NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 149
and	)
	) Award No. 144
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: June 18, 2008

STATEMENT OF CLAIM:

(1) The dismissal of Joseph F. Hill for violation of the EEO Policy Directives and Rule 1.6 of the General Code of Operating Rules in connection with an incident that while working as a flange oil maintainer on November 15, 2006, you allegedly made racially offensive remarks towards a Union Pacific Employe and threw an object at him then submitted a false report to the EEO hotline on November 17, 2006 and for allegedly making threats of violence toward Union Pacific Employes on May 15, 2007 is unjust, unwarranted and in violation of the Agreement (System File J-0748U-258/1485504).

(2) As a consequence of the violation outlined in Part (1) above, we request the dropping of all charges against Mr. Joseph F. Hill, the removal of any mention of this incident from his personal record and compensation for all time that Mr. Hill was unjustly withheld from service.

FINDINGS:

Public Law Board No. 6302 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 June 22, 2007, Carrier notified Claimant to report for a formal investigation on June 29, 2007. The notice charged that Claimant violated Carrier's EEO Policy and Rule 1.6 when, on November 15, 2006, he made racially offensive remarks to a fellow employee, threw an object

at the employee and on November 17, 2006, filed a false report on Carrier's EEO Hotline at Evanston, Wyoming. It further charged that on May 17, 2007, Claimant made statements threatening violence toward Carrier employees. Following two postponements, the hearing was held on July 17, 2007. On August 1, 2007, Carrier notified Claimant that he had been found guilty of the charges and been dismissed from service.

The Organization contends that the charges stemming from the November 15 and November 17 incidents were not timely. Rule 48(a) requires that the hearing "be held within thirty (30) calendar days from the date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated . . ." Carrier responds that the hearing was originally scheduled within thirty days of the Manager Track Maintenance's first knowledge of the occurrence, specifically his first knowledge of the racial slur and false EEO report.

The MTM testified that around November 17, 2006, he received an e-mail from a Carrier EEO officer asking him to address a dispute between Claimant and another employee. Claimant had filed a report on the EEO Hotline on November 15, 2006, alleging that another employee had shaken up Claimant's can of soda and bounced it off the table. When Claimant asked why the other employee had done that, the other employee cursed and kicked the soda can. Claimant called the other employee a "stupid spic'n'span," referring to the other employee's baldness which made him look like "Mr. Clean," and threw a pen at the other employee who picked it up, broke it into pieces and threw the pieces back at Claimant. According to Claimant's Hotline report, later that day, Claimant attempted to apologize to the other employee who continued to be verbally abusive to Claimant.

The MTM testified that the EEO officer's e-mail suggested that the matter be handled as a dispute between two employees rather than a formal EEO matter. The MTM testified that he met separately with Claimant and the other employee, then met with them together, the two employees agreed to bury the hatchet and put the matter behind them and stated that they did not wish to pursue the matter further. At that point, the MTM considered the matter closed.

The MTM testified that at the time of the November incident, he did not know of the alleged racial slur. He related that Claimant insisted that Claimant had called the other employee a "spic'n'span," and the other employee told the MTM that he did not want to pursue an allegation of a racial slur and would let the comment stand as "spic'n'span." According to the MTM, because at the time he was unaware of the racial slur, he also was unaware that Claimant's report to the EEO Hotline was false.

There is no dispute that in November 2006, the MTM was aware that Claimant had thrown a pen at the other employee. Thus, the charge of throwing the pen brought the following June was clearly untimely. Under the MTM's testimony and Carrier's theory of the case, however, the charges of making a racially offensive remark and of filing a false report with the EEO Hotline were timely because the MTM was not aware of them in November. The record, however, does not support the MTM's testimony in this regard. The report from the EEO officer

that was e-mailed to the MTM on November 17, 2006, indicated that four other employees were present during the soda can and pen throwing incident. The report further indicated that all four employees "thought HILL called ELCANO a 'spic.'" Thus, it is clear that in November 2006, the MTM was on notice of allegations that Claimant had made a racially offensive remark. However, he chose, upon the advice of the EEO officer, to treat the matter with a conference with the two protagonists and, when they agreed to put the matter behind them, considered the matter closed. It is simply too late and a violation of Agreement Rule 48(a)'s time limits, for Carrier to resurrect this matter as a basis for disciplinary action seven months later.

We turn to the charge of making statements threatening violence to Carrier employees. The record reflects that shortly after the soda can – pen throwing incident, Claimant bid to the system gangs. However, he was unable to remain on the system gangs and bid back to the gang in Evanston, Wyoming, on May 14, 2007. Claimant was stressed by what he perceived as abuse by others at Evanston, contacted Carrier's EAP hotline and was referred for assistance. Simultaneously, Claimant's wife requested vacation on Claimant's behalf and Claimant was granted vacation until May 20. Claimant then requested an additional week's leave to continue with his counseling, which was granted. However, the MTM, in consultation with the Director Track Maintenance, decided to withhold Claimant from service and refer him for a fitness-for-duty evaluation.

Introduced into evidence was a written statement from an employee of a weed-spraying contractor dated June 1, 2007, which averred that on May 15, 2007, he saw Claimant coming out of the office, that Claimant appeared to be upset and that when the contractor employee asked Claimant why he was upset, Claimant stated, "I am about ready to start killing M-Fers around this place." The contractor employee was not called to testify and the MTM testified that he made no effort to secure the contractor employee's testimony.

Also introduced was a written statement from a Track Inspector, dated June 13, 2007, which reported that on June 8, 2007, he saw Claimant at a hardware store, Claimant complained to him about being pulled out of service and stated that he was "ready to kill everyone." The Track Inspector testified that he wrote the statement and that he stood by the statement. Claimant testified and denied making any threatening statements to the contractor's employee or to the Track Inspector.

With respect to the alleged May 15, 2007, threatening statement, the only evidence supporting that charge is the hearsay written statement from the contractor's employee. We recognize that Carrier does not have subpoena power and therefore could not have compelled the employee to testify. However, the MTM admitted that no attempt was made to see if the employee would appear voluntarily. Furthermore, there is absolutely no evidence in the record that would corroborate the written statement and Claimant testified and denied making the threatening remarks attributed to him. On the state of this record, we are compelled to find that Carrier failed to prove this aspect of the charge by substantial evidence.

With respect to the alleged threatening statement of June 8, 2007, the Track Inspector did

testify and reaffirmed his written statement. He added no further details. There is no evidence in the record corroborating the Track Inspector's testimony. Claimant testified and denied making the threatening remark attributed to him. Furthermore, although we typically defer to credibility determinations made on the property and accept resolutions of conflicting testimony made on the property, we do so because those determinations and resolutions are made by the hearing officer who observed the witnesses testify. In the instant case, however, the hearing officer was the Manager of Train Operations but the disciplinary determination was made by the DTM. There is nothing in the record to indicate that the hearing officer made any credibility determinations. Thus, there is no basis in this record for deferral to the resolution of the conflicting testimony made on the property. On the basis of the record presented, we are compelled to find that Carrier failed to prove this aspect of the charge by substantial evidence.

Accordingly, Claimant's dismissal must be overturned. We turn to the question of the appropriate remedy. At the time of his dismissal, Claimant was withheld from service without pay, pending a fitness-for-duty evaluation. There is no challenge to the decision to withhold Claimant from service and refer him for a fitness-for-duty evaluation before us. There is also no evidence whether the evaluation was conducted and, if so, what the result was. Under these circumstances, we hold that the appropriate remedy is to return Claimant to the status he held at the time of his dismissal, i.e., withheld from service without pay pending a fitness-for-duty evaluation. If Claimant is found to be fit for duty, he shall be returned to service, but Claimant is not entitled to compensation for time out of service.

AWARD

Claim sustained in accordance with the Findings.

ORDER

The Board having determined that an award favorable to Claimant be issued, Carrier is ordered to implement the award within thirty days from the date two members affix their signatures hereto

Martin H. Malin, Chairman

D. A. Ring
Carrier Member
11-12-08

T. W. Kreke, Employee Member
Employee Member Nov. 12, 2008

Dated at Chicago, Illinois, October 30, 2008