

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)
	) Case No. 144
and	)
	) Award No. 120
UNION PACIFIC RAILROAD COMPANY	)
_____	)

Martin H. Malin, Chairman & Neutral Member  
T. W. Kreke, Employee Member  
B. W. Hanquist, Carrier Member

Hearing Date: December 17, 2008

**STATEMENT OF CLAIM:**

1. The dismissal of Welder J. A. Kerr for violation of GCOR Rule 1.6(Conduct) in connection with inappropriate conduct and displaying racist symbols between the dates of January 1, 2008 through February 19, 2008 is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File MW-08-53/1499082 MPR).
2. As a consequence of the violation outlined in Part (1) above, all reference to the incident shall be removed and discarded from Mr. Kerr's personal files, with pay for all (straight time and over time) beginning on February 20, 2008 and on a continuing basis, with round trip mileage from his home and back for this investigation, reinstated back to work as of now, and all benefits due him and all seniority intact and unimpaired.

**FINDINGS:**

Public Law Board No. 6402 upon the whole record and all of 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 February 25, 2008, Claimant was notified to report for a formal investigation on March 6, 2008, concerning his having allegedly engaged in a pattern of inappropriate conduct including making racist comments, using racial slurs and displaying racist symbols in violation of Rule 1.6 and Carrier's EEO/Affirmative Action Policy. The hearing was held as scheduled. On March 18, 2008, Claimant was advised that he had been found guilty of the charge and had been

dismissed from service.

The Organization contends that Carrier denied Claimant a fair and impartial hearing. The record reflects that the Organization sought to call three witnesses. The hearing officer asked each of these witnesses whether he was present when any of the alleged incidents occurred and whether he had any knowledge of the incident under investigation. Each witnesses replied in the negative to both questions and the hearing officer, over the objection of Claimant's Representative, dismissed them from the investigation. Merely because the witnesses were not present during the specific incidents under investigation does not per se mean they would not have relevant testimony to offer. An obvious example would be a witnesses who was not present for the incident under investigation but who would testify that a person who was present for the incident later told the witness that he had lied about the incident. However, once the hearing officer elicited testimony from the witnesses that they were not present and had no knowledge related to the incidents under investigation, Claimant's Representative could not simply assert that Claimant had a right to call the witnesses. Rather, it was incumbent at that point on Claimant's Representative to advise the hearing officer of exactly what testimony he anticipated the witnesses would provide and how that testimony would be relevant to the investigation. No such showing was made in this case. Accordingly, we conclude that the hearing officer did not err in dismissing the witnesses from the investigation.

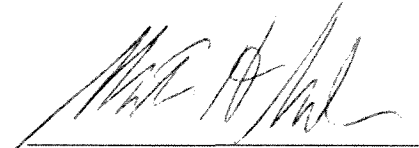
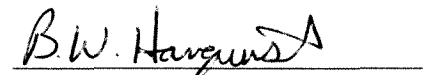
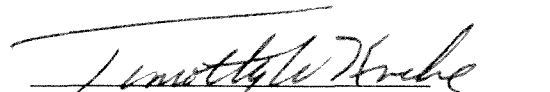
The record reflects that on February 8, 2008, members of the gang were in the gang truck waiting for trains to pass. The conversation turned to rap music and Claimant used the N word multiple times in referring to a rap artist. Claimant also stated that an African American member of the gang could never go home with Claimant to Kentucky because they would not come out alive. Claimant further made reference to taking a noose and hanging the rap artist.

Claimant testified and denied making racist remarks, but his denial was contradicted by testimony from members of the gang who were present at the time. We conclude that Carrier proved the charges by substantial evidence.

The Organization discounts the seriousness of Claimant's misconduct, characterizing Claimant's remarks as shop talk. We are unable to agree. In 2008, any civilized human being must realize that the use of racial slurs and similar comments directed at a person of color are completely inappropriate and cannot be dismissed as merely shop talk. Carrier need not tolerate such improper behavior. Claimant was a relatively short term employee and we see no factors that would mitigate against the very serious nature of the offense. We cannot say that the penalty of dismissal was arbitrary, capricious or excessive.

**AWARD**

Claim denied.

  
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Martin H. Malin, Chairman  
\_\_\_\_\_  
B. W. Hanquist  
Carrier Member 3-23-09  
\_\_\_\_\_  
T. W. Kreke  
Employee Member 3-23-09

Dated at Chicago, Illinois, February 26, 2009