

PUBLIC LAW BOARD 7660

PARTIES)	UNION PACIFIC RAILROAD COMPANY
)	[FORMER SOUTHERN PACIFIC
)	TRANSPORTATION COMPANY
)	(WESTERN LINES)]
)	
TO)	VS.
)	
DISPUTE)	BROTHERHOOD OF MAINTENANCE
)	OF WAYEMPLOYES DIVISION – IBT
)	RAIL CONFERENCE

Public Law Board consisted of the regular members and, in addition, Referee Meeta A. Bass when this Award was rendered.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) imposed upon Mr. J. Miranda, Sr., by letter dated January 4, 2021, in connection with allegations that he failed to comply with the EEO Policy – Dismissal was excessive, arbitrary, disparate; imposed without due process; without the Carrier having met its burden of proof and in violation of the Agreement (System File AE-2145S-101/1752910 SPW).

2. As a consequence of the violation referred to in Part 1 above, Claimant J. Miranda, Sr. shall now:

‘*** be immediately returned to work, be given all the opportunity for coaching and training in the EEO Policy, have his benefits and seniority restored and unimpaired, and be fully compensated for all losses, including all backpay for time lost, and discipline be stricken from his record.

In short, we herein make the demand that the Claimant be made “whole” for any and all losses related to his dismissal from service. ***’ (Employees’ Exhibit ‘A-2’).”

FINDINGS:

The Board, upon the whole record and all the evidence, finds that:

The Carrier or Carriers and the Employee or Employees involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act, as

approved on June 21, 1934. The Board has jurisdiction over the dispute involved herein. Parties to said dispute were given due notice of hearing thereon.

The Carrier hired the Claimant on January 21, 2013. On November 18, 2020, the Claimant was assigned as a Gang Truck driver; the Claimant and his Foreman worked as a two-person crew. The Claimant informed his Foreman that he could not work overtime. Towards the end of the workday, the Claimant and his Foreman had to gauge some switches. The Claimant left after his shift but before the tasks were concluded. The Manager arrived at the worksite and observed the Foreman still rolling up hoses. The Manager approached the Foreman to question the Claimant's whereabouts; the Foreman explained the Claimant had left at the end of his shift. The Manager contacted the Claimant.

On Sunday, November 22, 2020, between 6:45pm and 8:01pm, the Claimant and the Foreman had an off-duty text exchange about work-related issues. The Claimant texted his Foreman and wrote, "hey Alex, hope ya had a great weekend anyways me and Rubio had a conversation the other day he bitch at me cuz I left hydraulic hoses out while ya was on the truck n I was putting shit away if things are not working out tomorrow between me and ya lets talk about it tomorrow with him have a good nite." Without a response from his Foreman, the Claimant sent another text at 7:28 pm which read, "I aint no bodys nigger me and ya it's a stupid 2 man gang nothing fancy or big lets just work together 50/50." At 8:01 pm the Foreman responded, "You saying I don't work. That I let you do it yourself." The Foreman showed the text messages to the Manager. There was no evidence the two were of African American decent.

The Carrier issued a Notice of Investigation letter dated November 30, 2020, stating: "...to develop the facts and determine your responsibility, if any, in connection with the below charged. On 11/22/2020 at the location of Phoenix, Arizona, while employed as a Gang Truck Driver, you allegedly sent a derogatory text message to the gang foreman that included a racial epithet directed at yourself. This is a possible violation of the following rule(s) and/or policy: EEO Policy."

The investigation hearing occurred on December 16, 2020. Following the investigation hearing, the Claimant received a discipline notice dated January 4, 2021, finding a violation of EEO Policy. The Carrier dismissed the Claimant. The Organization filed a claim by letter dated March 1, 2021, and the Carrier denied the same on April 26, 2021. The Organization advanced the appeal by letter dated June 23, 2021, and the Carrier denied the same by letter dated August 12, 2021. The parties held a formal conference with no resolution of the claim on February 24, 2022. The Organization submitted a post-conference letter on February 25, 2022, requesting the Carrier re-

evaluate their position or the matter would be progressed to the National Railroad Adjustment Board. There was no change in the Carrier's position. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property and considered evidence related to the following to make its determination of this claim:

- 1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?
- 2) If so, did the Carrier establish by substantial evidence the Claimant was culpable of the charged misconduct or dereliction of duty?
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?

The Carrier contends the Claimant was afforded all due process rights. The Carrier asserts the Claimant admitted to using the N-word. The Carrier argues that using the N-word clearly violates the Carrier's EEO Policy. According to its policy, such violations can result in dismissal upon the first offense. The Carrier points out that the Organization's defense of the lack of awareness of the EEO policy and training is disingenuous. The evidence establishes the Claimant was trained on the EEO Policy on three separate occasions. Due to the egregious nature of the misconduct, dismissal was a justifiable form of discipline in this case.

The Organization contends the Claimant was denied a fair hearing due to the biased involvement of the reviewing officer, refusal to provide an EEO guide as to the appropriate remedial action for specific types of EEO violations, and a lack of adherence to due process. The Organization claims the Carrier failed to meet its burden of proof. The Organization argues the record established the Claimant did not comprehend the possible or probable disciplinary consequence of dismissal for utilizing the language contained within the subject text message. The Claimant testified that he used the subject language in response to another text message identifying him in a like manner. The Organization requests this Board to return the Claimant to work and sustain the claim. At the time of his removal, the Claimant had eight years of service with no record of discipline.

After carefully reviewing the transcript and the correspondence exchanged by the parties in connection with this dispute during the handling of the property and the submission and arguments of the advocates, the Board has concluded that no prejudicial procedural errors exist in the record. The evidence, including the admission of guilt, substantiates the Claimant made an offensive racial remark in violation of the Carrier's EEO policy. The paramount issue in this claim is determining whether the Carrier presented substantial evidence to support the dismissal.

The EEO policy effective December 5, 2000, and revised April 14, 2020, is incorporated herein as if fully rewritten. Although the Carrier's EEO Policy espouses zero tolerance for such misconduct, it also delineates various disciplinary measures, including dismissal. The record lacks evidence on how the Carrier imposes the range of disciplinary measures for a reviewing tribunal to determine the reasonableness of its action. However, in light of the Claimant's history, the gravity of the offense, and the overall circumstances herein, the Board finds the evidence does not substantiate termination. The Claimant's choice of words, "I ain't nobody's nigger me and ya it's a stupid 2 man gang nothing fancy or big lets just work together 50/50," in a text message to a personal cellphone while off-duty, though derogatory, must be assessed in a broader context. The phrase, although offensive, was a reaction to perceived mistreatment or unfair demands from his Foreman rather than a deliberate act of racial discrimination. The Foreman also explained that he similarly interpreted the text message.

Therefore, this Board finds the dismissal penalty not commensurate with the nature of this offense, given the totality of the circumstances and the Claimant's record. The Board finds reinstatement with sensitivity training and no backpay is more commensurate with the offense. It conveys that discriminatory language will not be tolerated while allowing for the Claimant's rehabilitation and corrective action.

AWARD

Claim sustained in part. The Claimant should be reinstated with seniority rights and benefits with no backpay. The Carrier should record this discipline as a Map Training 1. The Carrier is directed to enroll the Claimant in sensitivity training, diversity and inclusion workshops, or other forms of education to help the Claimant understand the impact of his words and actions.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

/s/ Meeta A. Bass

Meeta A. Bass
Neutral Chairperson

Jennifer McNeil

Jennifer McNeil
Carrier Member

Dated: April 17, 2024

John Schlismann

John Schlismann
Organization Member

Dated April 17, 2024