

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) – Other Than Northeast Corridor

STATEMENT OF CLAIM:

1. The Carrier's discipline (dismissal) of Mr. N. Durant, issued by letter dated April 25, 2022, for his alleged making unwarranted physical contact with your coworker causing him to feel a sense of threat and intimidation was unjust, arbitrary, capricious, based on unproven charges and a violation of the Agreement (System File 162452-BMWED NRP).
2. As a consequence of the violation referred to in Part 1 above, Claimant N. Durant shall be reinstated to service immediately and made whole for all losses associated with this dismissal, which includes 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:

In a letter dated March 25, 2022, the Carrier notified Claimant Neko Durant to appear for a formal investigation to ascertain the facts regarding the following:

On March 22nd, 2022, it was brought to local management's attention that you placed your hands on another employee in an inappropriate and unprofessional manner. Additionally, it was stated that there were comments made in an intimidating manner related to the employee's 90-day probation period.

You are being charged with General Code of Operating Rules, 1.6 Conduct. Employees must not be: Parts:

1. Careless of the safety of themselves or others.
2. Negligent...
6. Quarrelsome
7. Discourteous.

General Code of Operating Rules 1.7 Altercations: Employees must not enter into altercations with each other, play practical jokes, or wrestle while on duty or on railroad property....

The formal investigation was held on April 20, 2022. Following the investigation, by letter of April 25, 2022, Claimant was notified that he had been found guilty as charged, and on April 27, 2022, he was notified that he was assessed the penalty of dismissal from Carrier's service.

The Organization filed a claim on Mr. Durant's behalf protesting his dismissal on May 5, 2022. That claim was denied by the Carrier, and the parties ultimately conferenced the matter on June 1, 2022, after which it remained unresolved. It is properly before the Board for adjudication.

The Carrier contends that testimony presented by its witnesses during the formal investigation confirms that there was an altercation between the Claimant and Mr. Montoya – a new employee on the maintenance crew. It asserts that, in reviewing the transcript of the investigation, the Carrier's witnesses' statements were consistent in that they believed an altercation had taken place, and that Mr. Montoya's version of the event at issue was correct. The Carrier also urges that its offer to Claimant of a "last chance" reinstatement, did not indicate its belief that Claimant was innocent in any regard. Rather, he was expected to admit to his misconduct and be on notice that any further incidents of conflict with co-workers would result in his dismissal. Thus, the Carrier asks that the instant claim be denied.

For its part, the Organization maintains that the Carrier has failed to prove that Claimant “threatened and intimidated” Mr. Montoya. It asks the Board to review Claimant’s testimony, which directly contradicts the testimony of the Carrier witnesses including that of Mr. Montoya. The Organization further points out that Transcript Exhibit G, offered by the Carrier is a “third hand” statement offered by Carrier’s witness Aleksander Kurec, in which he admits that the alleged incident was reported to him by his foreman, who was himself reporting on the alleged incident as it was reported to him by yet another employee. In light of the weakness of the Carrier witnesses’ testimony, both in person and in statements submitted, the Organization contends that the Carrier has failed in its burden of persuasion, and the instant claim should be sustained in its entirety.

The Board has read the transcript of the investigation and the attendant exhibits offered therein with care. We share the Organization’s point that most of the testimony on the record, and in documentation appended to the record constituted at least second degree and, in one instance, third degree hearsay. Although the Board respects the fundamental principle that it is the Hearing Officer who is in the best position to determine the credibility of witnesses and would normally be held by this standard, Mr. Montoya’s characterization of the alleged incident is in direct contrast to the Claimant’s testimony which, absent any first-hand, objective testimony, would ordinarily be viewed as a failure of the Carrier to meet its burden of proof in this matter.

However, contained in Carrier’s transcript Exhibit G is a credible brief report of a first-hand account from an employee who was a direct witness to the alleged incident. That employee’s description confirms that Claimant “bumped/sidestepped” Mr. Montoya, but he also

admits he was not close enough to either Claimant or Mr. Montoya to confirm what, if anything, was said by either man. Combined with the fact that Mr. Montoya chose not to lodge a complaint regarding Claimant until 18 days after the alleged incident and subsequently declined to involve Carrier police (with whom he apparently filed an initial complaint) in any follow-up with Claimant, we cannot find that the incident at issue rose to the level of a dismissible offense. Thus, the Carrier has shown only that there was likely some measure of physical contact between Claimant and Mr. Montoya, despite Claimant's denial of that occurrence, but it has not shown that the nature of that contact rose to the level of a confirmed violation of GCOR Rule 1.6. or 1.7. Absent such evidence, we find that Claimant's dismissal was unwarranted. At most the Carrier has shown that there was a minor confrontation between Mr. Montoya and Claimant which appeared to involve some unwarranted physical contact by the latter.

In light of the foregoing, the Board finds that Claimant's discipline should be reduced to a 60-day actual suspension, he should be returned to work less the suspension, and his discipline record shall be corrected to indicate the reduction in penalty.

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