

SPECIAL BOARD OF ADJUSTMENT NO. 986

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY)	
EMPLOYEES DIVISION – IBT RAIL CONFERENCE,)	
)	
Organization,)	Award No. 345
)	
and)	
)	
)	Case No. 345
)	
NATIONAL RAILROAD PASSENGER CORPORATION)	
(AMTRAK) – NORTHEAST CORRIDOR,)	
)	
Carrier)	

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

1. The Carrier’s discipline (dismissal) of G. Delpino, issued by letter dated May 2, 2023, for sending a text message was unjust, arbitrary, capricious, based on unproven charges and a violation of the agreement (System File BMW-167789-D AMT).
2. As a consequence of the violation referred to in Part 1 above, Claimant G. Delpino 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.”

FINDINGS:

On or about May 12, 2021, the Claimant sent a group text message to Amtrak co-workers. The text was a meme featuring comedian Dave Chappelle and the meme included the following words: “IM BROKE NIGGA, I’M BROKE!” The individuals receiving the group text included two unionized supervisors represented by the American Railway Supervisors Association (ARASA).

On or about February 21, 2023, another Amtrak employee reported that the Claimant had sent a text message which included a racial slur in a group chat to other Amtrak employees in May 2021. At the time the other employee reported the incident, the reporting employee explained that the employee did not report it earlier because the employee did not believe any action would be

taken. The employee attributed the decision to report in 2023 to changes in personnel and an emphasis on reporting that led the employee to have greater confidence that the report would be appropriately heard. An HR investigation was conducted

On or about March 21, 2023, the Claimant was notified in writing of the charges and given notice to appear for a formal investigation. The Notice of Investigation stated in relevant part:

It is alleged that on February 21, 2023, Amtrak Management became aware that Gregory Delpino sent a text messaging including a racial slur in a group chat to other Amtrak employees.

The investigation was rescheduled and held on April 19, 2023.

Following the investigation, on or about May 2, 2023, the Carrier provided written notice to the Claimant that it had found the charges were proven and the Claimant violated the Anti-Discrimination and Anti-Harassment (ADAH) Policy and the penalty of “Dismissal In All Capacities, Effective Immediately”, was imposed. The Organization filed a claim on the Claimant’s behalf, challenging the Claimant’s dismissal and seeking reinstatement with full seniority unimpaired and that the Claimant be made whole. The Carrier denied the claim.

The Carrier asserts that the charges were proven through substantial evidence at the investigation and that the penalty of dismissal was commensurate given the egregious misconduct in which the Claimant engaged. The Carrier cites PLB No. 7060, Case No. 9, a matter involving racial disrespect, which states: “The Board notes that the day has long since passed in any workplace where any reasonable person can expect that any act of racial disrespect will be tolerated by any employer.”, as well as other awards upholding dismissals premised on the use of racial slurs. Concerning the Rule 71 timeliness argument raised by the Organization, the Carrier asserts that unionized supervisors and foreman represented by ARASA are not considered management for the purpose of notice of misconduct under Rule 71.

The Organization contends that the incident occurred approximately two years before the investigation was commenced, despite the fact that a supervisor had notice of the text message in question. The Organization avers this is a violation of Rule 71. The Organization further argues that during the time between when the text message was sent and the disciplinary penalty imposed, the Claimant was a model employee. The Organization argues the text was not directed at any person, cites instances where prior incidents of misconduct involving racial slurs resulted in lesser discipline, and asserts the discipline imposed was arbitrary, capricious, and an abuse of the Carrier’s discretion.

It is first necessary for this Board to determine the timeliness issue raised by the Organization. Rule 71 states in relevant part:

An employee who is accused of an offense and who is directed to report for a trial therefore shall be given five (5) days advance notice in writing of the exact charge on which he is to be tried and the time, date and place of the trial. The date on which the trial is scheduled to be held shall be within thirty (30) days from the date the Division Engineer or his representative had knowledge of the employee's involvement.

The Board has carefully considered the question of whether the supervisors included on the group text message in question constitutes notice to "the Division Engineer or his representative" per Rule 71. The Board is persuaded that the supervisors in question, both of whom are unionized employees represented by the American Railway Supervisors Association (ARASA), are not at the managerial level, Division Engineer or his representative, contemplated by Rule 71. This determination is consistent with the past actions of the Carrier as well as PLB 7245, Award 174.

The Carrier has the burden of proof to establish by substantial evidence the misconduct charged. It is uncontested that the Claimant sent the offensive text message, which was a meme of the comedian Dave Chappelle and included the words "IM BROKE NIGGA, I'M BROKE!" It is clear that the text contained a racial slur and violated the Carrier's ADAH Policy. The Claimant subjected his co-workers to a racially offensive slur when he sent the meme. The Carrier, therefore, has met its burden of proof and established by substantial evidence the misconduct charged.

Concerning the penalty of termination, the Amtrak ADAH Policy, 2.0, "affirm[s] Amtrak's commitment to a workplace free of discrimination, harassment, sexual misconduct, and retaliation." The use of "epithets, slurs, gender-specific insults, or engaging in negative stereotyping" constitutes harassment under the Policy. The Code of Ethics and Standards of Behavior, Conduct, states in part: "We value a workplace that embodies respect and civil discourse. We can disagree without being discourteous. Activities or behaviors that compromise the safety, satisfaction and well-being of our customers, the public or our fellow employees, such as rudeness, insubordination, assault, intimidation, horseplay, and using profane or vulgar language, are unacceptable and will not be tolerated." The Claimant violated both the ADAH Policy and the Code of Ethics and Standards of Behavior. The Organization argues that previous similar cases have led to less severe discipline. However, the matters cited by the Organization occurred more than five years ago and the Carrier has provided evidence that use of racial slurs and racially insensitive language has led to termination in other instances.

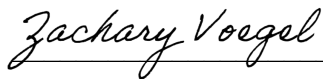
Subjecting other employees to racial slurs, whether verbally or written, including slurs in memes forwarded by text message, is unacceptable workplace conduct. All employees are on notice that such offenses violate Carrier policies. There is no excuse for knowingly forwarding such content. Thus, considering the nature of the misconduct, the Board concludes the termination of penalty is supported.

AWARD:


The claim is denied.



Sarah Miller Espinosa, Chair



Organization Member



Carrier Member

DATE: 11-25-2024