

Special Board of Adjustment No. 986

Parties to the Dispute

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION – IBT RAIL CONFERENCE

V.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) – NORTHEAST
CORRIDOR

Claimant: Steven Lengares

Award No. 272

Organization's Statement of Claim

The Brotherhood of Maintenance of Way Employes ("BMWE" or the "Organization") appealed the discipline of dismissal assessed on Northeast Corridor Foreman Steven Lengares (the "Claimant") on charges that were set forth in the Carrier's Notice of Investigation, dated July 23, 2008. The Organization claims the Claimant was unjustly disciplined. It further argues in the event the Board finds a basis to uphold the Carrier's finding of guilt, the penalty should be modified because it is unduly harsh and capricious. As a remedy, the Union requests the Claimant be reinstated to service with seniority and all other rights unimpaired and be made whole for all wage loss suffered.

Background of the Case

The Claimant, Steven Lengares, was a short term employee with approximately four years of service, assigned at the time of the incident as a Track Foreman on Carrier Clip Gang Y112. On July 9, 2008, the Claimant was working with this gang when he sent an alleged threatening and racially offensive text message from his cell phone while on duty. This incident resulted in a Notice of Investigation dated July 23, 2008 being served upon Claimant. He was charged with conduct unbecoming an Amtrak employee in violation of Amtrak's Standards of Excellence; the Carrier's Workplace Violence Policy; the Carrier's Anti-Discrimination and Anti-Harassment Policy; and NORAC Operating Rules. On August 12, 2008 a fair and full investigation was held with the Claimant and his representative present. By letter dated August 26, 2008 Claimant was found guilty of the charges and assessed the discipline of dismissal. All appeals on the property were unsuccessful and the parties agreed to bring the case to this Board for 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 BMWWE 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

hereon. The Claimant, Steven Lengares, was ably represented at the hearing before this Board by the Organization and given an opportunity to make a statement on his own behalf.

The Carrier contended its actions in this case were justified and supported by substantial evidence. The Carrier cited the record evidence which established the Claimant, who is white, while riding on a company bus and on duty, texted a racially offensive and threatening message on his cell phone. According to the record he text messaged "I need a gun for all these N***** (N-word)." This message was observed by two employees who were sitting behind the Claimant. When the content of the text message became known on the bus it created an "uproar." The text message violated the Carrier's Standards of Excellence, its Workplace Violence Policy, its Anti-Discrimination and Anti-Harassment Policy and NORAC Rules. The Carrier contended it has a zero tolerance for any form of violence in the workplace. It further maintained there could be no question that the comment made by the Claimant was offensive and the use of such a demeaning racial slur did not lend itself to misinterpretation. Carrier noted its anti-discrimination and harassment policy establishes such racially charged language to violate the policy and constitute serious misconduct.

Carrier contended the penalty of dismissal was appropriate. The serious nature of the offenses requires a severe penalty. Additionally the Claimant is a short term employee with two prior disciplinary penalties against him. Carrier distinguished the instant matter from other cases cited by the Organization in its argument that the penalty was disparate to treatment given for similar incidents on the property. While they involved allegations of racially offensive remarks, they did not also involve

threatening remarks as the instant case. Under these circumstances, the Carrier argued, dismissal is the only appropriate penalty.

The Organization argued the Carrier failed to meet its burden of proof in that it failed to establish the nexus between the claimed violations of Carrier's policies and rules and the Claimant's conduct. The message that the Claimant sent was not directed at nor sent to any Amtrak employee. It was sent on his personal cell phone to someone not connected to Amtrak. The Claimant sent it out of frustration with no intent to intimidate, threaten, harass or harm. He admitted his mistake and clearly was remorseful for his actions. According to the Organization, the testimony of record failed to demonstrate that any employee felt threatened or that as a result of such remarks there was a hostile, intimidating or discriminatory environment. Additionally the penalty was harsh, unusual and capricious. The Claimant was under significant pressure as a foreman and was very remorseful for his conduct. Prior Board cases hold that the purpose of discipline is to rehabilitate, correct and guide employees as to their future actions. The Claimant can be rehabilitated if given a chance. The Organization urges this Board to do so.

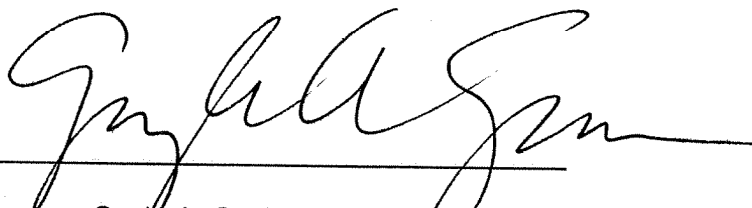
Upon a review of the entire record, the Board finds the Carrier's determination herein was appropriate. The evidence established that Claimant was guilty of text messaging a threatening and racial pejorative message. Such text message clearly violated the Carrier's policies on violence, anti-discrimination and anti-harassment. It is well established that Carrier has not only the right to maintain its standards of conduct and anti-discrimination policies, but also to enforce them to ensure it maintains a safe environment free from intimidation, discrimination and harassment. In the instant matter,

Claimant had an obligation to conduct himself within the bounds of these policies and to refrain from such despicable conduct. Based on the record before it, this Board has no basis to disturb the Carrier's findings of guilt.

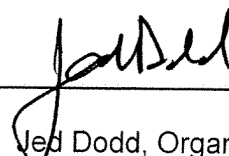
Likewise, the Board does not find any evidence of disparate treatment with respect to penalty. The Claimant is a short term employee who in four years had two prior disciplines against him. Additionally he was serving in the position of a track foreman, a position that must set the standard, by way of example, for acceptable conduct. As for the cases cited by the Organization, they differ with respect to the underlying actions and Carrier, therefore, has shown a basis to have implemented a more severe penalty in this case.

AWARD

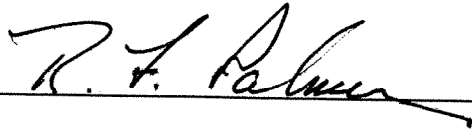
The claim is denied in its entirety.



Gayle A. Gavin, Chair & Neutral Member



Jed Dodd, Organization Member
Dated: 2/17/2009



R. F. Palmer

Rick Palmer, Carrier Member

Dated: 2/17/09