

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 176, (Case No. 197)**

**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
K. D. Evanski, Employee Member
K. N. Novak, Carrier Member

Hearing Date: June 19, 2012

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

- 1. The dismissal of trackman Mr. R. Hamby for failure to comply with item Number 4 of his Leniency Agreement on March 2, 2011 resulting in his dismissal effective March 8, 2011 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File UP-223-WF-11/1546040).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Hamby be reinstated with all back pay from March 8, 2011 and continuing. Also that he be reinstated with all seniority and vacation rights unimpaired and all other rights due to him by the Collective Bargaining Agreement."**

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 facts of the case indicate that on January 25, 2011, Claimant allegedly told a co-worker, *"boy give me them gloves"*. This was in reference to that employee getting some gloves out of a truck. Claimant's co-worker took offense to that remark and the alleged ongoing racial slurs that had been going on between the two individuals for approximately six months. The record further reveals that on one occasion, the co-worker had called Claimant *"white trash"*. Those incidents were reported and following an investigation by Carrier's EEO Department, charges were filed against the Claimant.

On January 27, 2011, Claimant was advised that if the charges brought against him were sustained, that would be a violation of Union Pacific's Equal Employment Opportunity/Affirmative Action (EEO/AA) and Related Policy Directives. Claimant was specifically charged with violation of Rule 1.6 (Conduct) for the alleged use of offensive and demeaning language and racial epithets on January 25, 2011, and possibly in the six-month period preceding January 25, 2011, which could result in a Level 5 dismissal.

The Carrier offered the Claimant a Leniency Agreement, or Waiver/Acceptance of Discipline (Waiver) dated February 17, 2011. The Claimant accepted and signed the Waiver on February 17th. Claimant attended the EEO training on March 2, 2011. The terms of the Waiver required the Claimant to waive formal Investigation and accept responsibility for violating Carrier's EEO/AA and Related Policy Directive and Rule 1.6. Claimant was to be returned to service with a discipline status of Level 3 after successfully completing a one-day EEO training session.

Paragraph 4 of the Claimant's Waiver Conditions for Return to Service and Remaining in Service states:

"You are required to successfully complete a one-day EEO training session in Omaha, Nebraska on your own time and at your own expenses. You must contact Yvonne Method-Walker at (404) 544-6375 to make arrangements to attend the next scheduled class. Your failure to comply with this portion of this Agreement and you will be considered a violation of the Agreement and you will be subject to reverting to the status of a dismissed employee." (Underlining Board's emphasis)

The Carrier asserted that the Claimant did not successfully complete the EEO training class on March 2, 2011, because he failed to accept responsibility for his violation and further failed to fully participate in the class, therefore, he was properly returned to a dismissed status on March 7, 2011.

It is the position of the Organization that Claimant completed the EEO training session and fulfilled the requirements of the Leniency Reinstatement Agreement which was evidenced by the Claimant's "Statement of Commitment" that confirms his participation in the program. It concluded the Carrier had not met its burden of proof and it requested that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the Claimant did not fulfill the requirements of the Leniency Reinstatement Agreement and was properly returned to dismissed status on March 7, 2011, and it closed by asking that the claim remain denied.

The facts indicate that under the terms and conditions of the Leniency Reinstatement Agreement the Claimant was returned to service with the requirement that he successfully complete a one-day EEO training session and if he failed to do such he would be immediately removed from service and returned to a dismissed status without the necessity of further disciplinary proceedings. The question at issue is whether or not the Claimant fulfilled the conditions set forth in Paragraph 4 of the Leniency Reinstatement Agreement.

The Organization argued that the Claimant received a Statement of Commitment signed by him and the Director of Diversity on March 2, 2011, after completion of the EEO training session as required by his Waiver Agreement. In essence the Organization has taken the position that Claimant received a "letter of completion" whereas the Carrier has argued that the document merely shows that employees have been through the class and are committed to changing, but it does not serve as a letter of successful completion. The Statement of Commitment signed by the Claimant states the following:

"After having completed this training designed to assist me in correcting non-compliance behavior. I fully understand my responsibilities to (a) be familiar with EEO policy requirements; (b) ensure that my on-the-job behavior is always in compliance with Company policies; and, (c) make consistent and positive contributions to a discrimination and harassment-free work environment - these being the foundation for valuing Diversity and inclusion."

The Director of Diversity, Yvonne A. Method-Walker, interpreted the Statement of Commitment as follows:

"Amy -

per your request. Please note that this is not a 'certificate' as I understand the labor organization and Hamby are arguing. Employees are merely signing that they completed the training and are committing to change."

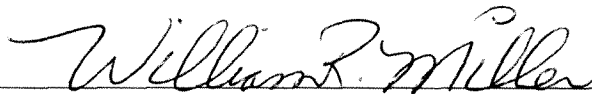
There is a common thread of language in the Director's comment and the Statement of Commitment that being the Claimant completed the training. Additionally, there was no evidence provided that there is any other kind of document that signifies successful completion of the EEO training other than the Statement of Commitment. The Board does not dispute the validity of the Director of Diversity's EEO Discipline Training Failure Report of March 3rd regarding the Claimant's participation in the EEO Discipline Training Class or her concerns as it pertains to rehabilitation, however, we are not satisfied that the Statement of Commitment is not a "letter of completion" especially when P.L.B. No. 7427, Award No. 25 stated the following:

"His return to work, however, was conditioned on Claimant completing an EEO Training Session on November 16, 2010. [BRC Exh. F] Claimant did not receive a certificate of completion for the Session."
(Underlining Board's emphasis)

The Claimant in the aforementioned Award did not receive a certificate of completion of his training session nor was there any mention in that Award that the certificate had to specifically state successful completion of the training session whereas the Claimant in this instance received a document that stated he completed the Training Session. In Award No. 25 the Organization also argued that the Claimant did not understand he was required to complete the training in a successful manner whereas in the instant case the Organization argued the Claimant met the requirements of the Paragraph 4 of his Waiver, as it took exception to the Director's position that the Claimant had not successfully completed the training, arguing that her comments were made after she had signed a document that he had completed the training. The Statement of Commitment reasonably suggests that Claimant successfully completed the EEO Training Session when coupled with the signature of the Director of Diversity. If the Director of Diversity had qualms about the Claimant's participation in the Training Session she had several options such as she could have chosen not to sign the document or added a comment that the Claimant had attended, but did not fulfill the requirements of the class and she would explain her position in greater depth at a later date. Absent any other information the Board is not persuaded that the Statement of Commitment was little more than a record of attendance as the Claimant agreed to be familiar with the EEO policies, that he would ensure that his on-the-job behavior would always be in compliance with Carrier policies, and he would make consistent and positive contributions to a discrimination and harassment-free work environment. Based upon the singular and unique facts of this case and on a non-precedential basis the Board has determined that the Carrier did not meet its burden of proof that the Claimant failed to meet the requirements of Paragraph 4 of his Waiver Conditions for Return to Service and Remaining in Service. Therefore, the Board finds and holds that the return of the Claimant to a dismissed status was in error and Claimant shall be reinstated to service at a Level 3 disciplinary status, with seniority intact and benefits unimpaired with full back pay in accordance with Rule 22(f) of the Agreement. The Board also forewarns the Claimant that after reinstatement to service he needs to be careful to diligently adhere to all Carrier Rules and EEO Policies.

AWARD


Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 10-23-2012