

SPECIAL BOARD OF ADJUSTMENT NO. 986

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees Division – IBT Rail Conference

and

National Railroad Passenger Corporation (AMTRAK) – Northeast Corridor

STATEMENT OF CLAIM:

1. The Carrier's discipline (dismissal) of Mr. D. Palumbo, Jr., issued by letter dated February 28, 2022, for his alleged use of a cell phone while operating a company truck resulting in a derailment was unjust, arbitrary, capricious, based on unproven charges and a violation of the agreement (System File BMW-160387-D AMT).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Palumbo, Jr. shall be reinstated to service immediately and made whole for all losses associated with this dismissal, which included lost time. Including, but not limited to, lost overtime, all benefit rights restored, and all seniority rights restored. Additionally, this matter shall be stricken from the Claimant's record.

OPINION OF BOARD:

At the time of the incident precipitating this claim, Mr. D. Palumbo, Jr. was assigned as a construction truck driver operating an Amtrak Swivel dump truck. On July 27, 2021, Claimant's truck ran through a derail not properly aligned for his movement and derailed his truck. By letter of August 4, 2021, Claimant was notified to appear for a formal investigation as follows:

On Tuesday, July 27, 2021, at approximately 12:47 A.M, South Berlin Wye, MP 26, Berlin, CT, it was discovered that truck driver Domenick Palumbo was working unsafely, not giving his full attention to his duties, when the Dashcam in his truck (Amtrak Swivel Dump Truck AG94016) went off revealing that while operating the truck, he was

looking down at an electronic device (cell phone) in lap. As a result, Mr. Palumbo derailed his equipment off a split point derail, as he moved south from south end leg of Berlin Wye.

Following two postponements, the formal investigation was held on February 17, 2022. On February 28, 2022, the Carrier notified Claimant that he had been found guilty of the charges in the notice of investigation and was assessed the penalty of dismissal as of that date.

The Organization filed an appeal on behalf of Mr. Palumbo on March 14, 2022. That appeal was denied, and the matter was conferenced between the Parties on April 22, 2022, after which it remained in dispute. Accordingly, the matter is properly before this Board for resolution.

It is the Carrier's position that the charges against Claimant were proven at the investigation by witness accounts and by means of the Dashcam in his truck. The Dashcam clearly shows Claimant looking down at what is revealed to be his cell phone while operating his truck. In addition, his distraction contributed to resulting miscommunication with his foreman, in which he failed to confirm what he took to be an order to proceed. The result was the derailment of his vehicle. Specifically, the Carrier maintains that because he was distracted by the use of his cell phone, Claimant failed to confirm the instruction he received in violation of proper radio procedures. Under the circumstances, and in view of Claimant's problematic discipline record, including a last chance agreement signed by the Claimant in early 2020, the Carrier urges that the discipline was justified, and the instant claim should be denied in its entirety.

For its part, the Organization asserts first that Claimant was not using his cell phone for personal communication. Rather, as was shown at the hearing, the Carrier does not generally

distribute sufficient Carrier cell phones, so employees are expected to use their own cell phones to communicate with, for example, their foreman during a maneuver. (Tr. pp. 37-38) In addition, it points out that the Dashcam video shows that Claimant was looking directly forward in his truck just before the derailment occurred. With respect to the charge regarding failure to confirm an instruction, the Organization points to Claimant's own testimony that there had not been difficulties with any derails on that particular section of track, and that in so far as he knew he was the only employee the foreman could have been talking to on the radio when he said to "Step on the pedal," so Claimant took that to be an instruction to proceed. Finally, the Organization asserts that the penalty assessed was disproportionate to the actual actions taken by the Claimant, and the instant claim should be sustained in its entirety.

The Board has reviewed the transcript of the investigation in this case, as well as the documentary and video evidence presented with care. In light of Claimant's testimony and the submitted testimony of fellow BMW employees on the same property, we do not find that Claimant's use of the cell phone in and of itself was a disciplinable offense. Claimant's unrefuted testimony that he was contacted by and replied to his foreman via his personal cell phone (Tr. pp. 36, 38) is supported by written statements of fellow employees establishing that it was not at all uncommon for supervisors to contact them via their personal cell phones, because a very limited number of Carrier cell phones were distributed among the crews. (Tr. p. 37)

What does concern the Board is the fact that because the Claimant was distracted by the use of his cell phone, he failed to confirm the foreman's apparent instructions to proceed before driving his truck through the misaligned derail. Claimant admitted that with the high rail

folded “underneath the front of the truck”, the position of the headlights and hood are raised twelve to thirteen feet off the ground, and in that position “you can see maybe 40 feet in front of you”, but not directly in front of the truck. (Tr. p. 35) Given that admitted distortion of his sight line and the fact that he was working at night, it would have been even more essential to confirm his foreman’s instruction to move forward prior to moving his truck through the derail. In Claimant’s favor, he was proceeding at a restricted speed and there was apparently no resulting damage to the track or the truck.

Finally, the Board notes that, while Claimant’s record is not totally clean, his two prior disciplines were for quite different violations. His first discipline involved a similar infraction nearly ten years prior to the one at issue here, and for which Claimant received a 5-day actual suspension. His more recent discipline was reduced from a termination to a “last chance” reinstatement – which included Claimant’s waiver of a right to grieve that discipline. Thus, Claimant is a 14-year employee with a relatively good discipline record, but the present infraction of failure to confirm his foreman’s instruction is a serious one. Under the unique circumstances of this case, and without precedent for future similar cases that might arise, the Board finds that Claimant shall be returned to work, without back pay, but with all other rights and seniority intact.

AWARD

Claim sustained only to the extent set forth in the above Opinion. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



Elizabeth C. Wesman, Chairman
Organization Member

Carrier Member

Dated 11-17-2023