

PUBLIC LAW BOARD NO. 6189

AWARD NO. 76

CASE NO. 76

System Docket OC-UTU-SD-702D

**PARTIES TO
THE DISPUTE:**

United Transportation Union

vs.

National Railroad Passenger Corporation (AMTRAK)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained.

DATE: July 2, 2002

STATEMENT OF CLAIM:

"Request the discipline of dismissal imposed upon N. Willard be expunged from his record and that he be restored to service with seniority and vacation rights unimpaired and compensated for all time and expenses incurred inclusive of Health and Welfare premiums, Reduced Train Crew Allowance and Productivity Savings Sharing Allowance and credit for Railroad Retirement payments for each month for all time lost in connection therewith:

SPECIFICATION: While working as Assistant Conductor on Trains 351 and 350 on September 16, 2000, it is alleged that you exhibited unprofessional conduct while interacting with both a 7 and 9 year old girl which resulted in bringing discredit upon the Corporation.

CHARGE ONE: Violation of NORAC Operating Rules, Seventh Edition, effective January 17, 2000, 'Rule D. Conduct', which reads in part as follows:

'Employees must devote themselves exclusively to the company's service while on duty. They must render every assistance in their power in carrying out the rules and special instructions, and promptly report any violation to the proper official.

To remain in service, employees must refrain from conduct which adversely affects the performance of their duties, other employees, or the public. Employees must also refrain from conduct that discredits the Corporation.'

CHARGE TWO: Violation of Amtrak's Standards of Excellence sections on Integrity and Conduct which reads in part as follows:

'Integrity We will always tell the truth. We will comply with the spirit and letter of laws, practice high ethical standards of conduct, be socially and environmentally responsible and strive to earn the trust and respect of our employees and the public.

Conduct On the Amtrak team, there is no place for activities or behaviors that

compromise the safety, satisfaction and well being of our customers, the public or our fellow employees ...”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

According to the transcript of the investigation hearing, Claimant worked a round-trip from Dearborn, Michigan to Ann Arbor and back on September 16, 2001. A family of four traveled both legs of the trip as part of a birthday celebration for the youngest daughter. She turned seven that day. The other daughter was nine. During the return trip to Dearborn, the family sat approximately in the middle of a nearly empty car. The parents sat together on one side. The two children occupied the seat immediately across the aisle from the parents.

While punching tickets at the beginning of the return leg, Claimant was observed by the parents to lean over the back of the children's seat and say something to them. After returning to Dearborn, the parents reported that Claimant had engaged in misconduct. According to the father's testimony, at page 19 of the transcript, the mother alleged that Claimant had "... solicited ..." the youngest child.

Claimant was dismissed from service following the formal investigation. The Hearing Officer found him guilty of Charge One and a portion of Charge Two. At the time of the Carrier's action, Claimant had approximately eleven months of service in Carrier's employ. The record contains no evidence of any prior discipline or allegations of misconduct.

After careful review of the record, the Board finds several disturbing factors to be involved and not satisfactorily explained by the evidence or the Hearing Officer's findings.

First, the Hearing Officer's findings are inherently contradictory. He found Charge One to have been proven but only a portion of Charge Two. He did not find the "Integrity" portion of Charge Two to have been proven. That portion directs the practice of high ethical standards and social responsibility. It also requires that employees strive to earn the trust and respect of the public. As written, the Hearing Officer's findings show Claimant's actions to have been in compliance with these requirements. Yet one must ask how this could be if his actions, at the same time, brought discredit to the Carrier and compromised the safety, satisfaction and well-being of customers?

Second, the parents reported the alleged misconduct solely on the basis of the Claimant's remarks as told to them by the children. Although there are also allegations that Claimant tickled one

or both of the children, to be discussed later, it is clear from the transcript that this alleged activity was not known to the mother at the time she reported the Claimant.

According to the parents' testimony, Claimant asked the younger daughter, who was seated next to the aisle, if she "... wanted to sit in the back alone where there was more room ..." Claimant denies asking the question as the parents have related it. Instead, he asked if the child wanted to move one row back so she could sit at a window seat.

The Organization also introduced photographs from the Carrier's timetable and ticket envelope that depict conductors engaged in playful interaction with children in full view of their adult traveling companions. The Organization maintains that Claimant's conduct was nothing more than the kind of conduct thereby promoted by the Carrier.

In analyzing Claimant's actions and the credibility of conflicting testimony, details and the context in which they occur are important.

Claimant is a former portrait photographer. His ability to relate well with children in connection with that work was established in the record by the letters of former employers. Both parents acknowledged that he was friendly with the children at the beginning of both legs of the trip. They took no exception to his conduct.

On the way to Ann Arbor, the family went into the dining car. The father stood in line holding the youngest daughter in his arms as the Claimant walked by. The child told her father he had tickled her behind the knee. Neither parent claims to have seen this alleged tickling. Upon hearing the child's comment, the father did not regard the tickling as the act of a pedophile. Indeed, he ignored it entirely. The evidentiary record does not show him to have even mentioned it to his wife at the time, during the remainder of the trip to Ann Arbor, while the family was off the train in Ann Arbor, or at any time prior to the reporting of Claimant for misconduct after arriving back in Dearborn.

The father maintained that both he and his wife are extremely protective of their children. Moreover, the mother described herself as "... a lioness when it comes to my children." Yet the father took no exception whatsoever to the alleged tickling incident at the time.

Upon reboarding for the return to Dearborn, both parents acknowledge that Claimant was again friendly with the children. He noticed the birthday items they had acquired and engaged them in small talk. He was in full view of the parents. Neither took exception to his actions.

The alleged offensive conduct took place moments later as Claimant punched their tickets. The parents, who were both watching Claimant intently, observed him to lean over from behind the children's seat and say something to them. They could not hear what was said. Both parents described Claimant as violating the children's personal space. The mother says she became "PO'd" at Claimant for having done so. At this point, Claimant approached the parents and asked to examine

the father's camera. The father let him. Nothing was said to Claimant. Claimant returned the camera and then left the area. Oddly, although the parents claim to have been disturbed by what they had seen Claimant do, neither of them, at that time, asked their children what the Claimant had said. Nor did they ask the question during the remainder of the approximately half-hour trip.

Claimant was not seen again until the train arrived at Dearborn and the family prepared to disembark. Although Claimant offered to assist the youngest daughter in stepping down off the train, the mother prevented any contact between him and the children.

It was not until the family was walking to their car in the parking area that the mother asked what Claimant had said to the children. The youngest daughter replied and was asked to repeat the words. Then the older daughter was asked the same question.

Although the older daughter had just heard her sister answer the question twice, the parents place great import upon the fact that, when asked, the older daughter repeated, word for word, what the sister had said. There is no evidence of further discussion before the parents returned to the station and began the misconduct reporting process.

The mother also alleged further tickling of the girls by Claimant during her testimony. She said,

Apparently he went like - - tickled each one of them under their neck, you know, how are you or how are you, something like that, which I did not find out about until later.

The mother admitted that she did not see this alleged tickling. The father did not claim to have seen it either. Yet it is clear from the transcript that both parents had Claimant and the girls under observation at the time it would have had to have occurred. Moreover, the transcript does not portray any period of time when Claimant would have been with the children out of sight of the parents. Given these considerations, one must ask whether embellishment of that facts had taken place. The hearing officer did not pursue this facet of the testimony.

The Carrier listed the youngest daughter as a witness to be available at the hearing and the Organization expected to be able to question her. But she was not produced. The charging officer merely announced he had no further witnesses. When the Organization requested a continuance to obtain her testimony, the Carrier's charging officer caucused with the parents. The charging officer returned and said,

I have spoken to [the parents]. We will not bring the daughter in. After interviewing them previous for this, we deem their testimony to credible and see no reason for the daughter.

However, assessing credibility is not within the province of the charging officer; it is the responsibility

of the hearing officer, in the first instance.

As can be seen, the allegations of misconduct rested entirely upon the accuracy of the recollection and impressions of a seven-year old child concerning a conversation that had taken place approximately one-half hour before she was asked to recall it.

Rule 25 of the parties' Agreement mandates that no employee may be disciplined without first having been provided a fair and impartial trial. When the child was not produced, in light of the criticality of her testimony, the hearing officer should have taken one of two appropriate steps. He either should have granted the continuance necessary to have the daughter produced or, in the event of the parents' refusal, he should have granted Claimant the benefit of an adverse inference to the effect that the daughter would not have corroborated the parents' testimony. The hearing officer did neither. As a result, the misconduct charges rested solely upon the pure hearsay statements of the daughter as related by the parents when the record already contained credibility considerations that were adverse to their positions.

Despite the foregoing, the hearing officer's findings deemed the testimony of both parents to be credible. Regarding the Claimant's testimony, the hearing officer found:

Your own testimony is deemed to be for the most part credible, however, it is to some degree tainted by an attempt to put your actions in the best possible light.

In the previous awards of this Board, we have recognized that the findings of the hearing officer are entitled to due deference by us. This is because, in our quasi-appellate role, we do not have the same ability to hear the testimony first-hand or gauge the demeanor of the various witnesses. However, we have also pointed out that the hearing officer's credibility assessment, like any other finding of fact, must be based on substantial evidence in the record to be valid. If it is not so based, then it must be struck down as being a product of arbitrariness and bias.

If the evidentiary basis of a credibility assessment is not readily apparent to us from our careful review of the evidentiary record, then it must be properly explained by the hearing officer in his or her written findings to be of support to the Carrier's disciplinary action.

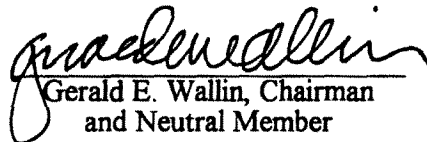
Given the credibility considerations previously discussed, which tend to call into question the veracity of the parents' testimony, as well as the adverse inference to which, on this record, Claimant was entitled, the basis for the hearing officer's credibility determination is not readily apparent to us. Moreover, the hearing officer's findings provide no explanation whatsoever for his determinations. Accordingly, we must find them to be without the support of substantial evidence in the record.

The Carrier's discipline, therefore, must be overturned in its entirety.

AWARD:

The Claim is sustained.


P. L. Patsouras,
Organization Member


Gerald E. Wallin, Chairman
and Neutral Member

 7/30/02
Lorraine McLaughlin, Esq.
Carrier Member
Written Dissent Attached

PUBLIC LAW BOARD NO. 6189

Award No. 76

Carrier Member Dissent

The Majority in this award excuses Claimant's serious misconduct with regard to direct "soft spoken" communication and inappropriate touching of young children. The direct "soft spoken" communication with the children and the "tickling" were and are most inappropriate actions on the part of the Claimant whether or not such actions constitute the actions of a pedophile. Even accepting Claimant's version of what was said, the Claimant's undisputed and direct "soft spoken" verbal contact with the children supports the charges. Claimant should have asked the parents, who were just across the aisle, if the children wanted to change to window seats. That the Claimant was a **former** "child portrait photographer" provides no comfort or mitigation to this Board Member. To the contrary, it gives this Board Member reason for additional concern.

The burden of proof in a discipline case that must be met is substantial evidence of probative value. That burden was defined in *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229 as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." This Member believes such burden was met. At a minimum, the Claimant placed himself in a position that had the appearance of the misconduct with which charged and certainly brought ill will to the Carrier as evidenced in the record by the parents' testimony. If as the Majority found at page 3 of this Award, the parents took no exception to the Claimant's conduct - why did they register a complaint. The parents testimony with regard to the ill will they now have for Amtrak was not subject to the testimony of their children.

Further, the fact that the parents wanted to shield their young daughter from the atmosphere of a disciplinary trial, while depriving the Carrier and Claimant of the exact words

Claimant said to the girl, was nonetheless understandable. Regardless of the exact words used by Claimant, there is no question that Claimant leaned over and spoke softly enough that the parents sitting just across the aisle could not hear what Claimant said to the children. Therefore, Claimant was not entitled to the strong adverse inference granted by this Board. The only inference to which Claimant was entitled was to have his version of what was said to the children credited.

The Majority engages in a lot of speculation in this Award to the potential detriment of young children riding on Amtrak trains where the Claimant is part of the train crew. If there were some errors made in this case, there was still substantial evidence of probative value in support of the charges. This Board should have acted to remove any possibility in the future that Claimant would be allowed to converse directly with young children in a soft tones or "tickle" young children while on our trains. This Board Member can only pray that the Majority's speculation with regard to Claimant's conduct is in fact correct speculation.

I Vigorously Dissent.

A handwritten signature in cursive script that reads "Lorraine McLaughlin".

Lorraine McLaughlin, Esquire
Carrier Member