

Special Board of Adjustment No. 986

Parties to the Dispute

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE

V.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) –
NORTHEAST CORRIDOR

Claimant: Giovanni Rivera
Award No. 251

Organization's Statement of Claim

The Brotherhood of Maintenance of Way Employees ("BMWE" or the "Organization") appealed the discipline of dismissal assessed on Mid-Atlantic Division Electrical Track Division Lineman Giovanni Rivera (the "Claimant") on charges that were set forth in the Carrier's Notice of Investigation, dated April 4, 2005. The Organization claims that the Claimant was unjustly dismissed from his employment with the National Railroad Passenger Corporation ("Amtrak" or the "Carrier"). As a remedy, the Union asked for the Claimant to be made whole for all wages, benefits, and seniority lost from the time of his dismissal to his reinstatement, and that the discipline be expunged from his record.

Background of the Case

Carrier hired the Claimant on July 12, 2004 in its Maintenance of Way and Structural Department where he worked mainly as an Electrical Traction

Lineman. On March 6, 2005, Claimant applied to be certified as a commercial motor vehicle driver, for which he needed a commercial drivers license. As part of the application process, Claimant was required to 1) report any traffic convictions and/or forfeitures he had in the past three years; and 2) report whether he had ever had his license, permit or driving privileges suspended or revoked. On the application, Claimant indicated that he had one speeding ticket and did not provide an answer to the question regarding driving privileges. Rather, he marked the question with a question mark. Claimant signed the form and indicated that the statements he made therein were accurate to the best of his knowledge and that he understands giving false information could be grounds for termination. The results of his background check revealed that he had a number of driving convictions within the past three years and a suspended license, none of which he disclosed.

A Notice of Investigation, dated April 4, 2005, was served upon Claimant, which charged the Grievant with violating Amtrak's Standards of Excellence regarding integrity, trust and honesty, professional and personal conduct (teamwork) and attending to duty. After one postponement of the investigation at the request of the Organization, the investigation was begun and then postponed until June 14, 2005. Letters were sent certified mail to Claimant at the home address he provided to Carrier setting forth the charges and stating that his failure to appear would result in the investigation being conducted *in absentia*. He failed to appear for the June 14th investigation and the hearing was held *in absentia*. During the

investigation, the Organization was provided the opportunity to present evidence and cross-examine witnesses. The Claimant was found guilty of the charges. Carrier dismissed Claimant on June 28, 2005. All appeals on the property were unsuccessful and the parties agreed to bring the case to this Board for final adjudication.

Opinion of the Board

This Board derives its authority from the provisions of the Railway labor Act, as amended, together with the terms and conditions of the Agreement by and between the BMW and Carrier.

After hearing upon the whole record and all the evidence, as developed on the property, the Board finds that the parties herein are 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 the hearing thereon. The Claimant was represented by the Organization.

The Carrier contended that its actions in this case were justified and proper. With respect to the due process issues raised by the Organization, the Carrier noted that the Claimant was served by certified mail with the charges and notice of investigation. He was advised that his failure to appear would result in the hearing being held in absentia and the hearing was postponed on his behalf

twice. The Organization was provided the opportunity to present the Claimant's case. As a result, the Carrier argued that all due process obligations to Claimant were met.

With respect to the charges, Carrier contended that its Standards of Excellence prohibit providing false and misleading statements. They noted that the Commercial Drivers License is a federal application and failure to properly comply with federal requirements subjects the Carrier to additional liability.

Carrier argued that the background check information obtained by Carrier indicated that Claimant provided false and/or misleading information on his application form. Specifically he failed to disclose numerous traffic violations and failed to disclose that his license had been suspended for thirty days. Carrier noted that the Organization's claims that these were minor memory lapses and not significant was not true. They maintained the application was clear with respect to what information the Claimant was to provide and he failed to do so. The application form was also clear, they argued. He had to make sure the information he was providing was complete and accurate, and failure to do so could subject him to termination.

Accordingly, Carrier argued that given Claimant's limited tenure with the Carrier and his prior disciplinary suspension of 60 days, termination is the appropriate disciplinary action in this case. The Carrier maintained that the dismissal of

Claimant on June 28, 2005 was not arbitrary or capricious so as to constitute an abuse of the Carrier's discretion.

The Organization argued first that Claimant was denied his contractual right to a fair and impartial investigation. They argued that holding the investigation *in absentia* over the objection of Claimant's representative denied him his right to cross-examine his accuser. Moreover, they alleged that the hearing officer refused to develop testimony that might mitigate the charges and, additionally, that the hearing officer asked leading questions to the witnesses.

Regarding the charges, the Organization claimed that Claimant's failure to disclose his prior traffic offenses and license suspension were mere memory lapses and oversights and, they argued, that the Claimant's supervisor should have completed the application form for the Claimant. They contend that prior Boards have not found such lapses to be actionable offenses. Finally, they contend that even if guilt could be established, termination is too harsh a penalty.

Upon a review of the entire record, the Board finds that the Carrier's determination herein was appropriate. It is the Board's determination that the Carrier did not violate the contract by holding the hearing *in absentia*. Claimant was given adequate notice and the matter was postponed twice to give him every opportunity to appear. That he elected not to so was done at his peril. Boards have upheld the propriety of holding investigations *in absentia* when the Claimant

had due notice. See SBA No. 986, Case No. 26 (Meyers). The Board also finds there was no evidence of any procedural irregularity violative of the Claimant's rights.

Finally, the Board will not disturb the penalty assessed. The Claimant did not disclose prior traffic offenses and his suspended license, although he obviously had knowledge and access to such information. The application form was clear and the Claimant was provided notice that failure to do so could lead to his termination. The Carrier has demonstrated that its code of conduct characterizes such behavior as dishonesty and failure to perform his duties properly. Claimant was a short-term employee with less than two years of seniority at the time of his dismissal. A prior offense had led to a 60-day suspension. The Claimant's current offense justifies the penalty imposed by Carrier. Therefore, this Board will not modify the discipline assessed.

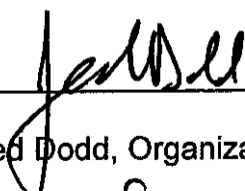
Award

Claim denied.



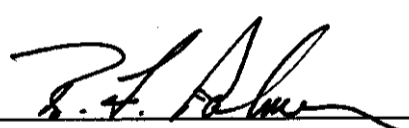
Gayle A. Gavin, Chair & Neutral Member

SBA 986
Award 251



Jed Dodd, Organization Member

Dated: September 15, 2006



Rick Palmer, Carrier Member

Dated: 9/18/06