

**NATIONAL MEDIATION BOARD**

**SPECIAL BOARD OF ADJUSTMENT NO. 928**

BROTHERHOOD OF LOCOMOTIVE ENGINEERS )  
 ) Case No. 428  
and )  
 ) Award No. 428  
NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) )

Martin H. Malin, Chairman & Neutral Member  
M. B. Kenny., Employee Member  
L. C. Hriczak, Carrier Member

Hearing Date: December 12, 2003

**STATEMENT OF CLAIM:**

Claim of Amtrak Passenger Engineer Barry S. Mayer (Claimant), for the rescinding of the discipline imposed of "DISMISSAL" in all capacities, effective immediately," as stated in the decision letter dated August 1, 2003 under the signature of General Superintendent-Mid Atlantic Division, Daryl K. Pesce and with full compensation for time lost, full credit toward vacation entitlement, health and welfare benefits during the period held out of work, and clear Claimant's personal record of any reference relative to the alleged violation.

**FINDINGS:**

Special Board of Adjustment No. 928, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On July 18, 2003, Claimant was directed to report for an investigation on July 24, 2003. The notice charged Claimant with violating Amtrak Standards of Excellence, Professional and Personal Conduct; General Code of Operating Rules Rule 1D; and Amtrak's Business Diversity Harassment Policy, DIV-2. The charges specified that on May 28, 2003, while assigned as Engineer of Amtrak Train 76, Claimant made inappropriate and unwarranted comments of a racial and sexual nature toward an Assistant Conductor.

The hearing was held as scheduled. On August 1, 2003, Carrier advised Claimant that he had been found guilty of the charges and dismissed from service.

During the hearing, Claimant admitted the conduct that served as the basis for the charges. On May 28, 2003, the Conductor sent the Assistant Conductor, who was in her ninety

day probationary period, to the cab of the locomotive to increase her familiarization with the engineer's operation of the train and with the route. When the Assistant Conductor, an African-American woman, reported to the head end, Claimant stated to her, "I wish I knew your black ass was coming up here sooner," or words to that effect. Shortly thereafter, Claimant stated, "Is your chair low? If you want you can sit in my lap," or words to that effect. There is no question that Claimant was guilty of the charges.

Claimant was guilty of a very serious offense that deserves a very stern penalty, and in most cases would warrant dismissal. Every employee has a right to a workplace that is free from racial and sexual hostility and intimidation. Claimant denied the Assistant Conductor her rights.

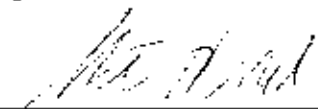
After careful consideration, however, based on the peculiar facts presented, we find that although a stern penalty was warranted, the penalty of dismissal was excessive. Of critical importance are two mitigating factors. First, Claimant's seniority dates from 1975 and there is no evidence in the record of any prior disciplinary action. Second, the record is clear that the Assistant Conductor voiced her concerns to the UTU Local Chairman who also served as the UTU's Director of Human Rights. He met with Claimant and the Assistant Conductor, at which time it was impressed on Claimant that his comments were inappropriate and Claimant apologized to the Assistant Conductor. As testified by the UTU Local Chairman, the Assistant Conductor accepted Claimant's apology, they shook hands and returned to work together. Under these circumstances, Claimant's dismissal shall be converted to a lengthy suspension, equal to the time he has been out of service. Carrier shall reinstate Claimant to his position with seniority unimpaired but without compensation for time held out of service.

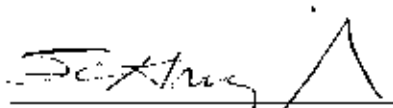
### AWARD

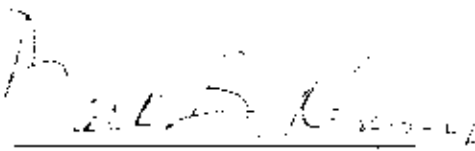
Claim sustained in accordance with the Findings.

### ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

  
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Martin H. Malin, Chairman

  
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L. C. Hriczak,  
Carrier Member

  
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M. B. Kenny,  
Employee Member

Dated at Chicago, Illinois, January 26, 2004.