

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 7258**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	
	)	Case No. 22
and	)	
	)	Award No. 22
UNION PACIFIC RAILROAD COMPANY	)	
	)	

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

Hearing Date: May 1, 2009

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

1. The dismissal of Track Laborer Conelious Roby II for violation of EEO Policy Directives, GCOR Rules 1.6, 1.7 and 1.13 in connection with acting in an insubordinate, discourteous and quarrelsome manner and making offensive and threatening comments toward an assistant foreman is unjust, unwarranted, based on unproven charges, and in violation of the Agreement (Carrier's File 1498600).
2. As a consequence of Part 1 above, we respectfully request that Mr. Roby now 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 suffered by him 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.

It is undisputed that there was an altercation between the gang's assistant foreman and the Claimant, a track laborer working under the assistant foreman's direction, on October 30, 2007. Claimant returned to work the following day and was charged with the various Rules violations stated above in the Organization's Statement of Claim and escorted from the property. Claimant was advised in writing to appear for investigation on November 12, 2007 and that investigation was postponed by mutual consent until December 6, 2007. The investigation was held and on

December 20, 2007, Claimant was notified that all charges had been sustained and that as a result he was being assessed a Level 5 discipline and being dismissed from the service of the Carrier. A claim was filed concerning that decision on February 5, 2008 and denied April 3, 2008. The denial was appealed on May 16, 2008 and denied July 16, 2008. The claim was discussed in conference February 3, 2009 without resolution.

A summary of the incident as derived from perusal of the record shows that on October 30, 2007 Claimant was given an order by his assistant foreman to take a spike maul that was laying on the track and put it on the back hoe. Claimant initially did pick up the maul and carry it some distance toward the back hoe, but set it down on the track and began doing other work. Some time later, the assistant foreman and two other employees approached Claimant and the assistant foreman noticed that Claimant had not put the maul on the backhoe as he had ordered. Claimant testified at hearing that at that point the assistant foreman asked him if he was going to pick up the hammer and he answered no. One of the other employees with the assistant foreman picked up the maul and carried it to the gang's truck to be taken back to the yard.

As the gang rode in the truck back to the yard at the end of the shift, the record shows, there was discussion concerning Claimant's failure to follow the assistant foreman's order. Claimant admitted that he told the assistant foreman that he was not going to be his personal nigger. An impromptu discussion was had once the gang reached the yard and before they went home for the evening. During the discussion the assistant foreman told Claimant that if he didn't start following his instructions, that the assistant foreman would have to take the issue to higher authority. Claimant testified that he told the assistant foreman that he should do what he had to do and that if he did he would hit him in the mouth.

The assistant foreman did report the situation to higher authority, the situation was investigated and after interviewing the other witnesses to the situation, Claimant was removed from the property on October 31, 2007 pending a formal investigation.

The Organization contends that while behavior such as the Claimant engaged in on the day in question would normally appear to be insubordinate, quarrelsome and discourteous, in this situation it amounted to nothing more than typical "trash talk" among friends and that is typically engaged in. The Organization asserts that the Carrier's handling of this situation went far beyond what the complaining assistant foreman intended or anticipated, and while it concedes that normally the language used by Claimant would be considered socially unacceptable, here it was culturally accepted and amounted to nothing more than common shop talk. The Organization argues that whether or not the verbal exchanges were proper or not, they were commonplace and tolerated among the parties and to place sole responsibility upon Claimant would be patently wrong.

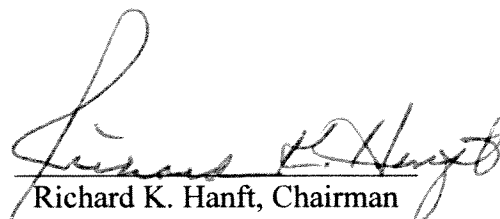
The Carrier contends that it has met its burden to produce substantial evidence to demonstrate Claimant did violate the rules with which he has been charged. Carrier points to Claimant's admission on the record that he used foul and racially insensitive language, acted insubordinately when asked if he was going to pick the hammer up, and threatened to pop his

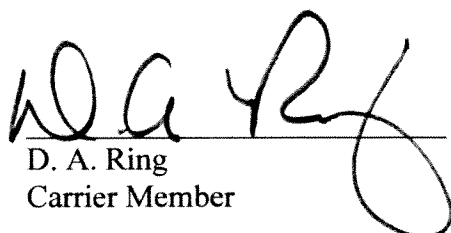
assistant foreman in the mouth. Further, the Carrier avers, Claimant was afforded all contractual due process, received a fair and impartial hearing and the discipline assessed was in accord with Carrier's UPGRADE policy and neither arbitrary, capricious, discriminatory nor unreasonably harsh. Hence the Carriers asserts that this claim should be denied.

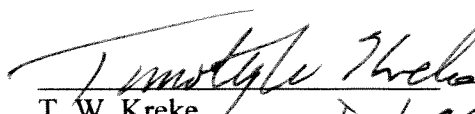
While we can understand that a certain amount of profanity and good-natured discourse that could be considered shop talk takes place in the daily interactions of all members of the gang and that in this particular situation there was a competitive back and forth banter both on and off the job between the assistant foreman and the Claimant, in the events that transpired on October 30, 2007, it went too far. Claimant's admission on the record that he did just what he was charged with in that he made an inappropriate, racially-based comment, refused a direct order, and threatened to assault his assistant foreman leave us with no alternative but to deny the Organization's claim. Moreover, we can not say that the discipline imposed was arbitrary, capricious or unduly harsh.

### AWARD

Claim denied.

  
Richard K. Hanft, Chairman

  
D. A. Ring  
Carrier Member

  
T. W. Kreke  
Employee Member

July 29, 2009

Dated at Chicago, Illinois, June 20, 2009

7-29-09