

PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
DIVISION – IBT RAIL CONFERENCE)
and) Case No. 240
UNION PACIFIC RAILROAD COMPANY)

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) imposed upon Mr. J. Sawvell, Jr., by letter dated December 6, 2021, in connection with allegations that he failed to comply with Rule 1.6: Conduct – Discourteous; SSI Item 10-1 – Union Pacific Railroad Policies; 'The How Matters' Policy; 'Equal Employment Opportunity/Affirmative Action and Related Policy Directives'; and additionally, Rule 1.6 Conduct which reads '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.' (Employees' Exhibit 'A-1') was excessive, arbitrary, disparate; without the Carrier having met its burden of proof; and in violation of the Agreement (System File B-2148U-210/1768108 UPS)
2. As a consequence on the violation referred to in Part 1 above, Claimant J. Sawvell, Jr. shall now be returned to service and '... be made whole by compensating him for all wage and benefit loss suffered by him for his removal from service, any and all expenses incurred or lost as a result, and the alleged charge(s) be expunged from his personal record. Claimant must be made whole for any and all loss of Railroad Retirement month credit and any other loss.' (Employees' Exhibit 'A-2')."

FINDINGS

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employer within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction of the dispute herein, and that the parties to said dispute were given due notice of hearing in the matter and participated therein.

J. R. Sawvell Jr. (hereinafter the Claimant), a System Assistant Foreman, was charged by letter dated November 3, 2021, stating that on September 28, 2021, he allegedly "made offensive and inappropriate racial comments" in "possible violation" of the following rules: 1.6 Conduct –

Discourteous, SSI Item 10-1 Union Pacific Railroad Policies, 'The How Matters' Policy, the Equal Employment Opportunity/Affirmative Action and Related Policy Directives. According to the evidence about 8:30 or 9:00 a.m. on September 28, 2021, the Manager/Track Programs overheard Claimant on his cell phone say, "I guess we're gonna have to do everything" because the Manager "is sending all those guys home." The Manager told the Claimant, "That's not what's going on. We have a plan, so I'd appreciate it if you would not say that." The Claimant responded, "You only got three cars in the parking lot. What do you guys do, cram the car like a bunch of Mexicans?" The Manager asked, "What did you say?" The Claimant immediately apologized and said that he was sorry. In further conversation with the Manager, in which the Manager informed the Claimant that his (the Manager's) wife was Mexican, the Claimant repeated his apology. The Claimant at some point stuck out his hand and again said that he was sorry. The Manager shook the Claimant's hand in return. The Manager reported the incident to the EEO Department on September 30, 2021, on the EEO hotline.

The Claimant's next workday was October 5, 2021. In a conversation with his Manager, the Charging Manager herein, he told the Manager what had happened on September 28 between him and the Manager/Track Programs. The Manager told him that he was aware of the incident, that he talked to the Manager/Track Programs, who told him what had happened. The Manager said to the Claimant, "He said you apologized so I wouldn't worry about it. Everything should be fine." The following November 2nd, the Manager informed the Claimant that he was being taken out of service because of the September 28th incident.

In a prior incident Claimant admitted that on May 20, 2020, he called a machine operator a "f_____g retard" and that he had also called him this at least five times over the preceding couple of months. In a letter from the Carrier dated May 22, 2020, Claimant was informed that his conduct was a violation of the EEO Policy and that "[u]nder the MAPS Policy, this violation is a Coaching event. Based upon your current status, if you are found to be in violation of this alleged charge, Training 1 may result." In connection with the charge, the Claimant signed an Employee Waiver in which he declared, "I, John Sawvell Jr, hereby waive my right to a hearing pursuant to the controlling collective bargaining agreement, accept responsibility in connection with the charges set forth above, and accept the remedial training program required by the Carrier."

The EEO Department assigned an Analyst, Corporate Investigations to investigate the September 28, 2021, incident. She interviewed the Manager/Track Programs, who reported the incident, and a machine operator, who was present during the incident. She attempted to interview Claimant, but did not receive a return call from him after leaving voicemails for him on October 22, and 25, 2021, asking him to communicate with her. The Corporate Investigator testified that she communicates with the person who reports the case, "[a]nd then we call witnesses and the reported party, and we come to a determination as a team." She added that "we are experts in EEO and other Company policies" and further stated, "And we are the final say of whether it is or it's not a violation." A Corporate Investigator, she testified, also substantiated that the May, 2020, incident for which the Claimant signed a waiver was an EEO Policy violation. In the present case, the Charging Manager was notified by EEO on October 29, 2021, that the charge against Claimant had been substantiated.

The Carrier contends that the evidence shows that Claimant violated its EEO Policy and the other rules or policies named in the charge. The applicable evidential standard in discipline cases, the Carrier argues, is substantial evidence, which, it notes, the United States Supreme Court has defined as “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” The evidence provided at the hearing, the Carrier asserts, met this standard, especially considering Claimant’s clear admission of guilt. Taking into account the egregious nature of the misconduct, the fact that Claimant also violated the EEO Policy one year earlier, and that he received remedial training at the time, the Carrier argues, dismissal was appropriate discipline for his conduct in accordance with its MAPS Policy. The only defense provided by the Claimant, the Carrier states, was that he didn’t mean for his racial comment to be offensive. In light of its zero-tolerance for such behavior in the workplace, the clear evidence of Claimant’s guilt, and the fact that this was his second violation, the Carrier maintains, Claimant’s defense was inadequate, and the dismissal must be upheld. The Carrier cites and quotes from several awards which, it contends, support its position that dismissal was warranted. It argues that there is no merit to the Organization’s contention that the Carrier committed a procedural time limit violation by scheduling the investigative hearing to be held more than 30 days after it first became aware of Claimant’s alleged improper conduct that resulted in the present charge. The Carrier requests the Board to deny the Organization’s claim.

The Organization first raises the procedural argument that the hearing in this matter on November 16, 2021, was held 49 days from the Carrier’s first knowledge of the September 28, 2021, incident and 42 days from the Charging Officer’s October 5, 2021, knowledge, in violation of Rule 48 of the Agreement, which provides, in pertinent part, “Formal hearing, under this rule, will be held within thirty (30) calendar days from date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated, except as provided hereinafter.” Accordingly, the Organization contends, the disciplinary action must be set aside and the claim sustained in full. A second procedural violation on the Carrier’s part, the Organization contends, was entering into evidence the Claimant’s prior disciplinary record. Prior discipline, the Organization asserts, may not be used to determine relative guilt or innocence of charges. In addition, the Organization cites the testimony of the Corporate Investigator of the present charge who stated, “We substantiate it as we are experts in EEO and other Company policies . . . and . . . we are the final say of whether it is or it’s not a violation.” This testimony shows, the Organization argues, that the Claimant’s guilt was predetermined and that he was deprived of a fair and impartial hearing.

The Organization argues that the Carrier did not meet its burden of proof to show that the alleged conduct rose to the level of a dismissible offense under Carrier policy. The fact that Claimant signed a waiver with respect to the May, 2020, incident, the Organization contends, provided no basis for informing him that use of insensitive language as occurred in this case would result in bypassing a normal step in the Carrier’s disciplinary process and assessing a penalty of dismissal for his conduct. The terms of the EEO Policy itself, the Organization asserts, provides for “appropriate” discipline for violation of its terms. The facts that Claimant is a 20-year employee, that he immediately recognized his mistake and apologized to the Manager with whom he had used the offensive term and who shook

his hand in seeming acceptance of his apology, and that the Claimant's own Manager, when informed by Claimant of the incident, responded with reassuring words, the Organization urges, demonstrate the disproportionate level of discipline imposed for the offense in question. The Organization requests the Board to overturn the discipline and allow the claim.

In PLB No. 7633, Award No. 206, involving these same parties and substantially identical contract language concerning the time limit for holding an investigative hearing, the Organization contended that the charge of violation of the Carrier's EEO Policy and Rule 1.6: Conduct – Discourteous should be denied because the hearing was held more than 30 days after the Carrier's knowledge of the alleged violation. The incident was reported to the Carrier's office on February 10, 2022. On April 18, 2022, the claimant in that case was notified that EEO had substantiated the claim. Hearing was held on May 5, 2022, and on May 17, 2022, claimant was notified of his dismissal from service. The Organization contended that the Carrier did not hold the hearing in a timely manner and that the claim should therefore be sustained. PLB No. 7633 rejected the Organization's argument, stating, "The Carrier may be permitted a period of time to do an internal investigation by the department charged with administering the EEO policy in order to determine whether the policy has likely been violated, rather than bringing charges immediately against every employee about whom such a complaint is made."

This Board also finds no violation. The Carrier's EEO Policy is a response to civil rights legislation by the United States government and the various states. The Policy represents the Carrier's effort to distill the contents of several different civil rights laws applicable to it and its employees into a single document. Violations of civil rights laws in the workplace can lead to suits against the Carrier exposing it potentially to substantial liability and awards of attorneys' fees. The civil rights laws, no less than most other laws, require a degree of expertise to interpret and apply them. It therefore makes sense that the Carrier would want to have a department of trained experts in civil rights law review every complaint of an EEO violation to make sure that it is handled in accordance with law as a means of risk avoidance. According to the uncontroverted testimony of the Corporate Investigator, the EEO department of the Carrier is composed of such experts. This Board finds no violation of Rule 48 in the fact that the Carrier commenced counting the 30-day period for beginning the investigative hearing in this case from the date the Charging Officer was informed that the EEO complaint was substantiated by the EEO department. The evidence does not indicate that the EEO department took an inordinately long time in conducting its investigation or that it delayed informing appropriate management of the results of its investigation. In fact the Claimant himself may have prolonged the period of the investigation because it is not denied in the record that he failed to respond to two separate requests of him by the Corporate Investigator that he communicate with her in connection with her investigation of the complaint against him.

This finding is not inconsistent with this Board's decision in Award No. 184. The Board there noted, "The Carrier has not shown that in order for the time limits of Rule 48(a) to commence, knowledge must be brought to the attention of a particular level of supervisor." The prior decision thus made specific allowance for the possibility of an exception to the usual method of commencing the counting of the 30 day period for the start of the investigative hearing. Nor does the Carrier's requirement of substantiation of a violation by the EEO department before it will pursue a charge of an

EEO policy violation mean that there has been a predetermination of guilt. As stated in PLB No. 7633, Award No. 206, substantiation of a complaint by the EEO department indicates that the Carrier has concluded that “the policy has likely” been violated. That is no different than where an employee is charged with a rules violation such as, for example, fouling a track without authorization. The fact that a manager charges an employee with such a violation means that he or she believes that the employee likely violated the applicable rule. In neither case, however, would the reviewing officer be foreclosed from exonerating the employee, depending on the evidence presented at the investigative hearing.

With regard to the merits of the present case, in the Board’s opinion the Claimant’s remark to the Manager/Track Programs, “What do you guys do, cram the car like a bunch of Mexicans?,” came within the following provisions of the EEO Policy:

PROHIBITION OF OFFENSIVE BEHAVIOR & REMARKS

Union Pacific is committed to providing a work environment free from offensive behavior and statements directed toward race, sex, or any other protected status. This policy prohibits such offensive behavior and remarks in the presence of other employees, contractors, interns, volunteers, customers, visitors, previously unidentified third parties or others whom employees may come into contact while working. * * *

The types of prohibited behavior include, but are not limited to, the following:

1. Any offensive or demeaning epithet or remark referring to race, sex, or other protected status, including that which is intended as humor;

* * *

The remark in question was demeaning of Mexicans and offensive to the Manager to whom the Claimant was speaking and whose wife is Mexican. Aside from any other basis for refraining from such remarks, Claimant had been trained in the requirements of the EEO Policy after his first violation of that policy and should have been careful not to make any ethnic or racial slurs.

The fact that Claimant violated the EEO Policy, however, does not necessarily mean that dismissal was an appropriate penalty for his violation. Carrier acknowledged that the standards for review in discipline cases include not only determinations regarding the fairness of the investigation and proof of the employee’s culpability but also “was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in [the] facts and circumstances of the particular case?” In the present case the Organization contends that the penalty assessed was not appropriate but, instead, unreasonably harsh in the circumstances.

In determining the degree of discipline of the Claimant for his first EEO Policy violation, the Carrier assessed the penalty in accordance with the terms of its MAPS Policy. This is clear not only

from the fact that the penalty assessed was the same as set forth in the Process Matrix in Appendix A at page 6 of MAPS for a first policy violation, namely, Training 1, but also from a letter dated May 22, 2020, from the Claimant's Manager to him in connection with his first EEO Policy violation, in which the Manager stated, "Under the MAPS policy, this violation is a Coaching event. Based upon your current status, if you are found to be in violation of this alleged charge, Training 1 may result." The Carrier, however, deviated from the MAPS Matrix when, instead of assessing Training 2 as the penalty or consequence for Claimant's September 28, 2021, violation, it penalized him with dismissal. The Organization argues that skipping a step in the disciplinary process was not warranted in the circumstances of this case.

APPENDIX E: Rules Matrix of MAPS, under the heading Dismissal Events, includes the following statement:

Violations of Company policies including the Policy on Ethics and Business Conduct which incorporates other policies by reference including, but not limited to the EEO Policy, can result in discipline including dismissal from employment.

The fact the verbal form used is "can result" and not "will result" means that there are times when a violation of the EEO Policy will **not** result in dismissal. What determines the level of discipline? The answer, the Board believes, is found in **Appendix B: MAPS Frequently Asked Questions**, item **21)** under the heading Rule and Policy Violation Handling:

21) Does a violation of a Company policy (see SSI 101) result in a dismissal charge?
Charges issued for violation of Company policies are governed under the terms and conditions of those policies. Depending on the circumstances surrounding a violation, the employee may be charged with dismissal or some lesser charge, such as failure to comply.

The foregoing provision makes clear that discipline may not be arbitrary but must be fitting to the circumstances surrounding the violation. To this Board that means that the level of seriousness of the violation must be the governing consideration in imposing discipline.

The EEO Policy also provides guidance on the question of the degree of discipline to be imposed in the event of a violation of the policy:

ZERO TOLERANCE

Union Pacific does not tolerate any type of discrimination, harassment, or offensive behavior based on a protected status. All proven violation of Union Pacific's policies against discrimination, harassment, and offensive behavior will result in appropriate discipline of the employee, up to and including termination. Graffiti or other anonymous communication in violation of this policy are particularly serious, and absent very compelling extenuating circumstances can result in dismissal on the first offense.

The second sentence of the paragraph on zero tolerance requires that any discipline under the policy be “appropriate” and denotes that it may be termination or something less than termination (“up to and including termination.”) The third and final sentence indicates that termination for a first offense requires that the violation be “particularly serious.” Here again the level of seriousness of the violation is the controlling element in determining what discipline is appropriate.

In this Board’s opinion the same standard should apply in determining whether the Carrier may skip the normal progression of discipline provided for under the MAPS. Section 3 of MAPS, **RULE AND POLICY VIOLATIONS**, Subsection 3.4 **Progressive Handling for Multiple Violations**, states, “An incident involving a potential violation of a rule or policy will be managed as described in Appendix A. . . .” Appendix A of MAPS contains a diagram called **MAPS Process Matrix** that depicts how discipline is to be applied for rules and policy violations. It shows Training 1 and Training 2 as the **ACTION** to be taken for the first two rule or policy violations and Dismiss as the **ACTION** for a third rule or policy violation. The Matrix also provides Dismiss as the **ACTION** to be taken for the first violation of certain rules and policies, which can include the EEO Policy.

In accordance with this Board’s discussion above regarding item 21) of MAPS Frequently Asked Questions and the statement about zero tolerance in the EEO Policy, the degree of seriousness of the violation should determine whether, in administering discipline, the Carrier is permitted to skip a step in the normal disciplinary progression. This conclusion is also supported by the following provision in Section 1: General Guidelines of the MAPS Policy:

The objective of this Policy is to provide a meaningful and effective process to address rule and policy violations in a consistent and fair manner. Certain rule or policy violations and/or patterns of behavior may be so serious that suspension or dismissal from service may result.

Plainly, in this Board’s opinion, the incident in this case did not rise to the level of seriousness that would make it appropriate for the Carrier to skip the Training 2 step of the disciplinary progression set forth in the Process Matrix in Appendix A of the MAPS Policy. While the statement suggested ridicule of Mexican people for allegedly having a habit of crowding more people into a car than it was designed to hold, the remark was not directed at the Claimant’s interlocutor or anyone else within earshot. The remark was made only once and not repeated. When the Manager with whom the Claimant was speaking indicated he found the remark objectionable, the Claimant immediately apologized. The Claimant then did everything he could to assuage the manager’s feelings and succeeded in getting the Manager to shake hands with him over the incident. The record demonstrates remorse on the Claimant’s part for uttering the offensive remark. These facts do not amount to a serious violation of the EEO Policy.

Further evidence that, when all of the circumstances of the incident are taken into account, it may not reasonably be characterized as a serious violation of the EEO Policy is the response of the Claimant’s immediate Manager when informed by the Claimant of the incident. The Manager had already learned of the incident from the Manager/Track Programs himself. The Claimant’s Manager reassured the Claimant, “He said you apologized so I wouldn’t worry about it. Everything should be

fine.” In fact the actions of the Manager/Track Programs who reported the incident to the EEO department suggest that he himself was uncertain whether the incident should be reported. Thus the EEO Policy states, “Any person who believes that he or she is being subjected to behavior or actions of this nature, or any person aware of such prohibited conduct, has an obligation to report the matter at once. Employees MUST come forward when violations occur” Yet the Manager/Track Programs waited two full days to report the incident. The incident occurred at 8:30 or 9:00 a.m. on September 28, 2021, and he did not report it until sometime on September 30, 2021. He offered no explanation for the delay.

The Board finds that the record in this case fails to establish by substantial evidence that dismissal was appropriate discipline for Claimant’s September 28, 2021, violation of the Carrier’s EEO Policy. His discipline shall be reduced to Training 2 status with a retention period of 24 months, and he shall promptly be offered reinstatement to his former position with the Carrier without loss of seniority for his time off work and made whole for lost wages and benefits in accordance with this Board’s decision in PLB No. 7660, Award No. 82. He shall be given appropriate remedial training relevant to his EEO violation and also any training necessary for the proper performance of his employment duties with Carrier considering the long period of time that he has not performed such work.

A W A R D

Claim sustained in part. The Carrier is directed to Comply with this Award within 30 days of the date that any two members of the Board affix their signature to the Award.

<u>/s/ Sinclair Kossoff</u>	<u>9/15/2025</u>
Sinclair Kossoff, Neutral Member	Date

<u>Jennifer McNeil</u>	<u>October 6, 2025</u>
Jennifer McNeil, Carrier Member	Date

<u></u>	<u>October 6, 2025</u>
John Schlismann, Organization Member	Date