

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44770
Docket No. CL-45701
22-3-NRAB-00003-200003**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Transportation Communication Union/IAM
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)**

STATEMENT OF CLAIM:

- “1. Carrier violated the Agreement when it improperly dismissed Appellant, Mr. Todd Leist, from employment as a result of formal bearing held on August 29, 2018; and**
- 2. Appellant shall now be reinstated to service, compensated for all wages, overtime and holiday pay, including any other compensation Claimant may have earned during the time Appellant is held out of service; Appellants record will be cleared of the charges made in this matter, and all rights, privileges and seniority shall be restored unimpaired; and**
- 3. Appellant shall now also be reimbursed for any amounts paid by Appellant for medical, surgical or dental expenses for Appellant and Appellant’s dependents to the extent that such payments would be payable by the current insurance carriers covering Appellant’s fellow employees in the craft; Appellant shall be also reimbursed for all premium payments Appellant may have to make in the purchase of substitute health, dental and life insurance; this and the above claims shall be considered as on-going and therefore shall continue until such time as this dispute is settled.”**

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.

The Claimant's seniority date was June 15, 1989. At the time this dispute arose, he held the position of Crew Management Representative at the Consolidated National Operations Center in Wilmington, Delaware. His duties included the assignment of Amtrak's Train and Engine Crews on the west coast.

On August 9, 2018, the Carrier notified its employees of an upcoming civil rights rally organized by "Unite the Right" to be held on August 12 in the District of Columbia. The Carrier indicated that security would be increased on lines and in Washington Union Station. On August 14, 2018, the Claimant was working his regular assignment. At approximately 4:00 pm, Assignment Clerk Danielle Davis observed the Claimant visiting websites depicting racist and offensive imagery for an extended period of time. She reported this to Crew Management Supervisor Lori Thompson who requested that IT investigate the Claimant's computer usage.

On August 17, 2018, the Claimant was given notice of an investigation in connection with the following charges:

CHARGE ONE: Alleged failure to comply with Amtrak Standards of Excellence pertaining to "Communications and Information", which reads in pertinent part...

"Our communication systems are a vital link to our customers and co-workers, and we need you to do your part in keeping them open and accessible. They should be used for company business only".

SPECIFICATION ONE: It is alleged that on Tuesday August 14, 2018 at approximately 4 pm, while working as a CMR2 Assignment Clerk, you were observed watching racist and offensive material at your desk, on an Amtrak provided computer, failing to keep this line of communication open and accessible.

CHARGE TWO: Alleged failure to comply with Amtrak Employee Code of Ethics pertaining to “Electronic Communication”, which reads in pertinent part...

“Never access material that is illegal, offensive, and disrespectful to others or that otherwise violates Amtrak policies”.

SPECIFICATION TWO: It is alleged that on Tuesday August 14, 2018 at approximately 4 pm, while working as a CMR2 Assignment Clerk, you were observed by a co-worker watching racist and offensive material at your desk, on an Amtrak provided computer, which was found to be offensive and disrespectful.

CHARGE THREE: Alleged failure to comply with Amtrak Anti-Discrimination and Anti-Harassment Policy pertaining to “Harassment” and “Personal Protected Characteristics”, which read in pertinent part...

“Harassment. For purposes of this policy, harassment is defined as verbal, physical, written or visual conduct that offends, belittles, denigrates or shows aversion to a person or group based on personal characteristics or protected activities”.

SPECIFICATION THREE: It is alleged that on Tuesday August 14, 2018 at approximately 4 pm, while working as a CMR2 Assignment Clerk, you were observed by a co-worker watching racist and offensive material at your desk, this displaying of offensive electronic material on an Amtrak provided computer showed aversion to a group of people based on personal characteristics, which resulted in a co-worker being offended and belittled.

CHARGE FOUR: Alleged failure to comply with Amtrak Standards of Excellence pertaining to “Attending to Duties”, which reads in pertinent part...

“As an Amtrak employee, and, therefore, the company’s most important resource, you have an obligation to perform your duties properly and in accordance with the standards set for your

particular job. This requires that you remain alert to your duties at all times. Any activity or behavior that distracts or prevents you or others from attending to duties is unacceptable”.

SPECIFICATION FOUR: It is alleged that on Tuesday August 14, 2018 at approximately 4 pm, while working as a CMR2 Assignment Clerk, you were observed by a co-worker watching racist and offensive material at your desk failing to remain alert to your duties.

After a formal investigation on August 29, 2018, the Hearing Officer found the charges were proven and Claimant was thereafter dismissed from the Carrier’s service.

In a letter dated September 26, 2018, the Organization appealed the Carrier’s discipline. The Carrier denied the appeal in a letter dated December 21, 2018. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that it has presented substantial evidence of the Claimant’s violations. The Claimant admitted that on August 14, 2018, he used the Carrier’s computer to visit websites containing racially charged and offensive material. The Carrier contends that it has never asserted that the Claimant visited these websites because he was a supporter of the viewpoints depicted there but argues that the Claimant’s coworkers had the right not to be exposed to those images at the workplace. Further, the Claimant spent approximately 40 minutes visiting these websites when he should have been working. The Carrier contends that accessing such websites at work violates the Carrier’s Anti-Harassment, Anti-Discrimination policy.

The Carrier recognizes that the Claimant was a long-term employee but asserts that the severity of his infractions justified his dismissal. Violation of the Anti-Discrimination and Anti-Harassment policy is a significant violation deserving of severe discipline.

The Organization contends that the Carrier has failed to demonstrate why the Claimant’s removal from service before a formal investigation occurred was necessary. The Organization contends that the Carrier’s decision to remove the Claimant from service after receiving a single, unsubstantiated allegation from a co-worker was arbitrary, capricious, and violated his right to receive a fair and impartial investigation.

The Organization contends that the Carrier has failed to consider that the Claimant was viewing the websites after a Security Update from the Carrier caused the Claimant to be concerned about his own safety on an upcoming trip. The Organization contends that the Carrier has falsely characterized the Claimant as racist, but he was simply following the Carrier's directive to remain vigilant.

The Organization contends that the record demonstrates that the Claimant was performing work during the period in question and was not solely viewing websites for 40 minutes. Although the Claimant's internet search for "Alt-Right Movement" on his computer yielded some videos, the Claimant's computer does not have speakers and the video sound was not played. The Organization contends that the Carrier failed to consider that the Claimant did not intend to harass anyone and that only one employee accidentally viewed one offensive image.

The Organization contends that the penalty of dismissal is too severe for the proven misconduct, especially in light of the Claimant's long and excellent service record. The Organization contends that the Carrier has failed to follow its progressive discipline policy and failed to show that lesser discipline would not have sufficed.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant.

Here, the Carrier has presented substantial evidence of the Claimant's violations. Indeed, he has admitted to intentionally conducting the internet search regarding the Alt-Right movement while on duty. While the Organization tried to link the search to the Carrier, the record demonstrates that the Claimant was motivated by concern for his own safety and then proceeded to view numerous offensive pages and videos for an extended period when he should have been attending to his duties.

However, the Organization's argument that there is no evidence that the Claimant's intention was to promote a racist or harassing viewpoint is well-taken. The Carrier concedes that it has no evidence that the Claimant supported these beliefs. There is no indication that the Claimant intended for anyone else to see what he was viewing. He mistakenly conducted his research while on duty at his assignment, which had the effect of offending a coworker, but there is insufficient evidence that his purpose was to offend or harass.

The Board finds that the Carrier has met its burden of proof in this case and under less unique circumstances the Board would likely uphold the discipline assessed. However, there are some mitigating circumstances that must be considered. The Claimant had more than 20 years of service with the Carrier with a good disciplinary record. There is no evidence that the Claimant's intention was to share what he was viewing or to harass or offend anyone else. Therefore, the Board is exercising its authority to reduce the discipline in this case to time served. Accordingly, the Claimant shall be returned to service with seniority unimpaired, but without backpay.

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 Third Division**

Dated at Chicago, Illinois, this 29th day of July 2022.