

PUBLIC LAW BOARD NO. 6139

Case No. 20

Award No. 20

**(National Railroad Passenger Corporation
(AMTRAK)**
PARTIES TO DISPUTE: (
**(American Railway & Airway Supervisors
(Association, a Division of The Transportation
(Communications Union**

STATEMENT OF CLAIM:

- 1. Carrier was arbitrary and capricious when they assessed Claimant Michael Palumbo thirty [30] days suspension for allegedly violating Amtrak's Standards of Excellence Policy**
- 2. Carrier shall now be required to make Claimant whole for any and all lost wages, including overtime, that he suffered due to the unjust discipline, and his personal record expunged.**

FINDINGS:

This Board, after hearing upon the whole record and all the evidence finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and, that the parties were given due notice of hearing thereon.

A complaint was filed against the Claimant for offensive language and actions prohibited by the Carrier's Anti-Discrimination and Anti-Harassment Policy. Following up on the complaint, the Carrier issued a Notice of Investigation November 29, 2005 with seven alleged specified occurrences of unacceptable behavior. Following postponement, the investigation was held January 4, 2006. Subsequently, by letter dated January 18, 2006, the Claimant was found guilty of the following specifications:

SPECIFICATION I: It is alleged that on August 28, 2005, while working in the capacity of supervisor, you addressed Clinton Newman, machine operator in a disparaging and offensive manner.

SPECIFICATION II: It is alleged that on September 24, 2005, while working as a supervisor you addressed employee Clinton Newman with a racial epithet. Mr. Newman is an African American.

SPECIFICATION VI: It is alleged that sometime during the summer of 2005 you referred to employee Clinton Newman by using a racial epithet.

The Carrier assessed discipline of 30 days actual suspension.

The Organization argues procedural errors in that a complete transcript was not forthcoming. The Organization maintains that important testimony and evidence was missing in a record of at least 30 lost segments. It further argues that the Trial Officer should have disqualified himself, as he had a history which would influence his decision making against the Claimant. He ignored objections and reached conclusions based on a one sided selection of evidence.

The Organization also argues that although the procedural errors are fatal, the Carrier did not prove the merits. The two major witnesses, Mr. Parento and Mr. Newman were not honest. Mr. Parento's testimony was motivated by pressure from an EPA investigation (as was Mr. Myles) that could result in discipline, charges, and fines. Mr. Newman's testimony was solicited by Mr. Parento and was the basis for the Claimant's suspension. Mr. Newman's assertions came three months after the alleged occurrences and follow an earlier investigation wherein he did not relate any racial slur. Such behavior should have proven lack of credibility and should have exonerated the Claimant from all specifications, supra.

The Organization strongly asserts the Claimant's innocence. It points to corroborating statements from unit members that, "It is not possible for a Supervisor to use racial slurs or sexual misconduct in a Unit like this without everyone knowing it within minutes, it just can't happen." The Organization maintains that guilt was not demonstrated.

The Carrier maintains that the Claimant was provided a fair and impartial investigation. It discounts any assertion that the Trial Officer was unfair or influenced by past events. It also maintains that it fully complied with the furnishing of a complete transcript. Although there were some omissions, it provides an explanation from the transcription service that they were due to blower noise, testimony that was too fast or too soft and in any event, none of the omissions in the over three hundred page transcript were serious.

As for the merits, the Carrier asserts that the testimony and exhibits prove the Claimant made the disparaging remarks to Mr. Newman. As Supervisors are expected to engage in proper behavior, particularly with those employees they supervise, the Claimant's remarks prove serious misconduct. The Carrier argues that the discipline assessed was proper.

The Board has carefully considered the procedural issues and finds them to be without merit. There is no evidentiary proof in this record to document that the Hearing Officer was influenced by his former role as president and his defeat in the election. Nor is there any proof that he conducted the investigation or decided the result based on anything except the evidence before him. The Board also finds that the transcript was without significant omission. While the Organization argues that the thirty omissions were important, it fails to prove any significant omission. The Board finds that these procedural issues and other procedural objections lack proof and must be rejected.

As for the merits, the Board has studied the Carrier's evidence. The Board has also studied the alleged fabrication of Mr. Myles testimony, as well as Mr. Newman's testimony. It has also reviewed the twelve statements from the Claimant's gang indicating no evidence of behavioral misconduct. The Board however does find overall that the evidence supports the Carrier's decision of guilt. For example, the following question and answer was given (TR, page 190)

Question: . . . [Claimant], who is your supervisor, stated to you: What's up my n*gger. It's also been stated that Mr. Myles overheard that. Did you hear that yourself?

Mr. Newman: Yes, I did.

The Board notes that Mr. Myles concurs (TR, page 252) with the above testimony. Mr. Myles statement substantiates that the Claimant failed to utilize appropriate behavior. The Board also notes that there is sufficient additional testimony to support the Carrier's conclusion with regard to the Claimant's actions toward Trackman Newman in the summer of 2005 with an additional racial epithet and then again, during August, 2005 (TR, page 193).


A study of the full transcript supports the credibility decision of the Hearing Officer and the Carrier's burden of proof. The Board notes that the Claimant denied all such occurrences. However, there is sufficient probative evidence to reach a conclusion that the Claimant violated the Carrier's Standards of Excellence and its Anti-Discrimination and Anti-Harassment Policy.

The Board has found the incidents disturbing and certainly in violation of policy. Such incidents cannot be condoned, particularly in the role of Supervisor over the employees involved. The Claimant should understand that this behavior is most serious. Nonetheless, under the full circumstances of these incidents and the record at bar, the Claimant's discipline is to be reduced from thirty (30) days to a fifteen (15) days suspension. Claimant is to be compensated for the fifteen days already served.

AWARD: Claim sustained to the extent indicated in the Findings.


Marty E. Zusman, Neutral Member


R. F. Palmer, Carrier Member


G. Campbell, Employee Member

Date: 8-16-07