

PUBLIC LAW BOARD NO. 5223

PARTIES

United Transportation Union (C&T)

TO

and

DISPUTE

National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM: "Request that discipline of 30 day suspension imposed upon W. Thistle be rescinded, expunged from his record and that his vacation rights be unimpaired and that he be compensated for all time and expenses incurred inclusive of Health and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: ". . . (voiced and sexually explicit remark to a passenger) . . . & (2) subjected Amtrak to a loss of good will by his action on September 16, 1993."

STATEMENT OF FACTS: On October 7, 1993, the Carrier directed the following notice of investigation to the Claimant:

"Dear Mr. Thistle:

"You are hereby directed to appear for a formal investigation as indicated below:

"Date: October 14, 1993
Time: 2:00 p.m.
Place: 253 Summer Street
 2nd Floor
 Boston, MA 02210
 Conference Room

"This notice is issued in connection with the occurrence outlined below:

"Development of the facts and determination of your responsibility, if any, in that on September 16th while assigned as an Assistant Conductor on train 333, which was boarding at North Station, you allegedly made the following comment to a passenger -- 'nice Tits'. This sexually explicit remark was conduct unbecoming an employee. The passenger's written complaint, forwarded to the MBTA, has subjected Amtrak, the MBTA's contract operator, to criticism and loss of good will.

"You may produce any witnesses you so desire and you may be accompanied by a representative as provided for in your current and governing agreement without expense to the National Railroad Passenger Corporation.

"All requests for postponements of this investigation must be handed through the Division Hearing Officer at 617-345-7666 or by U.S. Mail at 253 Summer Street, Boston, MA 02210.

"Very truly yours,

"W. C. Laxton
Asst. Transportation Superintendent"

Subsequent to the investigation the Carrier assessed the discipline now on appeal before the Board.

FINDINGS: This Board, upon the whole record and all of the evidence, finds that the Employees and Carrier involved in this dispute are respectively Employees and Carrier within the meaning of the Railway Labor Act as amended and that the Board has jurisdiction over the dispute involved herein.

DECISION: The Carrier's case that the Claimant made a sexually explicit comment to the passenger in question is based on: (1) the passenger's letter indicating it was "Mr. Thistle" who made the comment, (2) the passenger's statement to an Amtrak police officer that it was "Mr. Thistle" who made the comment, and (3) the passenger's telephone testimony during the formal investigation that it was "Mr. Thistle" who made the comment.

It is the conclusion of the Board that the record does not contain substantial evidence of a positive identification of the Grievant as the speaker of the offensive statement in question. While telephone testimony may be acceptable in certain circumstances, it prevented the hearing officer from asking the passenger to look at the Grievant and positively identify him as the person she believed made the statement. Certainly she believed "Mr. Thistle" made the comment, but there also must be evidence making certain it was the Grievant was the person she saw and that he was the "Mr. Thistle" she identified. It is certainly possible that the passenger put the wrong name to the wrong face. She may have incorrectly thought the person who made the comment was named Mr. Thistle. It is also noted that the Grievant has a brother who works for Amtrak.

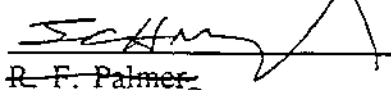
The lack of a positive, face-to-face identification at the investigation was also not remedied during the police interview or in her complaint letter. She never gave a physical description, she never was shown a picture, and she never explained how she knew "Mr. Thistle's" name. The lack of evidence undermines the Carriers case to the point it cannot be upheld.

AWARD

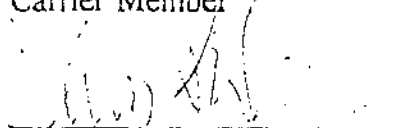
The claim is sustained.



Gil Vernon
Chairman and Neutral Member



R. F. Palmer
Carrier Member



L. R. Davis
Union Member

- I DISSENT.

Dated this 30th day of September 1996.