

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 7
 and)
) Award No. 7
 UNION PACIFIC RAILROAD COMPANY)
)

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

STATEMENT OF CLAIM:

1. The dismissal of Track Supervisor John B. Cupples for violation of Rule 1.6 in connection with willfully disregarding the UPRR EEO Policy and Directives is unjust, unwarranted based on unproven charges and in violation of the Agreement (Carrier's File 1484800 SPW).
2. As a consequence of the violation outlined in Part 1 above, the Organization requests that Mr. Cupples be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss since his removal from service and the alleged charge(s) be expunged from his personal record.

Public Law Board No. 7258 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 July 13, 2007, Claimant and one other employee were notified to report July 25, 2007 for an investigation and hearing concerning an allegation that they violated Rule 1.6 by disregarding UPRR EEO Policy and Directives between June 25, 2007 and July 6, 2007 by using racial epithets and inappropriate verbal comments of a sexual nature while on duty and on company property. Claimant was withheld from service from the aforementioned date of notification forward. The hearing was held as scheduled. The Carrier notified Claimant on

August 14, 2007 that all charges against him had been sustained and that accordingly, he was being discharged from service.

The critical issue in this matter is whether the Carrier proved the charges by substantial evidence. Claimant was charged with the offense of "...continually willfully disregarded UPRR EEO Policy and Directives by using racial epithets toward another employee and by the use of inappropriate verbal comments of a sexual nature towards an employee while on duty and on company property..." We find that the Carrier failed to prove by substantial evidence that Claimant ever used racial epithets toward another employee. In fact, on the record all witness testified that they had not heard Claimant ever use a racial epithet.

In regard to the charge that Claimant made inappropriate comments of a sexual nature, the Carrier likewise failed to prove by substantial evidence that Claimant had made inappropriate comments. While it is true that one of the witnesses on the record avers that Claimant told him a story of a sexual nature that could have been subjectively offensive, the witness also related that this conversation was had between him and the Claimant in a truck in which those two were the only ones present. Hence, there was no corroborating witness to prove that what the witness related was true.

The Organization points out that there is arbitral precedence for the concept that the unsubstantiated evidence of a sole witness does not provide evidence of such substance as to convict, relying on NBAB Third Division Awards 14333, 18551 and 20706. The rest of the witnesses asked testified that they had never heard Claimant make offensive comments of a sexual nature. Hence we find that the carrier has failed to provide substantial evidence of Claimant's guilt of this charge.

The Organization's representative at hearing argued that because the use of racial epithets and making of verbal comments of a sexual nature are the only violations specifically cited in the Carrier's Charging Letter and that clearly, substantial evidence was not produced to find Claimant guilty of either offense, that the matter should, therefore, be at an end. However, there was one more allegation raised that the Organization argues was not specifically spelled out in the Carriers charging letter: that Claimant touched another employee in an inappropriate manner.

The Carrier made the contention on the property that the part of the charge that states that the Claimant continually willfully disregarded the UPRR EEO Policy and Directives encompasses the allegation of an inappropriate touching of another employee. If the Carrier had proved by substantial evidence that an inappropriate touching of a sexual nature had occurred, there is a possibility that disregard of the EEO policy forbidding such conduct would be encompassed by the accusation contained in the Charge Letter. We need not go there, however, because the Carrier failed to prove that the touching ever occurred..

Claimant testified that he never touched the complaining witness. All but one of the witnesses who worked with the complaining witness testified that they did not see any inappropriate touching by the Claimant and one averred that the only time he had ever seen

Claimant touch another employee was when he may have shook their hand .

The problem with the Carrier's case is that the testimony of the corroborating witness that testified to the event differs in where this touching occurred from that of the complaining witnesses story. The complaining witness testified that he was bent over working on a switch outside, while the corroborating witness testified that the touching took place in a building on the North end of the tracks. Both recollections of where this incident took place cannot be right and thus, credibility of one of the two witnesses is suspect. In any event the testimony of the corroborating witness fails to prove the statement of the complaining witness. So once again the charges against the Claimant boil down to one witness testifying something happened and the other testifying it didn't. As stated above, because the uncorroborated testimony of one witness against the testimony of the Claimant does not allow us to conclude that the Carrier provided substantial evidence of guilt, this charge cannot stand.

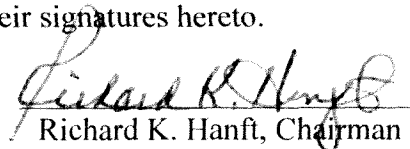
We conclude that Carrier failed to prove the charge of continually willfully disregarding UPRR EEO Policy and Directives by using racial epithets toward another employee and by the use of inappropriate verbal comments of a sexual nature towards an employee while on duty and on company property or of any inappropriate touching of another employee by substantial evidence. Hence, the claim must be sustained and Claimant must be reinstated to service with seniority and all other rights unimpaired and his record be expunged of any and all reference to the Level 5 dismissal and reflect that he has been exonerated of all charges against him in this matter.

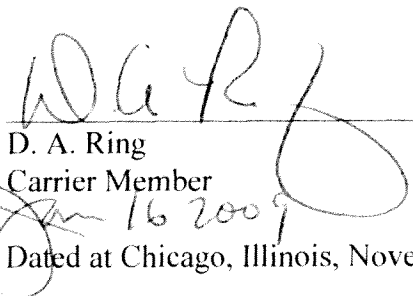
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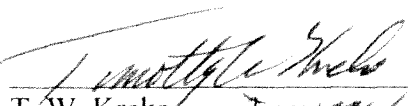
Claim sustained according to the findings.

ORDER

The Board. Having determined that an award favorable to the 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.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

Jan 16 2009
Dated at Chicago, Illinois, November 28, 2008

CARRIER DISSENT TO AWARD NO. 7 OF PUBLIC LAW BOARD 7258
(REFEREE HANFT)

In rendering its decision in this Award, the Majority has concluded the Claimant is to be returned to service based on what the Referee considers to be testimony in conflict between the two of the individuals at the hearing. See the following citation from this award:

"The problem with the Carrier's case is that the testimony of the corroborating witness that testified to the event differs in where this touching occurred from that of the complaining witnesses story. The complaining witness testified that he was bent over working on a switch outside, while the corroborating witness testified that the touching took place in a building on the North end of the tracks. Both recollections of where this incident took place cannot be right and thus, credibility of one of the two witnesses is suspect. In any event the testimony of the corroborating witness fails to prove the statement of the complaining witness. So once again the charges against the Claimant boil down to one witness testifying something happened and the other testifying it didn't. As stated above, because the uncorroborated testimony of one witness against the testimony of the Claimant does not allow us to conclude that the Carrier provided substantial evidence of guilt, this charge cannot stand.

In the Railroad Industry, countless awards reflect that the Board does not make credibility determinations based on the testimony at the hearing since they are best determined by those who receive the evidence and testimony. For example, Referee Martin Malin stated in Award No. 39 of Public Law Board 6302 (BMWED v Union Pacific):

"The question of Claimant's intent turns on the credibility of Claimant's testimony that his inaccurate reporting of the time was an honest mistake. Claimant's initial explanation was that the extra time was to compensate him and the other two employees for missed meal breaks. However, that explanation was shown not to account for all of the excessive time reported. Claimant then maintained that he made an honest mistake in his reporting. Carrier judged Claimant's testimony as not credible. As a reviewing body, we are in a relatively poor position to evaluate witness credibility, as we have not had the opportunity to observe the testimony. Therefore, we generally defer to credibility determinations made on the property. In the instant case, we see no reason to deny the credibility determinations the deference to which they are usually entitled. Accordingly, we hold that Carrier proved the charges related to the September 14 incident by substantial evidence."

Similarly in Third Division Award 37328 (BMWED v DM&IR),

Referee Steven Bierig addressed the issue of credibility as follows:

"In the event of a credibility conflict, the Hearing Officer is charged with making credibility determinations, as is the case in the instant matter. Unless it can be shown that the Hearing Officer's determination is arbitrary or capricious, the Board may not substitute its judgment:

"In adopting the system of investigations and discipline prevalent in the railroad industry, the parties have accepted the long-standing practice that the hearing officer, not the Board, is charged with evaluating the evidence and testimony presented at the investigation. It is the hearing officer who makes the determinations regarding the credibility of witnesses. The Board may overturn such a determination only when the record shows the hearing officer acted in an arbitrary and capricious manner."

See Special Board of Adjustment No. 910, Award 763."

Following the reasoning in these two awards, the Board should have upheld the decision of dismissal. See also Third Division Awards 30049 (Mason), 30057 (Simmelkjaer), 32139 (Cohen) and 33491 (Pike) which are just a few of the plethora of awards addressing credibility at the investigative hearing. Accordingly, Carrier dissents to the finding in Award No. 7 of Public Law Board 7258.


D. A. Ring
Carrier Member

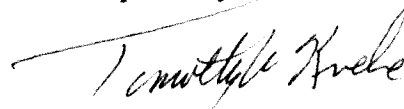
LABOR MEMBER'S RESPONSE
TO CARRIER MEMBER'S DISSENT
TO
AWARD 7 OF PUBLIC LAW BOARD No. 7258
REFEREE HANFT

The Organization is compelled to respond to the Carrier's dissent.

It should first be noted that the "... testimony in conflict between the two of the individuals at the hearing. ***" referenced in the Carrier's dissent refers to the complaining witness and a Carrier witness brought to the investigation to corroborate the complaining witness' testimony. These principle witnesses gave conflicting testimony as to where the alleged incident occurred. Since both of these witnesses' testimony as to where the alleged incident occurred cannot possibly be correct, the Referee correctly concluded that there was no corroborating testimony and that "*** because the uncorroborated testimony of one witness against the testimony of the Claimant does not allow us to conclude that the Carrier provided substantial evidence of guilt, this charge cannot stand."

The Organization is quite sure that the Referee would have considered any credibility determinations made by the hearing officer in this dispute when rendering his decision. However, the record of this dispute contains no evidence whatsoever that the hearing officer determined the credibility of any of the witnesses testifying at the investigation. Consequently, the Referee based his decision upon a review of the entire record of the dispute and correctly determined that the Carrier failed to present substantial evidence to prove the charges leveled against the Claimant and concluded that discipline could not stand.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Timothy W. Kreke", written over a horizontal line.

Timothy W. Kreke
Employee Member