by the Board in Third Division Award 32890, under such circumstances, the Carrier does not meet

its burden of proving the validity of the charges that the Claimant was discourteous and made unwarranted sexual advances toward a female passenger. However, based upon the Claimant's admission that he gave Kahn food and drink on his own without recompense and Service Chief Quezada's testimony that service recovery and free food was not yet authorized on Train 2/22, we uphold the Carrier's finding that the Claimant improperly performed his duties on September 9, 2000. Therefore, the termination which was based upon the more serious charge must be set aside, and a 30-day unpaid suspension substituted in its place.

Accordingly, we deny paragraph (1) of the claim and sustain paragraphs (2) (3) and (4) directing that the Claimant be reinstated to service, his record expunged with reference to the allegation of inappropriate sexual misconduct in accordance with the findings of the Board, and that he be made whole for the period of time commencing upon the completion of his 30-day suspension and ending upon the Carrier's offer of reinstatement.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 22nd day of March 2004.