

PUBLIC LAW BOARD NO. 7660
CASE NO. 31

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY
[former Southern Pacific Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s dismissal of Claimant L. Madrigal by letter dated April 15, 2014, for alleged violation of GCOR Rule 1.6, Conduct (7) Discourteous, the Violence and Abusive Behavior in the Workplace Policy and the UPRR Equal Employment Opportunity/Affirmative Action and Related Policy Directives was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File T-1445S-702/1606150 SPW).

2. As a consequence of the violation referred to in Part 1 above, Claimant L. Madrigal shall be made whole by compensating him for all wage and benefit loss, as well as other reasonably foreseeable losses (loss of harm to housing, property, land, credit score, etc.) suffered as a consequence of the Carrier’s imposition of a Level 5 termination, as well as having the alleged charge(s) expunged from his personal record.”

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, an 18 year employee, was working as an Assistant Foreman in on-line Gang 7826 in and around the Los Angeles, California area. A Notice of Investigation dated March 20, 2014 was issued on charges that, on numerous occasions, he allegedly sexually harassed subcontract cleaning employees in and around the Engineering building in West Cotton, California. The April 15, 2014 Notice of Discipline finds Claimant guilty of the charges in violation of Rule 1.6 Conduct (7) Discourteous, the Violence and Abusive Behavior in the Workplace Policy, and the Equal Employment Opportunity/Affirmative Action and Related Policy Directives, and assesses him a Level 5 permanent dismissal. The instant appeal resulted.

At the commencement of the Investigation on April 3, 2014, the Organization objected to two things - the defective notice with lack of specificity and dates, and the *ex parte* discussion that occurred between the Hearing Officer and all Carrier witnesses in the hearing room for at least the 20 minutes prior to the hearing, from which the Organization was specifically excluded and prevented from entering. These “procedural defects,” asserted to be “fatal flaws” were repeated throughout the investigation and in the Organization’s subsequent claim and appeals.

During the Investigation, the Carrier presented seven (7) witnesses, including the Charging Officer, two contract cleaners working in the Engineering Building in the West Cotton, California yard who were the alleged targets of Claimant’s harassment (Pamela and Marcela), their on-site supervisor, the President of their cleaning company, and two Carrier Manager’s who were directed to investigate by obtaining written statements from

the cleaners. These statements were obtained on March 19, 2014, and Pamela wrote and testified in English, while Marcela wrote and testified in Spanish through a translator.

The thrust of Pamela's evidence was that she knew Claimant over the 4 years she worked at this location, when he came in and out, and he constantly complained about the state of the showers, in a "not nice" manner. She explained that the showers were old and that they did their best to clean them, but his complaint resulted in her boss coming out and checking the whole building and her getting in trouble. Pamela stated that her boss understood that the shower could not be cleaned any better and that although Claimant was courteous, he was unhappy with the state of the shower. She recalled an incident occurring when Claimant came out of nowhere while she was mopping and kicked over her "wet floor" sign stating "that's how we do it in the hood" and chuckled. She did not recall when this happened, but placed it at 7 or 8 months ago. Pamela said that Claimant asked if she was married and invited her out to dinner with him, and seemed to be sneaking around and interfering with her work. She recalled him cursing and calling Marcela names, and her telling Marcela and warning her to be careful and aware of Claimant's presence because he was angry about the shower and sounded aggressive. Pamela admitted not reporting any of these things to her superiors, but understood that Marcela did.

Marcela's evidence was that she was cleaning the restroom and Claimant came in to take a shower, she said why not wait till she was done, but he showered and opened the curtain and began to towel off his naked body and she left. She recalled that about three weeks later Claimant came in and showered while she was cleaning, came out from the back fully clothed, started to shave his beard, and commented that when he had a woman in bed he had a lot of strength and could go all night and she was his type of woman. Marcela testified she asked him why he was telling her this and he was quiet. She did not

recall the date, but believed it was after New Year, stating that she first met Claimant in November or December, 2013. Marcela testified that Claimant said he had been divorced for 18 years and wanted to marry her, and she said she was married and wanted no part of it. She stated that he asked her out twice and said that he would not take no for an answer, and that she thought it was a joke but then thought that something was not right. Marcela said that she was scared to do cleaning with Claimant around, and reported it to a supervisor the following day. Marcela admitted that Claimant did not speak Spanish and made his comments in English. She recalled him telling her when he was going to take a shower, her asking him why now, and him responding that he had other things to do including going to dinner. Marcela also recalled Claimant complaining about the shower.

Neither woman recalled when the incidents to which they referred occurred. The cleaning supervisor recalls some comments Marcela and Pamela said Claimant made to them but she told them to ignore him, and reported it to her boss, Elvis. He testified that when he was told that a gentleman was giving them a hard time in the Engineering building, he was informed that the UPRR supervisor was advised, and he figured they would take care of it so he did not make any further report. Manager Castillo testified that when he was working a weekend a few months prior, Marcela came in and said that Claimant made it seem that he was intentionally taking a shower when she was cleaning and approached her making offensive remarks a few times. Castillo called the EEO Hotline, according to procedures, advising that the cleaner felt uncomfortable. He assumed that all was taken care of until his Manager, Charging Officer Krzemien, asked Manager Arreola to take written statements from the ladies, and he was asked to accompany him since he spoke Spanish. Krzemien testified that he believes he was advised of this situation in January.

Claimant denied making any inappropriate statements to the cleaning ladies, denying the truthfulness of their allegations, indicating that he is married, and that his interactions with them had been respectful, but that he did complain about the shower repeatedly, including reporting the fact that they were not cleaned to his supervisor. He noted that he only occasionally was at the West Cotton location, since he worked flagging in different places and had extended periods of medical leave during the 2010-2013 time frame. Claimant stated that he may have come to use the shower once or twice a week when he was around that area, and he would always let them know that he was going to take a shower ahead of time so they would know where he was (and he let another employee know about it as well as a precaution since he didn't speak Spanish) and 99% of the time they said okay. He denied showering and toweling off when Marcela was in the restroom, or making the alleged statement about women in bed, noting that he does not speak Spanish and never made sexually explicit remarks to them. Claimant testified to one time Marcela came into the locker room when he was getting undressed to shower and he told her, he was in there. Thereafter she left.

Claimant recalled approaching the locker room from the back on one occasion and when he opened the front door, it unintentionally knocked over the "wet floor" sign in front, and he apologized and replaced it. He denied doing it on purpose, or making any other comment or asking them out on dates, and noted that when he complained about the state of the shower they would each blame the other for not properly cleaning. Claimant stated that he made polite conversation but that Marcela did ask him a lot of questions about his job, saying he made a lot of money, and he did not feel comfortable around her. He had no idea why these women were making these allegations against him, except for the fact that he complained about their cleaning of the shower to his supervisor. He testified that since he was out on leave a lot and assigned elsewhere for periods of time, (a fact confirmed by his written personnel record), without knowing when these alleged

statements took place he was unable to prove that he was not in the area or further defend against these accusations.

The Carrier argues that there was nothing improper with the Hearing Officer meeting with the witnesses, many of whom were contractor employees who had never been through the investigation process before, and merely explaining the procedure that would be followed and that there could be no reprisals taken against them, and not the substance of their testimony, as he noted on the record. It asserts that the charges were specific enough for Claimant and the Organization to know the allegations that they were defending against, and that, due to the ongoing nature of the conduct, and the women's reluctance to report it for fear of getting into trouble, it is understandably difficult to be more certain about a particular date when something occurred. The Carrier contends that Claimant was afforded full due process rights. It also maintains that there was substantial evidence of Claimant's inappropriate and harassing conduct in violation of the cited Rules and Policies to support the Carrier's conclusion that dismissal was the appropriate Level 5 response under the UPGRADE policy.

The Organization first contends that the claim must be sustained on procedural grounds since the Carrier violated Claimant's Rule 45 right to a fair and impartial hearing and notice of the specific charges against him. It notes that there were no specific dates of the alleged infractions, and none of the witnesses could give any context to the time during which alleged conversations took place. The Organization asserts that since Claimant was not present for substantial periods of time during the employment of the accusers, it was hampered in its ability to defend against the charges by showing that he was not present during the time periods in question. Additionally, it points out that there were no specifics of the form the alleged "sexually harassment" took or the identity of the victims in the charge letter.

The Organization also argues that when it attempted to enter the hearing room about a half hour prior to the start of the investigation, the door was slammed in the face of Vice Chairman Cardwell, who was not permitted to be present while the Hearing Officer met privately with Carrier officers and witnesses, including the alleged complainants. It asserts that this left the impression that the witnesses were being coached, and that the Hearing Officer could not serve in an impartial or nonjudgmental role when the investigation commenced. This objection was immediately voiced on the record, and, although the Hearing Officer attempted to give assurances that only procedural matters were discussed, the Organization avers that it will never know, and that this appearance of impropriety is sufficient to deny Claimant his due process rights and void the resulting discipline.

With respect to the merits, the Organization opines that the record is devoid of substantial evidence that Claimant harassed or engaged in inappropriate behavior with respect to cleaners Pamela and Marcela, and, at best, there is a direct conflict in evidence, preventing the Carrier from being able to meet its burden of proof in this case. It notes that the fact that Marcela could only communicate in Spanish, yet testified to lengthy conversations she had with Claimant, who admittedly did not speak Spanish, calls into question her credibility. The Organization asserts that Claimant's 18 years of service should not be sacrificed in favor of accepting the unconfirmed word of two friends who were upset with having their work criticized by Claimant to their supervisor, and never reported an alleged course of conduct that made them feel uncomfortable while it was occurring.

On the basis of the entire record, the Board concludes that, while we do not normally prefer to resolve a dismissal case without reaching the merits of the charge, this case must be decided on procedural grounds. Initially, we note that we are in agreement

with the Organization that the nature of the charges set forth in the Notice of Investigation - on numerous occasions you allegedly sexually harassed sub contracted cleaning employees ... in and around the Engineering building - does not meet the specificity requirements normally found in charge notices which are to include the who, what, where, and when of the allegations. The purpose of the notice is to give Claimant and the Organization the opportunity to prepare their defense to the charges. See, e.g. Third Division 25039. However, we do understand that the nature of these type of accusations involving a continued course of conduct over a period of time, which have not been previously reported, are more difficult to specify than an individual occurrence at a time certain. There is no question that the content of the allegedly improper statements, comments and actions, which are found in the employee written statements in the Carrier's possession when it drafted the Notice of Investigation and upon which it relied, could have provided more specificity even if the dates were unknown.

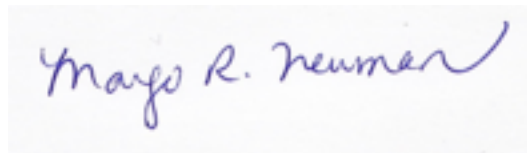
Yet, it is not the lack of specificity alone that gives the Board concern. There is no dispute in this record that, prior to the investigation, the Hearing Officer met with Carrier witnesses separately, outside the presence of the Organization, and specifically denied the Vice Chairman the opportunity to be present to hear the exchange when requested. While the Board has no reasons to doubt the Hearing Officer's explanation on the record that the only matters discussed were procedural in nature and an explanation to the non-employee witnesses of their right to be free from reprisals, we cannot find fault with the Organization's reticence to continue with such a proceeding and its expressed belief that witnesses had been coached and the matter had been prejudged, all to the detriment of Claimant's due process rights to a fair and impartial hearing under Rule 45.

As has been stressed in prior cases, including Third Division Award 41224 and Second Division Award 13426, the Hearing Officer, as a Carrier official, must avoid even

the appearance of partiality or the perception of unfairness, which occurs when *ex parte* meetings are held in secrecy and behind closed doors prior to, or during, an investigation. If procedural familiarization was the purpose of the meeting, there has been no reasonable explanation for why the Organization's representative would be denied access, or why such comments could not have been discussed on the record at the commencement of the investigation. There was no insistence by the Organization that Claimant himself be permitted into the room, if there was any reluctance by potential witnesses to his presence, considering the nature of the allegations. Under these troubling circumstances, the Board is forced to conclude that Claimant was denied his right to a fair and impartial hearing provided in Rule 45, a fatal due process flaw that undermines the validity of the resulting discipline.

AWARD:

The claim is sustained.



Margo R. Newman
Neutral Chairperson

Dated: Sept. 24, 2016



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member