NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
) Case No. 11
and)
) Award No. 11
UNION PACIFIC RAILROAD COMPANY)
)

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

Hearing Date: November 12, 2008

STATEMENT OF CLAIM:

1. The dismissal of Track Supervisor Jack A. Alarid 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 1486305 SPW).

2. As a consequence of the violation of Part 1 above, the Organization requests that Mr. Alarid 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.

FINDINGS:

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 charges brought here do not exist in a vacuum. Claimant has been in service for 21 years with an unblemished record. In summary, this veteran track supervisor was assigned to supervise a group of employees that included a few new hires just out of training and to help teach them and assimilate them into the gang during the time period mentioned in the charge. Over that period of time, the record developed on the property shows, a number of daily interactions of a questionable nature occurred that formed the basis of an EEO charge that was filed by one of the newly hired track laborers.

The timing of the EEO charges happened to coincide with an incident where the complaining witness and another new hire were told to leave the property and to not come back by the Claimant. Upon a thorough review of the record developed on the property, it seems that another supervisor, who was also implicated in the EEO charge, took the complaining witness and another new hire, who is coincidently the witness who corroborates the complaining witness's testimony, with his gang to spike and gauge a switch during the morning hours of July 6, 2007. After Noon, the complaining witness and the corroborating witness were returned to Claimant's gang to unload ballast. Neither had the Personal Protective Equipment to do the job and were told by the Claimant to leave the property and not to return. Thereafter, the complaining witness filed EEO charges against both supervisors.

The actual charges against Claimant are that he 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.

Basically, the record contains evidence of four incidents of interactions that the complaining witness felt were racially motivated and two incidents that were perceived to be offensive in a sexual nature.

One the complaints of a racial overtone includes Claimant calling the complaining witness "Willie" which the complaining witness explains refers to another employee who worked with this gang previously and was also an African-American. Claimant, on direct examination on the property, admitted to having called the complaining witness that nickname on a few occasions, but explained that it was before he knew his real name, that everybody in the crew called that employee that nickname and that he did not know that the employee found it offensive. The complaining witness, during direct examination, confirmed that most everybody called him "Willie," that he had never asked any of his co-workers not to call him "Willie," and that he complained about that on July 6th in his EEO Complaint only because he was mad at the Claimant.

Another example of behavior that the complaining witness avers is indicative of the hostile environment Claimant allegedly created based on race is the accusation that the Claimant has, on occasion, referred to the complaining witness as "Fat Albert'. We shall take arbitral notice of the fact that "Fat Albert" was a cartoon character created by Bill Cosby for a cartoon

show and that the character was both African-American and large. Claimant admitted to calling the complaining witness that nickname, but asserts that he was not referring to the cartoon character, but rather to his cousin, who is called "Fat Albert". Claimant insists that the use of that nickname was not meant in a racially derogatory way, but only that the complaining witness reminded him of his cousin.

More seriously, the complaining witness relates that Claimant referred to him by using the Spanish word "mayate." The record demonstrates that the term in Spanish literally means 'beetle,' but also has a slang connotation that is a derogatory term for blacks.

Claimant testified that the only time he ever used the term was during a lunch period when a beetle had flown into the crew's truck and that he had used the term in its literal meaning. That testimony was corroborated by other members of the crew who testified during the investigation on the property. In fact, the complaining witness testified that he never heard Claimant referring to him directly as 'mayate,' and that Claimant never said the word directly to him.

The final allegation concerning racial epithets being used by the Claimant concerns a question posed by the Claimant to the complaining witness. The Claimant admits that he asked the complaining witness, in the general course of conversation during the day, "why is it okay for blacks to call each other the "N" word , but when anyone else uses that word, the blacks get mad?" Claimant also testified that he never used the actual "N" word.

In regard to violations of the EEO Policy concerning sexually-related misbehavior, Claimant stands accused of two indiscretions that he admits happened, but maintains were taken out of context.

The first incident happened when the crew was manually spiking a section of track. The complaining witness was spiking off-center and breaking the sledge. Claimant asked the complaining witness to remove his safety glasses, purportedly to check if he had a lazy eye. Once the glasses were removed, Claimant looked at the complaining witness's eyes and commented, in front of others, that the complaining witness had 'pretty, bedroom eyes.' Claimant admitted to having made the comment, but explained that he meant the comment as a compliment of his long, thick eyelashes and that the complaining witness wrongly interpreted it as though he were coming on to him or trying to embarrass him.

The next incident happened at a safety Bar-B-Que on July 3rd. While the crew was in a restaurant parking lot after eating, a conversation ensued amongst them. The complaining witness stated that he was from Michigan to which the Claimant inquired "Have you ever fucked a duck?" Claimant admits that he asked the question, but denies that it was in regard to the complaining witness's sexual habits but more just teasing him about being from Michigan in a good-natured way.

In regard to all of this, the Organization asserts that the record does not provide sufficient

evidence to support the charges preferred against the Claimant. The Organization avers that much of what is alleged amounts to nothing more than "shop talk" and that a warning that such behavior will not be tolerated and that adherence to the 'letter of the law' in regard to the EEO policy is mandatory would serve as sufficient warning for a first-time offender.

The Carrier counters with the argument that the three things that this Panel must be concerned with, as an appellate body reviewing this matter are: procedure, Claimant's guilt or innocence, and the assessment of discipline. The Carrier asserts that not only did the complaining witness testify as to what happened, but that another corroborating witness confirmed witnessing it. Moreover, asserts the Carrier, the Claimant confirmed most of the allegations.

Hence, the Carrier avers, once this Panel has substantiated that substantial evidence was presented at hearing that this Panel lacks authority to overturn the level of discipline assessed unless it can be sufficiently demonstrated to be arbitrary, capricious or an abuse of the Carrier's discretion.

We find that the Carrier has proven the charges by substantial evidence. Claimant admitted to addressing his subordinate as "Willie" although he contends that he didn't realize that the other employee found it offensive. Claimant admitted to calling the same employee "Fat Albert:" on occasion, though he maintains the term was not used in reference to the cartoon character, but rather to the Claimant's own cousin. Claimant admitted to having used the Spanish word "mayate" in its literal sense to describe a bug and to having asked the complaining witness 'why blacks can use the "N" word to refer to each other, but take offense when other people use the word?'

Moreover, Claimant admitted to making the comment that the complaining witness had "pretty, bedroom eyes" and also to asking the complaining witness the "duck" question. All of these indiscretions objectively amount to disregard of the UPRR EEO Policies and Directives, as charged.

We must now, however, determine whether, under all of the circumstances, the penalty imposed, dismissal, was arbitrary, capricious, or excessively harsh. It is axiomatic that the penalty imposed should be commensurate with the offense proven and that mitigating factors be considered. Claimant has an unblemished twenty-one year service record. Hence, this was a first time offense for any sort of violation of any rule in more than twenty years of service. Although Claimant candidly admitted to each of the indiscretions complained of, his explanation of each showed that subjectively he didn't really think that he was doing anything wrong, but merely teasing this newly hired employee in a good-natured manner, as he would anyone else. Claimant's subjective state of mind, while not excusing the offenses, does mitigate them. Thus, we conclude that given all of the circumstances, the penalty of dismissal in this instance was excessively harsh.

Hence, the Board concludes that time served on suspension by Claimant is sufficient for Carrier

to make its point in this instance. The Board therefore directs that Claimant be reinstated to his former position with seniority but without pay for lost time or benefits. The remedy provided hereinafter should serve as sufficient warning that in the future any violation of the Carrier's Policies and Directives may subject Claimant to the ultimate penalty of immediate dismissal.

AWARD

Claim sustained according to the findings.

ORDER

The Board, having determined that an award favorable to the Claimant hereby orders the Carrier to return Claimant to service with seniority unimpaired, but without back pay 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

Dated at Chicago, Illinois, December 4, 2008