

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 157, (Case No. 178)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: February 23, 2011

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

- 1. The dismissal of Assistant Hoist Engineer Harlan S. King for the alleged violation of the Union Pacific Equal Employment Opportunity/Affirmative Action Policy and Union Pacific Rule 1.6 (Conduct), Part 5 (Immoral) and Part 7 (Discourteous) in connection with his alleged actions of taking inappropriate pictures of a coworker on the evening of April 20, 2010 and displaying these pictures on April 22, 2010 at a safety briefing, is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File UP-LW-421-10/1534664).**
- 2. As a consequence of Part 1 above, we request that Mr. King be reinstated to the service of the Carrier on his former position with seniority and all other rights restored and unimpaired, that he be compensated for all wage and benefit loss suffered by him since his removal from service and the alleged charge(s) be expunged from his personal record."**

FINDINGS:

Public Law Board No. 6402, 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.

The fact indicate that on the evening of April 20, 2010, Claimant and three other employees J. Bateman, B. Pritchard and R. Fitzgerald went out drinking after a day of rules training and consumed a significant amount of Margaritas. By the close of the evening employee Pritchard needed assistance to his hotel room. Claimant and J. Bateman were amused by

Pritchard's intoxication and thought it would be funny to take pictures of him in various poses. Some of the pictures were left for Pritchard to see upon waking up and others were shown at an April 22, 2010, Safety Meeting before a dozen employees. Subsequently, the Carrier learned of what transpired when employee Pritchard's attorney contacted them regarding an alleged EEO violation.

On May 27, 2010, the Carrier advised Claimant to appear for a formal Investigation on June 10, 2010, concerning in pertinent part the following charge:

"While employed as an Assistant Hoisting Engineer, you took inappropriate pictures of a coworker on the evening of April 20, 2010, and displayed these pictures of April 22, 2010, at a Safety Briefing.

'These allegations, if substantiated, shall constitute a violation of the Union Pacific Equal Employment Opportunity/Affirmative Action Policy, and Union Pacific Rule 1.6 (Conduct), Part 5 (Immoral), and Part 7 (Discourteous), and that portion of the rule which provides *'any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.'*

Please be advised that if you are found to be in violation of this alleged charge the disciplinary assessment may be a Level 5 Discipline, Permanent Dismissal."

On June 28, 2010, Claimant was notified that he had been found guilty as charged and he was dismissed from service.

It is the position of the Organization that none of the pictures taken indicate anyone, identified or unidentified within the pictures, was doing anything inappropriate. According to it the pictures were not taken in a hostile or malicious manner as said pictures were taken during after-hours, off of Carrier property, while a group of friends/co-workers were drinking alcoholic beverages and engaging in merrymaking and should not have not resulted in a disciplinary matter. It concluded by requesting that the discipline be rescinded and the Claim sustained as presented.

It is the Carrier's position that the record verifies that on the evening in question Claimant permitted and participated in the photographing of an employee who was physically unable to object to the sexually suggestive positions that the Claimant and others placed themselves in relation to the unconscious employee after which various pictures were shown in a company meeting subjecting employee Pritchard to public ridicule in violation of Carrier Rules.

In support of its position the Carrier offered the Board for its consideration recent Award No. 80 of P.L.B. No. 5514 wherein it was determined that the Carrier's dismissal of ARASA Supervisor J. S. Bateman (long term employee) who was one of the participants involved in evening of April 20, 2010, was appropriate. It argued that the Claimant was as equally involved if not more than Bateman in the April 20th incident and should not be treated any differently. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and determined that no procedural errors occurred during the Hearing and the Claimant was afforded his "due process" Agreement rights.

The Carrier alleged that the Claimant violated its Equal Employment Opportunity/Affirmative Action Policy and Rule 1.6 (Conduct). The EEO Policy states in pertinent part the following:

"...Please note that policy prohibits such offensive behavior or statements in the workplace, while representing Union Pacific, while contracting any Union Pacific vendor or customer, while using any social media provided by or sponsored by Union Pacific, or during travel or overnight stays paid for by Union Pacific that are derogatory of any person because of race, gender, or any other protected status even if no one who is present is offended by the behavior or remark."

Rule 1.6 states the following:

"Employees must not be:

- 1. Careless of the safety of themselves or others**
- 2. Negligent**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**
- 6. Quarrelsome**
- or**
- 7. Discourteous**

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated."

A review of the photographs taken by the Claimant and J. Bateman, introduced at the Hearing, substantiates that Claimant posed for and took pictures including some that were sexually suggestive and all of which show employee Pritchard in a state of unconscious intoxication. In Award No. 80 of P.L.B. No. 5514 that Board determined in pertinent part the following :

"It cannot be refuted that the pictures of Pritchard, if nothing else, were an invasion of his privacy and should not have been taken. More important, they should not have been shown to other employees...."

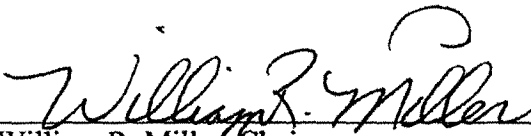
We are in agreement with the aforementioned reasoning, that the photographs of Pritchard should not have been taken and then subsequently shown to other employees. It stands un-refuted that the Claimant participated with others taking photographs of a co-worker in compromising positions while that employee was unconscious and unable to object to them being taken. Some of those pictures were then displayed on Carrier property during a Safety Briefing subjecting employee Pritchard to public embarrassment. Claimant's actions violated the Carrier's EEO Policy regarding Offensive Behavior and Rule 1.6 both of which prohibit behavior that is offensive, immoral or discourteous.

Testimony elicited at the Hearing further confirmed that Claimant's actions also negatively impacted the Carrier in violation of Rule 1.6 as Pritchard obtained counsel and was pursuing legal action against the Carrier account of the incident. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had 27 years of service. The Board is always reluctant to dismiss a long term employee, but the Claimant's actions in this incident were egregious and not excusable as he adversely affected the Carrier's interest and subjected the victimized co-worker to ridicule and embarrassment. Because of the seriousness of the matter and despite his years of service the Board determines there are no grounds for mitigation of the discipline. The Board finds and holds that the Carrier did not err in the discipline issued the Claimant because it was not arbitrary, excessive or capricious and was in accordance with the Carrier's UPGRADE Discipline Policy. The discipline will not be set aside.

AWARD

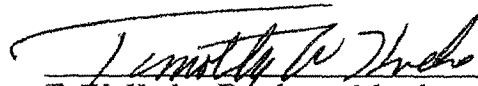
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: June 27, 2011