

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad Company
(Former Missouri Pacific Railroad Company)

Case No: 114

Award No: 114

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

1. The Carrier's discipline (dismissal) of Mr. J. Kenny, by letter dated September 8, 2017, for alleged violation of the EEO Policy, Rule 1.6: Conduct - Quarrelsome, Rule 1.6: Conduct - Immoral and Rule 1.6: Conduct - Discourteous was unwarranted, arbitrary and in violation of the Agreement (Carrier's File 1693288 MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Kenny's termination shall be overturned, the charges dropped from his record and provided restitution to be made whole."

FINDINGS:

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction of the dispute herein; the parties were given due notice of hearing before this Board and they participated therein.

The Claimant was disciplined pursuant to a Notice of Investigation dated August 11, 2017, Investigation held August 28, 2017, *"to develop the facts and determine your responsibility, if any, in connection with the below charge. On 07/31/2017, at the location of 2921 Main St, Bryant, AR, 72022, while employed as a Construction Foreman, you allegedly made comments and gestures that were offensive in nature directed toward the staff and guests at the HomeTown Hotel in Bryant Arkansas. Additionally, on 08/06/2017, you were verbally abusive toward a member of the staff at the HomeTown hotel, causing the staff member to feel threatened. This is a possible violation of the following rule(s) and/or policy: EEO Policy; 1.6:*

*Conduct – Quarrelsome; 1.6: Conduct – Immoral; 1.6: Conduct – Discourteous. Additionally, **Rule 1.6: Conduct** stipulates that 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. Under the MAPS Policy, this violation is a Dismissal event. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result.”*

In a discipline letter dated September 8, 2017, the Carrier found that “*the evidence more than supports the charges against you. The following charge has been sustained: On 07/31/2017, while employed as a Construction Foreman, you made comments and gestures that were offensive in nature directed toward the staff and guests at the HomeTown Hotel in Bryant Arkansas. Additionally, on 08/06/2017, you were verbally abusive toward a member of the staff at the HomeTown hotel, causing the staff member to feel threatened. This is a violation of the following rule(s) and/or policy: EEO Policy; 1.6: Conduct – Quarrelsome; 1.6: Conduct – Immoral; 1.6: Conduct – Discourteous. Additionally, **Rule 1.6: Conduct** stipulates that 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. Based on your current record, you are hereby dismissed from all service with the Union Pacific Railroad.*”

The Organization appealed the discipline and the Carrier denied the appeals. The dispute was not resolved during a settlement conference and progressed to arbitration. This matter is now before the Board for final and binding resolution. The Board has carefully reviewed the entire record in this case, including the arguments and awards provided in support of the parties’ respective positions, whether or not specifically addressed herein.

The Carrier’s case hinges upon the report and testimony of Carrier Railroad Police Special Agent Jesse Proffitt. The Organization objected to his evidence on hearsay grounds during the Investigation, and renews the objection in this proceeding. It is undisputed that Special Agent Proffitt did not witness any of the events Claimant is charged with, and that his testimony regarding same is hearsay. The Board does not doubt that he accurately reported and

testified as to what the hotel desk clerk told him. The Board notes it is well established that hearsay is admissible in these Investigations. Therefore, the Organization's objection is not persuasive. That said, it remains the Carrier's burden to put forth substantial evidence to support its discipline determination.

This case boils down to "he said / she said". Claimant testified at the Investigation, and was cross-examined. He denied making any statement and/or engaging in any conduct charged by the Carrier. The hotel desk clerk did not appear or testify at the Investigation, nor did any other witness to either of the two (2) alleged incidents.

The hotel desk clerk alleged that both incidents occurred in the public lobby/reception area of the hotel. It is undisputed that this area is covered by the hotel's video camera surveillance system, and, that the hotel had video footage of the time and place when/where each incident allegedly occurred. However, the hotel refused to release the video. The Organization raised the issue of the missing video on the property, and renews it in this proceeding. The missing video raises serious concerns for the Board, particularly in the context of a "he said / she said" case. The hotel desk clerk alleged that on July 31 Claimant, *"made inappropriate statements and gestures directed towards several Hispanic guests in the lobby when he checked in on 7/31, including a reference to 'white power' and a Nazi-type arm salute."* This would likely be visible on the video. The hotel desk clerk alleged that on August 6 Claimant, *"became belligerent [with the clerk] and began screaming and cursing at her . . . [and] got onto and then exited the elevator 3 times in order to continue his verbal abuse."* This, too, would likely be visible on the video. The Board thus finds that the undisputed existence of the likely probative video recording of both alleged incidents, coupled with the hotel's refusal to release the video, raises a strong inference against the hotel desk clerk's allegations.

Furthermore, despite the independent seriousness of each of the two (2) alleged separate incidents (July 31 and August 6), the hotel desk clerk did not report either incident to the Carrier until August 7. The Board finds the record explanation for this to be unpersuasive. The Board notes that despite the hotel desk clerk's claim that she felt *"uncomfortable"* and *"threatened"* by Claimant's alleged conduct on August 6 – *"to the point that she was planning on quitting her job"*

if he stayed there again.” – there is no record evidence that she notified or reported either incident to the hotel manager/owner, nor to any law enforcement agency. In fact, the record shows that the hotel manager/owner became aware of the allegations only upon inquiry by Special Agent Proffitt in response to the hotel desk clerk’s August 7 complaint to the Carrier.

In contrast to the above factual irregularities stands Claimant’s un rebutted testimony. For example, Claimant’s testimony that he apologized to the desk clerk for any misunderstanding during their conversations about room pricing discrepancies at check-in and check-out. Under the facts and circumstances of the record, this appears to have been reasonable, and did not constitute an admission to the charges. Claimant specifically denied being argumentative or quarrelsome on either date, and testified that there were no such conversations on the dates in between check-in and check-out. The Board also notes Claimant’s un rebutted testimony that he has been married for eight (8) years to a *Hispanic* spouse, and they have four (4) children. Moreover, Claimant gave un rebutted testimony that he has a “*very good*” working rapport with the five (5) coworkers who were at the hotel with him, two (2) of whom are *Hispanic*. This casts further doubt on the hotel desk clerk’s allegations.

Additionally, the Board notes Claimant’s completely clean record. In Claimant’s 6-½ years of service he had no discipline, no EEO violations, and no safety violations, whatsoever.

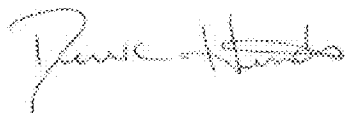
The Board thus finds that the record lacks substantial evidence to support the Carrier’s determination of Claimant’s culpability. Therefore, the claim must be sustained.

AWARD:

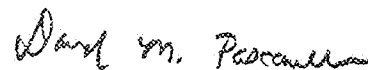
Claim sustained. The Carrier is ordered to make the Award favorable to the Claimant effective on or before 30 days following the date below.



Robert Grey
Neutral Member
Dated: October 23, 2019



Derek Hinds
Carrier Member



David M. Pascarella
Organization Member