

PUBLIC LAW BOARD NO. 7660
CASE NO. 6

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 Mr. R. McGirl by letter dated February 12, 2013 in connection with allegations that he violated Rule 1.6 Conduct (7) when, on January 18, 2013 he allegedly engaged in inappropriate communications and behaviors while communicating with co-workers was without just and sufficient cause, unwarranted and in violation of the Agreement (System File D-1348U-304/1580492 UPS).

2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove this discipline from Mr. McGirl'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, a 4 year employee, was removed from service on November 30, 2012 for inappropriate communication with co-workers. On December 26, 2012 Claimant and his General Chairman signed a Leniency Reinstatement Agreement (LRA) permitting him to return to work under certain conditions, including Claimant's agreement to accept dismissal as discipline, to contact EAP and comply with the recommended course of treatment, attend and successfully complete a one day EEO training session in Omaha on his own time and at his own expense, his return to service would be in probationary status for 18 months and he would return at a Level 3 in Carrier's UPGRADE disciplinary policy, as well as the following provision:

7. In the event that Mr. McGirl again violates the above identified Rule (1.6 - Conduct) during his probationary period, he shall be removed from service without benefit of a formal investigation and shall revert to the status of a dismissed employee.

On January 29, 2013 Claimant was issued a Notice of Hearing on the charge that he was involved in inappropriate communication and behavior with his co-workers on January 18, 2013. As the result of an investigation conducted on February 5, 2013, Carrier sustained the charges and found Claimant guilty of violating Rule 1.6 (7) and its EEO/Affirmative Action-Related Policy Directives, as well as his LRA, and dismissed him from service. This claim protests the imposition of that penalty.

The investigation evidence presented by Claimant, his supervisor, and three of his co-workers present in the crew room on the afternoon of January 18, 2013, establishes that Claimant was explaining that he was making arrangements to go to Omaha by train for a class, and in response to questioning, stated that he was being sent because he was alleged to have used the "N" word on an earlier occasion. A few of the employees recalled Claimant saying that he disagreed with having to go on his own money and time. One of the employees attempted to break the tension in the room by joking about whether the "N" word meant Nebraska, and Claimant became annoyed and said that it was "Nigger" and that the word was in the dictionary

and he could use it if he wanted to. Claimant admitted using that word, but not directing it at anyone or meaning it to be offensive or demeaning, only by way of explanation in response to his co-workers' questioning. Claimant testified that he was coaxed or teased into say the "N" word, didn't feel it was wrong because it was not meant in a derogatory way, but felt bad about it. He admitted that one of his co-workers later called to tell him that he was offended by it. Claimant stated that he was working with a psychologist he was referred to through EAP on anger management issues, and had not yet had the chance to participate in the EEO training program which he thought might be helpful.

Carrier contends that there was substantial evidence presented in the investigation, including Claimant's own admission, that he used a racial slur, which is clearly inappropriate language in violation of Rule 1.6 (7) and Carrier's EEO Policy, and that he did so shortly after he had entered into a LRA for similar conduct and was in probationary status. It asserts that it could have reverted Claimant to dismissed status under paragraph 7 of the LRA, but afforded him a full and fair hearing, which establishes beyond question that Claimant still does not understand why his statement was offensive or demeaning, and is not deserving of having the dismissal penalty, appropriate under its UPGRADE policy, mitigated by the circumstances surrounding his misconduct.

The Organization argues that, although the fact that Claimant said the "N" word is not disputed, there are mitigating factors in this case that show the penalty assessed is too harsh. It relies on evidence of the context within which the conversation arose, Claimant's co-workers' involvement in it, his attempted factual answers to their questions, the fact that his remark was not directed toward anyone or meant in a derogatory or demeaning way, as well as Claimant's compliance with the EAP ongoing treatment recommendations and the fact that he was removed from service prior to receiving the EEO training provided for by his LRA, which could have helped guide his future conduct. The Organization maintains that the purpose of

discipline is to rehabilitate, and Claimant was not given a chance to have his conduct corrected before being removed from service.

A careful review of the record convinces the Board that Carrier met its burden of establishing by substantial evidence that Claimant made a racial slur on January 18, 2013, and that such conduct violates both Rule 1.6 (7) Discourteous, and Carrier's EEO Policy prohibiting offensive remarks including "demeaning epithet or remark referring to race.." The fact that he did so in the context of a conversation with co-workers in the crew room, and was not directing his remark to any specific person or intending it to be demeaning or derogatory is insufficient to excuse its use under any circumstances. Neither is the Board convinced that Claimant's situation is one that lends itself to an argument that further mitigation is appropriate or that the penalty is too harsh or unwarranted. Claimant had been removed a few months earlier for similar conduct, given the opportunity to save his job and get help with reforming his actions, and was placed on probation under a LRA that prohibited such conduct. Despite these facts, only a few weeks passed before Claimant found himself using the same racial slur in communicating with his co-workers. Even if Claimant had yet to receive the one day EEO training contemplated by his LRA, he had to admit having knowledge that such language was deemed to be inappropriate by Carrier. It had led to his prior dismissal. Under the circumstances of this case, the Board cannot find that Carrier's imposition of a Level 5 dismissal penalty, in compliance with its UPGRADE policy, is excessive or arbitrary.

AWARD:

The claim is denied.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

K. N. Novak

K. N. Novak
Carrier Member

Andrew Mulford

Andrew Mulford
Employee Member

Dated: 10/3/14

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