

BEFORE PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 9

Statement of Claim: Claim of the System Committee of the Brotherhood that:

1. The Level 5 UPGRADE discipline assessment (dismissal from service) to Mr. Salvador Tejeda for an alleged violation of Agreement Rules 44, 45 and 53 when the Carrier sustained a violation of Operating Rules 1.6 (Conduct) and 1.7 (Altercations) and a violation of the Leniency Reinstatement Agreement of January 19, 2001 was not justified.
2. As a consequence of the violation referred to in Part (1) above, the Claimant shall be "reinstated to the service of the Carrier to his former position with seniority and *all other rights restored unimpaired, compensated for all wages (straight time and overtime) and benefit loss suffered by him, including but not limited to medical and/or insurance premium costs for the Claimant and his family beginning on the date the Claimant was dismissed and continuing, compensated the time associated with Claimant coming into the office to attend his investigation, along with any mileage expense associated with his travel to attend his investigation, and that the alleged charge(s) be expunged from his personal record.*

Background:

Salvador Tejeda's employment was terminated in December 2000 for making oral threats of harm to supervisors and managers. The Carrier, Claimant and the Organization entered into a Leniency Reinstatement Agreement ("LRA") dated January 19, 2001, under which (1) Claimant was required to engage in an anger control program pursuant to the Employee Assistance Program; and (2) Claimant agreed that his reinstatement was on a twelve-month probationary basis, commencing on the first day of his return to service and conditioned upon no violations of Rules 1.6 (Conduct) and 1.7 (Altercations) during the probationary period. Claimant was returned to service on February 26, 2001.

Claimant was charged with violations of Rules 1.6 (Conduct) and 1.7 (Altercations) because of an altercation with fellow employee Ismael Martinez on February 11, 2002, within the twelve-month probationary period. Following a hearing held on April 16, 2002, by letter dated May 6, 2002 the Carrier assessed Claimant with a Level 5 UPGRADE assessment and he was dismissed from the service of the Carrier.

Carrier's Position:

The Carrier claims that the evidence at the hearing established that Claimant used profane language toward Martinez, and that when Martinez stood up and approached, Claimant also stood up and invited the other employee to "go outside." The Carrier further contends that at the hearing Claimant admitted these facts, which establish violations of Rules 1.6 (Conduct) and 1.7 (Altercations) and the LRA. Because such violations result in dismissal under the Rules and the LRA, the Carrier asserts that it has met its burden of proof to sustain the charges.

Organization's Position:

The Organization contends that, during the incident on February 11, 2002, Claimant merely used terms such as "kiss ass" and "motherfucker" which are commonly used in the workplace. Further, the Organization asserts that Claimant was the victim, not the aggressor, during the altercation that ensued with Martinez. Indeed, according to the Organization, many witnesses confirmed that it was Martinez who took offense at Claimant's words, got up and started walking toward Claimant. Although the Organization does not condone Claimant's choice of words directed at Martinez, it asserts that they should not have provoked Martinez to try to assault Claimant.

Findings:

Claimant admitted that (1) he called Martinez, a fellow employee, a brown nose and kiss ass; (2) Martinez came at him because of what Claimant had called him; (3) he put out his left arm, with his palm out, and pushed Martinez away, on the right shoulder, as he approached; and (4) he invited Martinez to "step outside" because he felt that Martinez wanted to fight with him; In addition, numerous eyewitnesses stated that Claimant also called Martinez a mother fucker and cabron (bastard), and that Claimant and Martinez were both moving toward each other.

There is no dispute that the altercation took place within the twelve-month probationary period, during which Claimant had agreed that he would forfeit his reinstatement rights if he violated Rules 1.6 (Conduct) or 1.7 (Altercations). Claimant's admissions, corroborated by numerous witnesses, show conclusively that he failed to abide by the LRA and that he did not take to heart the serious consequences of a violation of the LRA. Despite the LRA, Claimant felt free to publicly insult fellow employees, including Martinez, and to invite Martinez to "step outside" because he felt that Martinez wanted to fight him. Simply stated, Claimant did not get the LRA's message.

The Organization contends that Martinez, not Claimant, was the aggressor, and that Claimant merely was trying to defend himself when he rose and extended his arm to push Martinez away. Even if the Board, however, were to discredit the several witnesses who stated that Claimant was approaching Martinez, the uncontested fact that Claimant provoked the incident and then invited Martinez to step outside make Claimant responsible for violations of Rules 1.6 (Conduct) and 1.7 (Altercations) and the LRA.

For the foregoing reasons, the Board has determined that the Carrier has met its burden of

PLB 6621

Rwd 9

proof.

Award:

The claim is denied.



JOAN PARKER, Neutral Member


CARRIER MEMBER

DATED: 7-16-03


ORGANIZATION MEMBER

DATED: 7-16-03