

Parties to the Dispute

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION – IBT RAIL CONFERENCE**

V.

**NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) – NORTHEAST
CORRIDOR**

Claimant: Christopher DiGiacomo

Award No. 273

Organization's Statement of Claim

The Brotherhood of Maintenance of Way Employees ("BMWE" or the "Organization") appealed the discipline of dismissal assessed on Northeast Corridor Mid-Atlantic Division Electric Traction Substation Electrician Christopher DiGiacomo (the "Claimant") on charges that were set forth in the Carrier's Notice of Investigation, dated September 5, 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, Christopher DiGiacomo, was a short term employee with approximately three years, seven months of service, assigned at the time of the incident as a Substation Electrician. On August 20, 2008, the Claimant was working with a construction gang at Substation 18, Gunpow at the time of the incident. He was alleged to have displayed rude, aggressive and unprofessional behavior toward the entire gang by using profane and vulgar language which compromised the safety and well-being of the gang. Additionally he allegedly left the property without permission or authorization when directed to remain in order to discuss the matter with the Assistant Division Engineer. As a result of these actions he was served with a Notice of Investigation dated September 5, 2008. He was charged with insubordination and conduct unbecoming an Amtrak employee in violation of Amtrak's Standards of Excellence; the Carrier's Workplace Violence Policy; and NORAC Operating Rules B, D, E, N, and S. On September 17, 2008 an investigation was held with the Claimant and his representative present. By letter dated October 1, 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 BMWE 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, Christopher DiGiacomo, was ably represented at the hearing before this Board by the Organization. The Carrier contended its actions in this case were justified and supported by substantial evidence. The Carrier cited the record evidence that it contended established the Claimant on the date in question had a confrontation with members of the gang in which he was working over the use of a piece of equipment. During this confrontation the Claimant used profanity toward the gang members and refused a direct order. His actions created a hostile environment and a distraction from the gang's duties. When he and the other members of the gang were ordered to see the Assistant Division Engineer to be interviewed over the incident, the Claimant left the property without permission from his supervisor. His actions, according to the Carrier, violated the Carrier's Standards of Excellence, its Workplace Violence Policy, and NORAC Rules. The Carrier contended it is a well established principle, not just on the property but through out the industry, that disobeying an order is a dismissible offense. Additionally the Carrier has a zero tolerance for any form of violence or threatening behavior in the workplace. The Claimant's use of profanity and vulgar language toward his fellow workers together with the hostility and anger he directed toward them is conduct that simply can not be tolerated. 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 a prior disciplinary penalty against him.

Carrier further argued that the Organization's contention on appeal -- that the Claimant was denied due process in his ability to present a defense in violation of Rule 68 of the parties' agreement -- was without merit. The hearing officer correctly prevented any testimony regarding the Claimant's alleged medical condition in order to preserve the Claimant's privacy. It further argued that the Claimant's alleged medical condition was not a legitimate excuse for the behavior he exhibited.

The Organization argued at the outset that the Claimant was denied a fair and impartial hearing as required under the prescripts of the parties' agreement. When the hearing officer precluded pertinent information as to the Claimant's medical condition that would have helped to explain the Claimant's conduct, the Claimant attempted to justify such action by claiming it was done to protect the Claimant's privacy. The Organization contended such explanation was absurd as it was the Claimant's privilege to waive. In actuality, the Organization argued, the hearing officer even acknowledged that the information might be used in the future; yet refused to allow it into the record. The Organization further contended that the Carrier failed to meet its burden of proof in proving the charges. The testimony of record failed to demonstrate that any employee felt threatened or that as a result of such remarks there was a hostile or intimidating environment. The Claimant engaged in the same type of talk that his co-workers used toward him. There was no fighting or violence. It was merely "shop talk"... no more and no less. Finally the penalty was harsh, unusual and capricious. 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 Claimant used vulgar and profane language that created a hostile environment for the gang to work. The evidence established that Claimant was guilty of charges and specifications. It is well established that Carrier has not only the right to maintain its standards of conduct but also to enforce them to ensure it maintains a safe environment free from intimidation and harassment. In the instant matter, Claimant had an obligation to conduct himself within the bounds of these policies and to refrain from such unacceptable conduct.

Having said that, what is disturbing to the Board in this case was the Carrier's preclusion of any medical documentation that might have established that the Claimant had a medical condition, bi-polarism, that could have explained his conduct on the date in question; not necessarily excuse it. Such circumstance would go toward the possible mitigation of penalty. The Carrier's explanation that it was precluded to preserve the Claimant's privacy simply misses the point of protecting privacy. Obviously it was the Claimant who would have benefitted from the admission of such evidence and it was his right to waive. The Claimant should have an opportunity to establish that he suffers from such medical condition, but that it is controllable.

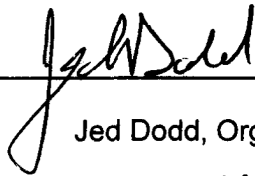
AWARD

The claim is denied in part and granted in part. The Claimant is to report to the Carrier's Medical Director with his medical documentation regarding the claim that he suffers

from being bi-polar. Should the Medical Director determine that the Claimant in fact does suffer from such medical condition and that it is controllable, the Carrier shall restore the Claimant to his former position with no back pay.



Gayle A. Gavin, Chair & Neutral Member



Jed Dodd, Organization Member

Dated: 4/14/2009



Rick Palmer, Carrier Member

Dated: 4/14/09