

PUBLIC LAW BOARD 7660

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| 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. Mendez, by letter dated May 25, 2021, in connection with allegations that he failed to comply with the EEO Policy – Dismissal; Rule 1.6: Conduct – Insubordinate; and Rule 1.6 Conduct – Quarrelsome; and 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.’ 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 M-2145S-502/ 1760234 SPW).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant J. Mendez shall now have the discipline of dismissal ‘... expunged from his personal record. Claimant be immediately reinstated to service and compensated for all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wage earnings. Claimant be compensated for any and all losses related to the loss of fringe**

benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Dental benefits for

himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters. Claimant is to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land, and any other personal items that may be garnished from him for lack of income related to this dismissal.' (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 issued a Notice of Investigation letter dated April 5, 2021, stating: "...to develop the facts and determine your responsibility, if any, in connection with the below charged ... On 04/01/2021, at the location of 810 Eddy Dr. Alamogordo, MN, near Milepost 883.0 Carrizozo Subdivision, at approximately 07:15 hours while employed as a FRMN Track, you allegedly Used profane and sexually charged language when speaking with Manager. Additionally, you were allegedly disrespectful and insubordinate when instructed by your Manager to return to the office. This is a possible violation of the following rules(s) and/or policy: EEO Dismissal, 1.6 Conduct-Insubordinate, 1.6 Conduct Quarrelsome..."

Following a postponement, the investigation hearing occurred on May 13, 2021. Following the investigation hearing, the Claimant received a discipline notice dated May 25, 2021, finding a violation of the EEO Policy, Rule 1.6 Conduct Quarrelsome, Rule 1.6 Conduct-Insubordinate, and Rule 1.6 Conduct-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. These rules are incorporated herein as if fully rewritten. The Carrier dismissed the Claimant.

The Organization filed a claim by letter dated July 13, 2021, and the Carrier denied the same on September 10, 2021. The Organization advanced the appeal by letter dated November 9, 2021, and the Carrier denied the same by letter dated January 3, 2022. The parties held a formal conference with no resolution of the claim on January 31, 2022. The Organization submitted a post-conference letter on April 27, 2022, and August 23, 2022, requesting the Carrier re-evaluate their position. The Carrier's position remained the same as stated in its September 12, 2022 letter. 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 evidence established the Claimant exhibited quarrelsome and insubordinate behavior toward his Manager in violation of Rule 1.6, resulting in dismissal. The Carrier argues substantial evidence supports the charges, the hearing was fair, and the dismissal was warranted and commensurate with the severity of the offenses. The Carrier asks this Board to deny the claim, and if backpay is awarded, a net wage loss is the appropriate measure for compensation.

The Organization contends the Carrier did not prove a violation of the EEO policy and Rule 1.6 Conduct. The Organization argues the testimony established the instructions were not apparent in a chaotic situation, creating a dispute of fact. The Organization asserts the charge can only be sustained with a clear order. The Organization also contends the Claimant's statements should be considered shop talk, which is common in the workplace. Lastly, the Organization argues the imposed dismissal was arbitrary and excessive due to mitigating factors. The Claimant's lack of prior warnings suggests a failure in progressive discipline.

The Board has determined no significant procedural errors are evident in the record. Additionally, the Board notes that while the Manager instructed individuals attending the job briefing to submit written statements under the threat of potential job loss, there was no indication that the Manager instructed employees to provide false information.

The Board recognizes the Claimant's failure to follow a directive as violating Rule 1.6 Insubordination. However, upon review, it is evident the directive lacked clarity regarding the potential disciplinary consequences of non-compliance. While the Claimant's failure is noted, it cannot definitively be labeled as insubordination to warrant summary dismissal due to the absence of explicit clarity regarding consequences. Referring to a manager using a homophobic slur like "faggot" is considered a violation of Equal Employment Opportunity (EEO) policies, and its context determines the penalty.

The Board further finds the behavior exhibited by the Claimant falls within the realm of quarrelsome and insubordinate conduct towards his Manager. The statements made directly to the Manager, such as "Shut your mouth and be a good supervisor," along with the derogatory remarks "you're a faggot" and "shitty manager," uttered during a professional briefing in the presence of colleagues, significantly undermine the authority and respect due to the Manager. The evidence established these remarks were not mere expressions of dissatisfaction but intentional acts aimed at challenging the managerial competence of his Manager. By openly challenging the managerial skills of the supervisor in front of peers in such a manner, the Claimant has demonstrated a blatant disregard for the chain of command and the hierarchical structure of the workplace, and the Carrier has caused the dismissal.

This Board finds the Claimant was quarrelsome and insubordinate to his Manager in violation of Rule 1.6, and this violation of Rule 1.6 supports the dismissal. The dismissal penalty was not arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.

/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**