

# NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES )  
and ) Case No. 16  
UNION PACIFIC RAILROAD COMPANY ) Award No. 16  
\_\_\_\_\_ )

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 Mr. Michael T. Orr for violation of GCOR Rule 1.6 and the UPRR EEO Affirmative Action and related Policy Directives is excessive, unduly harsh and an abuse of the Carrier's discretion (Carrier's File 1492478 SPW).
2. As a consequence of Part 1 above, the Organization requests that Mr. Orr's record be expunged of any and all reference to the Level 5 Dismissal and his personal record reflect that he has been exonerated of all charges. Additionally the Claimant shall be reimbursed for all wage and benefit loss suffered by him since his wrongful removal from service.

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 August 31, 2007, Claimant was notified to report September 11, 2007 for an investigation and hearing concerning allegations that he used language and exhibited conduct in violation of the EEO Policy and Directives by making comments in regard to the sexual orientation and religion of a fellow Union Pacific Employee. He has been held out of service since that time. A hearing was held as scheduled. Carrier notified Claimant on September 28, 2007 that all charges against him had been sustained and accordingly, he was being assessed a Level 5 discipline and dismissed from service. On November 13, 2007 the Organization filed the

instant claim that was denied on January 3, 2008. Carrier's denial was appealed February 25, 2008 and that appeal was denied on April 11, 2008. The Claim was further discussed in conference on May 2, 2008.

The Organization argues that the Carrier's action of imposing the ultimate penalty of dismissal in this matter is excessive, unduly harsh and an abuse of its discretion. The Organization asserts that Claimant was one of two employees involved in what one witness described as 'good-natured joking' carried on by both employees, but contends the Claimant was the only employee dismissed as a result. Thus, the Organization points out, although discipline should be meted out even-handedly, in the instant case it wasn't. Moreover, the Organization avers, discipline should be imposed as a tool to rehabilitate, correct and guide employees, but that in the instant case, the discipline imposed serves no purpose other than to punish the Claimant. Hence, the Organization asks that Claimant be reinstated, made whole, and all reference to the Level 5 dismissal be expunged from his record.

The Carrier avers that in this particular matter that it offered substantial evidence to show by clear and convincing record evidence that the Claimant was culpable; that Claimant received a full, fair and impartial hearing with due notice of charges, opportunity to defend, and representation; and that the discipline assessed was not arbitrary, capricious, discriminatory or unreasonably harsh given the facts and circumstances of the particular case. Hence, the Carrier argues that there is simply no basis to overturn the discipline imposed and that the claim should be denied or dismissed in its entirety.

Claimant was a welder helper with seniority of two (2) years at the time of the investigation on the property. One of the witnesses testified that there has been an ongoing 'feud' between Claimant and a foreman for at least twenty-two (22) months prior that he was aware of. The feud was mostly good natured joking back and forth between foreman and Claimant, but there was testimony by witnesses and admissions by both foreman and Claimant that leads to the conclusion that sometimes the joking 'went over the line.'

At one point in his tenure with the Carrier, Claimant testified, he bid up to another location in order to get away from the foreman, but due to the pregnancy of his wife and the subsequent birth of their child, in order to be closer to home, he was forced to bid back into the area, where he would be in contact with that foreman.

On the dates focused on during the investigation, August 13 and 14, 2007, the record reflects that there were typical exchanges between Claimant and foreman that exceeded the line of good-natured teasing and crossed into territory prohibited by Carrier's EEO Policy and Directives.

Claimant testified that on August 14, 2007 he left the job site, went home and after reflecting on the verbal barbs and insults exchanged between the two men over the prior two days, and talking with his wife, he came to the decision that he had had enough. The next morning, Claimant testified, he contacted the EEO office to file a complaint.

The Manager of Track Operations got involved in this matter after interviewing Claimant concerning his being tardy on August 15. When Claimant explained that he had been on the

phone with EEO, the manager testified that he began to look into the situation that caused Claimant to call EEO. After interviewing both Claimant and foreman and other likely witnesses, he charged both Claimant and Foreman with violation of the UPRR EEO Policy and Directives. After a full hearing and investigation into the matter, Claimant was found by Carrier to be guilty of making offensive remarks concerning the alleged sexual orientation and religion of a fellow Union Pacific employee indicating a violation of GCOR Rule 1.6.

The Board finds that Claimant admitted during the investigation on the property that he had been involved in an exchange that cannot be described as anything but discourteous and quarrelsome. (*See* GCOR Rule 1.6). Moreover, Claimant further admitted that he had called the foreman a "Bible thumper" on more than one occasion and asked the foreman if he was gay. Hence, we have no alternative but to find that the Carrier proved the charges by substantial evidence. Moreover, the Board agrees that the claim was properly handled on the property and that there was no indication that Claimant did not receive all due process. Finally, the discipline assessed was in accordance with the Carrier's UPGRADE discipline policy that has been upheld as neither arbitrary, harsh nor capricious on numerous occasions by various Public Law Boards.

This Board also recognizes that, while not excusing Claimant's words and conduct, this was a two-sided affair with a foreman that taunted and provoked Claimant concerning his sexual orientation, appearance, religious beliefs and personal lifestyle choices. The record reflects that the foreman has been disciplined in regard to the instant charges, as well as the Claimant. We believe that Claimant should not receive a harsher penalty than the other employee here involved based on the same set of circumstances .

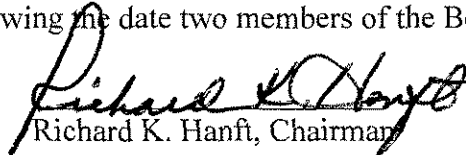
Hence, the Board concludes that time served on suspension by Claimant is sufficient for Carrier to drive home its point that offensive language and conduct in violation of Carrier's EEO Policies and Directives will not be tolerated. The Board therefore directs that Claimant be reinstated to his former 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**

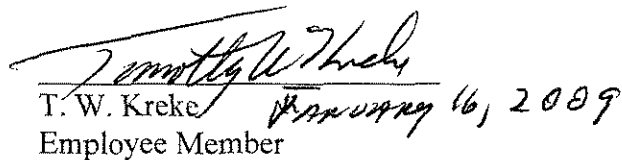
: Claim sustained in accordance with the findings..

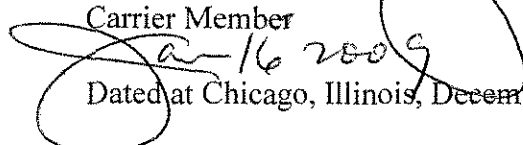
**ORDER**

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 13, 2008