

**NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT No. 986**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)**

**DIVISION – IBT RAIL CONFERENCE**

**and**

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

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**Case No. 334**

**Award No. 334**

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Richard K. Hanft, Chairman and Neutral Member  
Angela Heverling, Carrier Member  
Jed Dodd, Employee Member

**STATEMENT OF THE CLAIM:** “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. D. Stilwell, issued by letter dated November 18, 2020, in connection with alleged violations of the Carrier’s Workplace Violence Prevention Policy 7.56.1 and Amtrak’s Standards of Excellence on August 20, 2020 was unjust, arbitrary, capricious, based on unproven charges, and a violation of the agreement (System File BMW-158781-D AMT).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Stilwell shall be reinstated to service with all benefits and seniority unimpaired, shall have his record cleared of the charges leveled against him and must be compensated for all loss suffered. “

**FINDINGS:**

Upon the whole record and all of the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

After thoroughly reviewing and considering the record and the parties’ presentations, the Board finds that the claim should be disposed of as follows:

Claimant had almost twelve (12) years’ service with the Carrier at the time giving rise to the instant matter and was working as a Track Foreman for the Carrier.

On the morning of August 20, 2020 Claimant, after working the night before from 8:00 pm to 6:00 am, arrived at the PC Testing Room for a qualification test. The Claimant explained that because a machine broke down during the night shift his clothes that he was wearing during service became filthy and, not wanting to soil his car’s interior, he changed into a pair of shorts after work at headquarters.

When Claimant appeared at the testing center, he was confronted by an instructor with regard to having shorts on and subsequently about his failure to be wearing a face mask in violation of Carrier policy. The confrontation became heated and it is undisputed that Claimant used unprofessional language toward the Instructor before leaving the classroom.

By letter dated September 2, 2020, Claimant was advised to appear for a formal investigation on September 18, 2020 to develop the facts and determine responsibility, if any, concerning creating a hostile environment, engaging in unprofessional, inappropriate conduct in a threatening manner in violation of Carrier's Workplace violence Prevention Policy 7.56.1 and Amtrak's Standards of Excellence.

After two (2) postponements, the investigation was held, via video conference, on November 5, 2020. By letter dated November 16, 2020 Claimant was informed that the Carrier had determined that the record contained substantial evidence to prove the charges brought against Claimant. By letter dated November 18, 2020 Claimant was informed that he was being dismissed from service. On November 30, 2020, the Organization appealed the dismissal challenging the Carrier's decision to dismiss the Claimant.

The Carrier contends that the investigation into this matter was fair and impartial, that the charges levied were proven by substantial evidence and that the discipline assessed was warranted. The Organization asserts that the instant claim should be sustained in its entirety because the Carrier failed to comply with Rule 68 providing Claimant the right to a fair and impartial hearing, that the Carrier failed to meet its burden of proof that Claimant made any threatening remarks to the instructor or to anyone else in the room, and that the discipline imposed was excessive and unwarranted.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

The Investigation into this matter was held via videoconference on November 5, 2020. Nine month's prior, in March 2020, the New Jersey Supreme Court authorized a swift transition from in-person hearings to remote Court operations. Most Court hearings since March 2020 in New Jersey were held remotely. Since the start-up of the pandemic, Judges in New Jersey conducted more than 100,000 remote court events involving more than 1.2 million participants.

In its November 16, 2020 Order, the New Jersey Supreme Court, in recognition of the pervasive and serious effects of the COVID-19 public health crisis provided to... "accommodate the legitimate needs of the parties, attorneys and others in the interest of justice".

In this matter, the Organization asserts, relying on an award from 1940, before video conferencing technology was ever dreamt of, that the Carrier's failure to provide an "in-person" investigation deprived Claimant of the due process rights guaranteed under the parties' collective bargaining agreement.

As Referee Campagna set forth in Special Board of Adjustment 928, Case No. 641 "No one can dispute those remote hearings in this day and age with the advantage of advanced technology provides a fair replacement for in-person testimony." And further that "There is no dispute that the COVID-19 video conference hearing procedures were implemented in good faith to protect all participants' health and safety and in an attempt to avoid the on-going delay or cancellation of hearings due to the COVID-19 pandemic."

In this instance, the parties, adapting to the second wave of the pandemic, chose to conduct the investigation into the matter by means of video conferencing technology. There is no evidence on this record to show that Claimant was prejudiced in any way by the Parties timely conducting the investigation via remote hearing. Because the Claimant was not prejudiced, he was not denied procedural due process and the Organization's argument, given the circumstances, is unconvincing. Here too, the Parties' use of videoconference technology to adapt to a worldwide pandemic is found, in this instance, to be a fair replacement for an "in person" investigation.

The Board next considers the Organization's argument that the Carrier failed to meet its burden of proof in that while Claimant was charged with violation of both the Carrier's Workplace Violence Prevention Policy 7.56.1 and Amtrak's Standards of Excellence, the record evidence fails to prove that Claimant acted in a threatening manner or threatened the Training Manager on the morning in question.

The Claimant admitted to conducting himself in an unprofessional manner thus violating the Carrier's Standards of Excellence. He also violated the Carrier's Standards of Excellence by reporting to the testing center without wearing a mask, however, the Claimant denied threatening anyone on August 20, 2020 and the testimony at the investigation of three (3) witnesses who were in the testing room corroborates the fact that Claimant did not threaten the Training Manager or anyone else in the room.

In the Decision Letter mailed to the Claimant, the Hearing Officer found that Claimant's admission of using inappropriate language proved the charge of inappropriate conduct by substantial evidence but failed to address the more serious charge of violation of Carrier's Workplace Violence Prevention Policy 7.56.1.

Thus, the Board finds that only one of the two charges against the Claimant was proven. Where, as here, the quantum of discipline is bottomed on a finding of guilt on more than one charge, guilt on each of those charges must be proven because Carrier, it must be assumed, would not have found that level of discipline appropriate but for the guilt found on each of the charges. As a result, the Board has determined that the Carrier's decision to dismiss Claimant from service cannot stand and Claimant shall be returned to service but without compensation for time out of service.

**AWARD:**

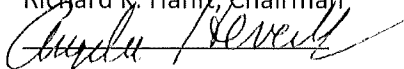
Claim sustained in part and denied in part in accordance with the findings.

**ORDER:**

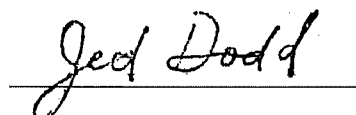
This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the date the Award is transmitted to the parties.



Richard K. Hanft, Chairman



Angela Heverling, Carrier Member



Jed Dodd, Employee Member

Dated at Chicago, Illinois, July 26, 2021