

**NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION**

Award No. 5060

Docket No. 5024

98-4-96-4-19

The Fourth Division consisted of the regular members and in addition Referee
• Edwin H. Benn when award was rendered.

(The American Railway & Airway Supervisors
(Association: A Division of TCU

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"It is the Claim and Request of Petitioning Organization that:

1. Carrier has violated the Agreement, and in particular Rule 19 -
DISCIPLINE, when they assessed the discipline of 'DISMISSAL' to Mr.
Edward Kortright, Chief On-Board Service following a Hearing held
January 18, 1994 on charges of violating Rules 'A', 'D' and 'F'. Said
discipline is unjust, unwarranted and an abuse of Carrier's discretion.

2. Carrier be required to rescind said discipline, return Mr. Kortright
to his former position as Chief-OBS with all rights and benefits
unimpaired and compensate him for all lost wages."

FINDINGS:

The Fourth 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.

As a result of charges dated November 27, 1993 and Investigation eventually held January 18, 1994, Claimant, an employee in the Carrier's service since March 1974 who held the position of Chief On-Board Service, was dismissed for unprofessional conduct directed towards a female passenger on October 20, 1993.

Loss Prevention Consultant C. Phillips testified that on October 20, 1993 she had an encounter with Claimant while Claimant was on duty on Train No. 51 as Chief OBS. According to Phillips, Claimant came to her roomette and gave her a meal voucher. Thereafter, according to Phillips, Claimant returned several times and told Phillips that he used to be a police officer and grabbed Phillips arm to demonstrate how he arrested people; Claimant caressed Phillips' hand as it rested on her knee and then touched her knee; Claimant stood in her doorway past the blue curtain; and Claimant winked, smiled and told Phillips that he would be "back later to bug" Phillips. Claimant essentially denies the conduct attributed to him.

It is well-settled that the questions before us are two-fold. First, does substantial evidence support the Carrier's decision to impose discipline? Second, was the amount of discipline arbitrary?

We find substantial evidence supports the Carrier's decision to impose discipline. The Organization's arguments essentially come down to an assertion that this Board should credit Claimant over Phillips when the Hearing Officer made a detailed series of findings that Phillips was the more credible witness. Without sufficient justification in the record, it is not the function of this Board to set aside credibility determinations made by a Hearing Officer who had the opportunity to observe and evaluate the testimony and demeanor of the witnesses. We find no reason to set aside those findings made by the Hearing Officer which credited Phillips' testimony over Claimant's version.

The Carrier's Rules F(1) and (3) provide that "All employees are required to conduct themselves in a courteous and professional manner in dealing with the public . . . [and c]onduct involving . . . immorality or indecency is prohibited. . . ." The testimony found credible by the Hearing Officer demonstrates the existence of substantial evidence that Claimant violated those Rules.

However, we find that dismissal was arbitrary and excessive.

First, Claimant is a very long term employee with almost 20 years of service.

Second, Claimant's prior disciplinary record is relatively minor, particularly given his length of service. Claimant's record shows a series of counselings, a reprimand and a five day suspension during his 20 years of service, all of which occurred prior to 1985 and long before the incidents in this case.

Third, the Hearing Officer made specific findings in Claimant's favor which serve to mitigate the seriousness of the demonstrated misconduct. Specifically, according to the Hearing Officer, although Claimant's conduct was unprofessional "[t]his record does not indicate that you personally threatened Ms. Phillips nor directed any salacious remarks towards her."

Fourth, the Carrier's attempt to equate the degree of misconduct engaged in by Claimant to other cases where dismissals from the Carrier were found warranted is not persuasive. Claimant's conduct in this case was far less egregious than Fourth Division Award 5005 (taking a 14 year old female passenger to his sleeper room, locking the door, stripping to his underwear and attempting to climb in bed); Public Law Board No. 3103, Award 123 (awakening a passenger with a too familiar touch and asking for her address and kissing the passenger against her will); Public Law Board No. 4709, Award 3 (having sexual intercourse with a trainee and making advances towards another consisting of "grabbing her, kissing her with his tongue down her throat and then said he wanted to f--- her"); Public Law Board No. 3103, Award 35 (attempting to kiss a female passenger and touching her breast); and Public Law Board No. 5323, Award 91 ("Claimant took her [a passenger] to a sleeper compartment and told her wanted to kiss and touch her . . . asked her personal, embarrassing questions . . . grabbed her buttocks and made an uncomplimentary remark"). Claimant's conduct in this case, while unprofessional, was nowhere near the degree of the conduct found to justify dismissals in the cited cases.

Except in cases like those cited by the Carrier where the conduct in and of itself is sufficiently serious to warrant dismissal, the purpose of discipline is to rehabilitate employees engaging in misconduct through increasing amounts of disciplinary actions in order to get the message through that the Carrier's Rules must be followed. Given Claimant's length of service; his relatively minor disciplinary record; and the type of conduct engaged in by him which was not as egregious as other cases relied upon by the Carrier, we find that dismissal was arbitrary and excessive. However, Claimant's

conduct was nevertheless serious, particularly given his position. To get the message through to Claimant that he must not ever again engage in the type of conduct found in this case, Claimant shall be returned to his former position without loss of seniority, but without compensation for time lost.

The Organization's procedural argument has been considered and is found to be without merit. We do not find that the Carrier unduly delayed bringing charges against Claimant under Rule 19 ("Charges must be made within 30 calendar days of the date an officer of the Corporation authorized to file charges has a reasonable basis for the filing of such charges"). The incident occurred on October 20, 1993 and the charges were brought on November 27, 1993. Given the time for the preparation of Ms. Phillips' report and the analysis of the same, we cannot say that Rule 19's time limits were violated.

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 Fourth Division

Dated at Chicago, Illinois, this 21st day of October 1998.