

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43078
Docket No. MW-44282
18-3-NRAB-00003-170380**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

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

PARTIES TO DISPUTE: (

**(National Railroad Passenger Corporation (Amtrak) -
(Northeast Corridor**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. D. Cerrito by letter dated September 15, 2016 was arbitrary, unwarranted and in violation of the Agreement (Carrier’s File NEC-BMWE-SD-5457D AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall rescind the aforesaid dismissal decision and Claimant D. Cerrito shall be reinstated to service immediately with full seniority unimpaired and compensated for all lost wages and benefits resulting from his improper termination.”**

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.

By notice dated August 15, 2016, the Claimant was directed to attend a formal Investigation and hearing on charges that the Claimant allegedly had violated Carrier rules in connection with an August 7, 2016, incident in which the Claimant allegedly had spit on and otherwise engaged in threatening behavior during an interaction with another Carrier employee. The Investigation was conducted, as scheduled, on September 7, 2016. By letter dated September 15, 2016, the Claimant was informed that he was being dismissed from the Carrier's service after being found guilty as charged. The Organization filed the instant claim on behalf of the Claimant, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because the Claimant was afforded a fair and impartial Investigation, because substantial evidence establishes that the Claimant is guilty as charged, because there is no merit or mitigating value to the Organization's arguments, because the requested remedy is inappropriate, and because the discipline imposed was commensurate with the proven offense and was not arbitrary, capricious, or excessive. The Organization contends that the instant claim should be sustained in its entirety because the Carrier failed to meet its heightened burden of proof on the charges that involve moral turpitude, and because the discipline imposed was unwarranted and in violation of the Agreement.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty when he engaged in violence with another employee while he was off duty and without authority on Amtrak's right of way near Wallingford, Connecticut. The record makes it clear that the Claimant threatened and intimidated, as well as spit on, an Amtrak conductor flagman, who was working on his assignment providing flagman protection for non-Amtrak subcontractors working in the area. The record reveals that the Claimant clearly violated the Carrier's Workplace Violence Rule because he caused the other employee to

reasonably fear for his personal safety. The Claimant was guilty of physically or verbally threatening another individual, as well as encouraging violent behavior, in the surveillance video that clearly shows the Claimant exiting his vehicle and confronting the victim. The Hearing Officer heard the testimony and found in favor of the victim and against the Claimant, and the Board is not in the position to overrule that determination.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was terminated for this incident. It is fundamental that the Carrier has a rule prohibiting the type of violent behavior in which the Claimant engaged. The Claimant's previous record shows that on three prior occasions, the Claimant was insubordinate and belligerent toward others, and he received a two-day suspension, a ten-day suspension, another ten-day suspension, and a final warning. Given that disciplinary background, coupled with this very serious offense in this case, the Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, this claim must be denied.

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 2nd day of May 2018.