

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7426

AWARD NO 9, (Case No. 9)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member

T. W. Kreke, Employee Member

B. W. Hanquist, Carrier Member

Hearing Date: September 22, 2010

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

1. The Level 5 discipline [dismissal] imposed upon Mr. N. Martinez for alleged violation of General Code of Operating Rule 1.6 in connection with allegations of dishonesty and/or an act of hostility, misconduct, or willful disregard or negligence affecting the interest of the Company or its employees, where the Claimant allegedly provided false allegations regarding another employees' conduct resulting in efficient use of Company time and resources in addition to potential harm to the subject individual's reputation as well as the morale and productivity of the affected work group was unjust, unwarranted, based on unproven charges and in violation of the Agreement (Carrier File 1523195).
2. As a consequence of the violation referred to in Part 1 above, we request that Claimant Martinez '...now be reinstated to 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.' (Employees Exhibit 'A-2')."

FINDINGS:

Public Law Board No. 7426, upon the whole record and all 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 2, 2009, Carrier notified Claimant to appear for a formal Investigation on July 15, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while working as a Utility Backhoe Operator, on Gang No. 7817, you allegedly violated Rule 1.6 of the General Code of Operating Rules (GCOR) when you allegedly committed an act of dishonesty and/or an act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees. Specifically, you were alleged to have contacted the EEO Hotline on May 21, 2009, as well as faxed a letter to Dennis Duffy, EVP-Operating, on May 27, 2009, containing false allegations regarding another employee's alleged conduct resulting in inefficient use of Company time and resources in addition to potential harm to the subject individual's reputation as well as the morale and productivity of the affected work group. The Carrier completed their pre-investigation of this allegation on June 25, 2009.

Please be advised that if you are found to be in violation of this alleged charge, that the discipline assessment may be a Level 5 and may result in your dismissal."

On July 23, 2009, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

There is no dispute between the parties that the Claimant entered the service of the Carrier on April 20, 1998, and was assigned as a Backhoe Operator at the City of Industry, California, with seniority in the Track Sub-department, Los Angeles Division, prior to his dismissal by the Carrier. There is nothing in the record to indicate that the Claimant had been assessed any prior discipline or that he was not considered a good employee. The subject case revolves around issues contained within a May 21, 2009, complaint filed by the Claimant with the Carrier's Equal Employment Opportunity (EEO) Department and similar written complaints of May 27, 2009, faxed to Executive Vice President D. Duffy.

It is the Organization's position regarding the case that: **"The crux of this issue clearly lies on whether or not the Carrier can prove that the Claimant purposely made a false report to the Carrier's EEO Hotline."** It argued that the Carrier did not meet its burden of proof that the Claimant purposefully attempted to file false allegations or that he intended to harm a co-worker's reputation. Additionally, it argued that Claimant did not receive a fair and impartial Hearing; and the Claimant acted in good faith and without malice when he reported what he believed to be a legitimate problem to the Carrier's EEO Department; and finally the Carrier violated its own policies when it retaliated against him for making a good faith report. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that Claimant received a fair and impartial Investigation and according to it the record is clear by convincing evidence that he was culpable of the charged misconduct or dereliction of duty. It argued that it presented substantial evidence that he violated Rule 1.6 when he filed a false EEO report to the Carrier on two occasions. Finally, it argued that there was no doubt the discipline was appropriate in light of the facts and the seriousness of the charges. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and will first address the Organization's assertion that the Investigation was not fair and impartial. The record reflects that the Claimant and Organization were not misled by the charges nor were they inhibited in their defense which was exhibited by the well prepared and professional defense proffered by the Organization. The Claimant was not denied his "due process" Agreement rights, thus the Claim will be resolved on its merits.

The Carrier has an obligation to do everything in its power to prevent harassment and racial discrimination in the workplace and insure that its employees are not subjected to a hostile work environment. To help avoid such conditions from arising or to prevent their continuance it has encouraged employees to report inappropriate acts and/or comments. While employees are encouraged to report improper behavior they are equally expected to not make frivolous or inaccurate charges as those allegations could inadvertently demean another employee's reputation or character.

In the instant case it is apparent that the Claimant believed that he had been subjected to racially slanderous comments and that he felt intimidated. He argued that he filed his report with the intent to have the harassing treatment stopped and the involved individual, Track Supervisor, D. C. Palmer, be held accountable for his actions. The allegations made by the Claimant were of a serious nature. For example in his letter of May 27th directed to the Executive Vice President he alleged that Palmer made racially insensitive remarks on May 7, 2009. Claimant wrote in pertinent part the following:

"...David Palmer says how much does a backhoe operator make \$22.00 or \$23.00 dollars/hour. Palmer says 'shit I could go down to Home Depot and get a f_____ Mexican to run the backhoe for \$6.00 hourly'. I am very offended by that racial comment...For all of you that don't know David Palmer, he is the same guy that has a "White Pride" tattoo going down from the back of his shoulder blades down to about his elbows which I am also offended by and now that it has been hot I have to see that offensive tattoo every day."

Claimant alleged that Palmer made the racial remark on May 7th in the presence of 12 of his co-workers. Each of those co-workers offered written statements regarding the Claimant's allegation and all denied hearing any racially biased comments and/or behavior by Palmer on May 7, 2009, or on any other date. As an example Raudel Aparicio wrote in pertinent part the following:

"...going back to the day of May 7, 2009, as I recall we got to the office at 7:00 a.m. and I did not heard David "Dave" Palmer, say anything racist or offensive to any of the other co-workers. In this day or any other day not a single word that would offend anybody has come out of Palmers mouth."

Co-worker Reyes Hernandez stated:

"On May 7, 2009, Palmer never talked or said anything racial about Mexicans."

Co-worker Guillermo Serrano, Jr. wrote in pertinent part the following:

"...I was sitting three feet from David, and I did not hear David say anything racial, this is what was said, 'there are many people who would like to do our job.' David Palmer never said anything racial in that conversation." (Underlining Board's emphasis)

Co-worker Jose Hernandez wrote in pertinent part the following:

"May 7th I did not hear David Palmer say anything, say or mention anything against Mexicans or racist in any way, on this day or any day prior..."

The written statements made by the other employees are consistent with those recopied above and substantiate that no one heard the allegation made by the Claimant. It is possible that Claimant misconstrued Palmer's comment mentioned above by co-worker Serrano, wherein he said, that Palmer stated: **"...there are many people who would like to do our job..."**, however, no interpretation could reasonably lead to the conclusion that comment was racist nor directed against employees of Hispanic origin.

Claimant also alleged that Palmer had offensive tattoos on his fore-arms. During its investigation of that allegation the Carrier took photographs of the tattoos which revealed that on the backside of the left arm Palmer had the name "Cali" and on the backside of his right arm the word "Love". Additionally, the photographs document the fact that with a short sleeve shirt the words were not visible, however, it is possible that while working portions of the words might be

seen. When the Claimant was questioned by the Hearing Officer on page 269 of the Transcript regarding the tattoos, he testified as follows:

"A Again, I said what I appear. I'm going to tell you again what appeared to be what is on his arms from a distance that's what I thought it - you know, I thought it said."

Later, when questioned, on page 274 of the Transcript, by his Organization representative Claimant altered his story by stating that he never actually saw the tattoo, but was only told by someone as to what it said. When asked who told him about the alleged offensive tattoo he could not recall the individual.

Review of the testimony offered by Ms. Beth E. Kirschbaum, Director EEO/Affirmative Action, for the Carrier, indicates that when she was questioned on page 253 of the Transcript about the tattoo she testified in pertinent part as follows:

"It doesn't matter whether I'm in his head or not. What matters is whether what is reported, if it's not true, is it in this case patently untrue. The tattoos simply don't say White Pride, and Mr. Martinez admitted to me he hadn't seen them. That to me is bad faith. To make a report about something as serious as something that could get someone fired...."

Kirschbaum's testimony was not rebutted and is consistent with the Claimant's testimony mentioned above, that he did not actually see the tattoo. Kirschbaum also offered a written statement dated June 16, 2009, which addressed Mr. Palmer's concerns about the Claimant's allegations wherein in pertinent part she wrote:

"I told Martinez that Mr. Palmer feels slandered and is very upset that people may now think he is a racist or a skinhead as his fiance is Mexican."

On page 186 of the Transcript, Palmer was questioned about his concerns over Claimant's charges against him and he testified as follows:

"A Well at first I was taken aback and then you get angry and then you start with the feelings of how serious these allegations are and how stressed out I was because when a lot of people have been pulled out of service..."

His testimony continued on page 186 as follows:

A ...you know that affected me a great deal, and my family, my girl- my- my fiancée, you know, my brother who's half Mexican.

Q Did that cause you stress?

A Absolutely, 100%."

Palmer's testimony was consistent with Kirschbaum's written statement regarding her conference with him, and again it was not rebutted.

General Code of Operating Rule 1.6 - Conduct states:

"Employees must not be:

- 1. Careless of the safety of themselves or others**
- 2. Negligent**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**
- 6. Quarrelsome**
or
- 7. Discourteous**

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated."

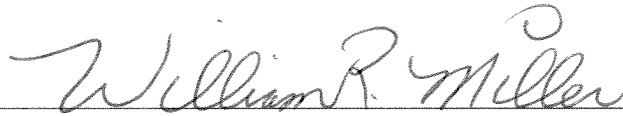
The record proves that the Carrier showed that Claimant was negligent in the filing of his allegations with the EEO and the Executive Vice President as they were reckless assertions lacking substance, however, we are not persuaded or convinced that it was done with dishonest intentions. Claimant violated Rule 1.6 account of negligence, but not dishonesty.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had 11 plus years of service with an unblemished record. The charges against the Claimant were of a very serious nature and the Board does not excuse his behavior as he was culpable for those actions, but after review of the facts the Board has determined that the discipline was excessive. Therefore, the Board finds and holds that the dismissal will be reduced

to that of a lengthy suspension. Claimant is to be reinstated to service on a "last chance" basis with seniority intact and all other rights unimpaired, without backpay. Claimant is forewarned to be more responsible in the future to adhere to Carrier Rules and Policies, otherwise he could face possible permanent dismissal.

AWARD

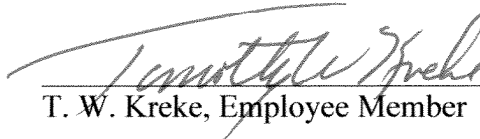
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: January 18, 2011