

PUBLIC LAW BOARD NO. 6302
CASE NO. 244

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (dismissal) imposed on T. Schmidt by letter dated March 28, 2012 for alleged violation of Rule 1.6 Conduct and the Union Pacific EEO/AA Policy and Directives in connection with allegations that while employed as a foreman on January 16, 2012 he used a racial slur was without just and sufficient cause, unwarranted and in violation of the Agreement (System File M-1248U-252/1572255).

2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. Schmidt's record and compensate him for all losses, including wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's improper discipline.”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was working as the senior Field Welding Foreman of Gang 4893 on January 16, 2012. He was removed from service pending investigation on January 18, 2012 and received a Notice of Investigation (NOI) dated January 26, 2012 charging him with using a racial slur on January 16, 2012. An Investigation was conducted on March 12 and reconvened on March 19, 2012 and, by letter dated March 28, 2012, Claimant was found guilty of the charge and in violation of EEO/AA Policy and Directives and Rule 1.6 Conduct, and was assessed a Level 5 dismissal. This claim protests the imposition of that discipline.

The substance of the charge against Claimant is that, while seated with two co-workers (who fell under his direction) in a truck on the right-of-way after a job briefing on the morning of January 16, 2012, which was the Martin Luther King holiday, Claimant stated that they did not have the “nigger day” off. There is no dispute that, if this was said, it would be a violation of Carrier’s EEO/AA Policy Directive which prohibits offensive or demeaning epithets or remarks referring to race. One of the two employees, Wieser, called the anonymous EEO hotline to report this comment, which resulted in an investigation and the charge letter, signed by Director of Track Maintenance Miller. Of the employees in the gang interviewed, only Wieser and Whiting, who were in the truck with Claimant, gave written statements confirming that they heard Claimant make this statement.

The Investigation commenced on March 12, and neither Miller nor Wieser was present. Supervisor Peterson, who reviewed the EEO investigation, testified to what it contained, although he did not participate first hand in it. Whiting, who is also a Welding Foreman, testified that Claimant made the comment during a discussion of which employees received that holiday off of work, it was not said aggressively, he did not take offense to it, and he did not feel that Claimant was a racist. The Organization produced two other gang members as witnesses at the hearing, but they did not testify once it was

determined that they did not hear such statement. Claimant stated that he had no recollection of the conversation or of making a racial slur concerning Martin Luther King day. He stated that there was constant tension between these two employees and himself, they were disrespectful of him when they were together, Whiting second-guessed his decisions as senior Foreman, and he believed that they fabricated the charges to get rid of him.

The Organization objected to Carrier not producing the Charging Officer and unilaterally reconvening the hearing to obtain the attendance of Wieser, who did not show up at the Investigation as anticipated. Despite witnesses being sequestered, Wieser admitted talking to Whiting about what occurred between March 12 and the time he testified on March 19. Wieser confirmed that he called the EEO hotline because the comment was wrong, and Claimant had made it before. He explained that he did not previously report it because he thought it was a mistake. Claimant denied ever using the "N" word at work and recalled that he had a prior issue where he told Wieser to slow down, which Wieser resented since he did not think he was driving quickly. Claimant stated that on January 12, 2012 Wieser told him twice that he wished he was dead. Wieser admitted making that comment to Claimant, but did not recall the context and added that they joked around a lot. The Notice of Discipline was issued by the General Superintendent, who was not the Conducting Officer or present during the hearing.

Carrier argues that there were no procedural errors in the conduct of this Investigation since Claimant and the Organization had knowledge of the charges and an opportunity to cross-examine his accusers, and that it was within its prerogative to remove Claimant from service pending an investigation, which does not show any prejudgment of his guilt. Carrier contends that there is substantial evidence in the record to support the charge that Claimant made a racially disparaging remark to two co-workers, which is a serious Conduct and EEO violation that it cannot countenance under

its responsibility to provide its employees a safe and discrimination-free workplace. It notes that the Level 5 dismissal is warranted based on the severity of the infraction and is in compliance with its UPGRADE policy.

The Organization initially contends that Claimant was denied his due process rights to a fair and impartial hearing by being prejudged when he was removed from service for a non-safety related allegation prior to the Investigation, Carrier's unilaterally reconvening the hearing to allow the accuser to attend without evidence that he could not have reasonably been there during the scheduled hearing date, not presenting the Charging Officer, and permitting and relying upon evidence given by a witness who was clearly not sequestered and discussed his testimony with the other employee so they could get their stories straight. The Organization maintains that the charge against Claimant was fabricated by the employees to get rid of Claimant, who was senior to Whiting as Foreman and was admittedly detested by Wieser for calling him out on his performance. It asserts that just because Claimant honestly testified that he could not remember having any such conversation, and later made clear that he did not say the "N" word, does not mean that his consistent denials are less credible than the inconsistent account of these employees. The Organization argues that Claimant's evidence, and that of other gang members who were not permitted to testify, establishes that he is not a racist, has personally aided less fortunate African Americans affected by Hurricane Katrina by traveling to southern Mississippi, had no prior record substantiating similar inappropriate conduct, and was not deserving of losing his job for these fabricated unfounded allegations.

A careful review of the record convinces the Board that there is some evidence in the record that raises a question about the motivation of Wieser for reporting the alleged racial slur, and no evidence as to anything uncovered during the EEO investigation that would lend credence to the credibility of the content of the testimony of the two

employees at the hearing. Neither employee testified that they raised an objection to Claimant's comment at the time it was made. Even Whiting indicated that, although he heard Claimant make the comment "nigger day" in the truck in reference to the Martin Luther King holiday, he did not believe Claimant was a racist, was not offended by the comment which was not directed at any particular person and was not aggressive, and did not think it merited reporting. Wieser's evidence as to why he reported it - just days after he admitted having told Claimant that he wished he were dead and after being called out for driving too quickly - must be considered suspect, especially after he failed to show up at the initial hearing date and discussed his testimony with Whiting in the interim.

While the Board is mindful that this is an appellate process and that we are not to substitute our judgment as to the credibility of witnesses for that of the Hearing Officer who observed the demeanor of the witnesses during the Investigation, the record makes clear that it was the General Superintendent who actually made such credibility resolution in this case, choosing to believe the employees over Claimant's denials, without having the opportunity to observe any of the participants upon which to base his judgment. In such circumstances, although the standard of review is substantial evidence, when dealing with a dismissal based upon one instance of an alleged inappropriate statement which has been repeatedly denied, without any corroborating evidence in support of the validity of such action, we believe that there is insufficient reliable proof needed to substantiate the charges. While the record does contain evidence that Claimant made the statement attributed to him, and it is admitted that such statement is inappropriate and in violation of the EEO/AA policy and Carrier's Conduct Rule, the Board does not believe that the circumstances warrant the imposition of a dismissal in this case. Under the totality of the circumstances in this case, Claimant is entitled to the benefit of the doubt when his job is on the line. The EEO/AA policy in issue does not require immediate discipline for a violation, but "appropriate discipline ... up to and including termination."

Carrier's UPGRADE policy notes that a lesser level of discipline may be issued in some cases for EEO Policy infractions.

For all of these reasons, we find that the penalty of dismissal was excessive, and that a Level 4C sixty (60) day suspension is a more appropriate penalty in this case. See, Public Law Board No. 5855, Award 2. We direct Carrier to reinstate Claimant without loss of seniority or benefits, to clear his record of the dismissal and substitute this penalty in its place, and to compensate him for losses suffered attributable to the time period after the assessment of his Level 4C suspension.

AWARD:

The claim is sustained in accordance with the Findings.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

K. N. Novak
K. N. Novak
Carrier Member

Andrew Mulford
Andrew Mulford
Employee Member

Dated: 8/6/14

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