

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42807
Docket No. MW-43109
17-3-NRAB-00003-150338**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline [thirty (30) day suspension] imposed on Mr. J. Smith by letter dated April 22, 2014 in connection with allegations that he, was in violation of '...Amtrak's "Standards of Excellence" related to the sections entitled Trust and Honesty, Discrimination, Attending to Duties, and Professional and Personal Conduct, * and 'Anti-Discrimination and Anti-Harassment Policy 5.2.2; 4.2' as allegedly disclosed in an investigation into the suicide death of an Amtrak employee was without just and sufficient cause, unwarranted, on the basis of unproven charges and in violation of the Agreement (Carrier's File NEC-BMWE-SD-5302D AMT).**

(2) As a consequence of the Carrier's violation referred to in Part (1) above, Claimant J. Smith shall '...be made whole for any loss of benefit, including any compensation he may have suffered as a result of this case ' (Emphasis inn original).”

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.

Jamie D. Smith, the Claimant herein, has established and held seniority with the Carrier's Maintenance of Way Department. On February 18, 2014, it was alleged that by his actions, discussed below, the Claimant violated the Carrier's Standards of Excellence (related to Trust and Honesty, Discrimination, Attending to Duties and Professional and Personal Conduct), as well as its Anti-Discrimination and Anti-Harassment policies. As described in greater detail below, the Carrier alleged that the Claimant had used the word "retard" in reference to another employee who sadly took his own life. A trial was held, pursuant to the Agreement, on April 10, 2014.

By letter dated April 22, 2014, the Carrier imposed upon the Claimant the discipline of a 30 day suspension. In direct response to the Carrier's action, by letter dated April 27, 2014, the Organization appealed this discipline. The parties discussed the appeal during their conference on May 19, 2014, with the Carrier denying this appeal by letter dated May 28, 2014. Thereafter, the Organization rejected the Carrier's appeal denial, and requested that the Carrier reconsider its position. By letter dated October 28, 2014, the Carrier advised the Organization that it rejected this further appeal. Subsequently, by letter dated May 6, 2015, the National Railroad Adjustment Board advised the Carrier that the Organization had filed a notice of intent to file a submission with the Third Division in connection with this case. Whereas no subsequent accord was reached and the matter now comes before this Board for final adjudication.

The facts giving rise to the instant matter are not in serious dispute.

As noted above, the instant matter involves the 30 day suspension assessed Empire Division Foreman-Track Jamie D. Smith on April 22, 2014, for violation of Amtrak's Standards of Excellence involving Trust and Honesty, Discrimination, Attending to Duties and Professional and Personal Conduct and Amtrak's Anti-

Discrimination and Anti-Harassment Policy, P/I No. 5.2.2, Section 4.2 as a result of an investigation into the suicide death of an Amtrak employee in November 2013. During the process of their investigation, the Amtrak Police Department and EEO Officer Steven Siebert discovered the Appellant and three other Amtrak employees had engaged in the workplace harassment of the employee between September 2012 and November 4, 2013, and/or were aware the harassing behavior was taking place, but allowed the harassment of the employee to continue. The investigation concluded on February 7, 2014, and although it was determined that this harassment occurred, the Amtrak Police Department found that while this behavior was unrelated to the ultimate cause of the employee's suicide, the Claimant and others involved engaged in inappropriate workplace harassment. The record shows that the Claimant was properly notified of the charges against him and to appear for an investigation on March 4, 2014. The investigation was postponed by mutual agreement and rescheduled and held on April 10, 2014. Both the Appellant and his duly accredited representative were present and permitted to question the witnesses and present evidence in Appellant's defense. Based on the evidence presented at the investigation, the Appellant was found guilty of the charges and by letter dated April 22, 2014, was assessed the discipline of 30 days' suspension. The record reflects that the three other employees who were charged with the same offense signed waivers accepting their guilt of the charges.

In addition to the Investigation conducted by the Amtrak Police, the Carrier requested its EEO Compliance Officer Steve Siebert to investigate if the employee who committed suicide had been mistreated by his co-workers during the time of his employment. Mr. Siebert interviewed numerous individuals which included Track Foreman I&R Brian Howard, Truck Driver Bill Hamm and Machine Operator "C" Bryan Davis. Based upon his interviews Mr. Siebert concluded that his investigation uncovered credible evidence to substantiate the claim that the Claimant referred to the employee as a 'fucking retard.' Mr. Siebert testified during the hearing that the Claimant mistreated the employee by referring to him as a "fucking retard." Mr. Siebert further indicated that Track Foreman I&R Brian Howard had testified that between August 2012 and January 2013, at various job sites, the Claimant referred to the deceased employee as a "fucking retard" because that employee had hit the truck tire with a weed whacker. Mr. Howard further noted that both Truck Driver Bill Hamm and Machine Operator Bryan Davis had advised him that they heard the Claimant refer to the employee as a "fucking retard" on other unspecified occasions. In his testimony, Mr. Siebert stated that the Claimant told him that people, whom he did not identify, and himself believed the deceased employee was a little slow in

general, a slow learner specifically, and that he would need work instructions repeated because he did not retain information. Based on this information, Mr. Siebert concluded that the Claimant believed that the deceased employee had a mental disability and that it was reasonable to conclude that the Claimant regarded the employee as being mentally disabled by referring to him as a "fucking retard" in violation of the Carrier's policy.

It is noteworthy that the Claimant does not dispute that he called the deceased employee a "fucking retard." In this regard, in the Claimant's own testimony, he stated as follows with respect to whether or not he called the deceased employee a "fucking retard": "I don't remember the exact instance... I can't say for sure."

By decision letter dated April 22, 2014, the Hearing Officer concluded that the charges against the Claimant were proven.

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record. Following our careful review of the record in this matter, the Board finds no basis upon which to overturn the findings and conclusions of this Hearing Officer, particularly as they relate to issues regarding credibility determinations. With this point well established, the Board finds and concludes that at the investigation, the Carrier sustained its burden of proof by establishing, through substantive credible evidence that the Claimant did, in fact, engage in inappropriate harassing behavior of the deceased employee between September 2012 and November 4, 2013 in violation of the Carrier's "Standards of Excellence" related to the sections entitled "Trust and Honesty", "Discrimination", "Attending to Duties and Professional and Personal Conduct", as well as a violation of the Carrier's Anti-Discrimination Policy 5.2.2; 4.2.

As to the discipline imposed, it is well accepted that such disciplinary action should not be modified unless it is shown that in assessing such discipline, the Carrier's action was arbitrary, capricious or discriminatory. Upon our review of the record, it is clear that the Claimant knowingly violated the Carrier's foregoing Policies, and while such violation was determined not to be the proximate cause of the employee's death, such actions are contrary to the anti-discrimination efforts

created by the Carrier's Policies and actions. Accordingly, on the basis of the record before us, the Board cannot find any basis to modify the penalty imposed.

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 28th day of November 2017.