PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION - IBT

and

UNION PACIFIC RAILROAD COMPANY

Case No: 92
Award No: 92

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. T. Lowman, by letter dated December 30, 2016, for alleged violation of its EEO Policy was arbitrary, unsupported, unwarranted and in violation of the Agreement (System File B-1648U-212/1679450 UPS).

2. As a consequence of the Carrier's violation referred to in Part 1 above, Claimant T. Lowman shall ' ... be made whole by compensating him for all wage and benefit loss suffered by him for his employment termination, any and all expenses incurred or lost as a result, and the alleged charge(s) be expunged from his personal record. Claimant must also be made whole for any and all loss of Railroad Retirement month [sic] credit and any other loss. (Employes' Exhibit 'A-1 ')"

FINDINGS:

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Agreement by and between the Brotherhood of Maintenance Employes Division – IBT (hereinafter referred to as the "Organization") and the Union Pacific Railroad Company (hereinafter referred to as the "Carrier"). Upon the whole record, a hearing, and all evidence as developed on the property, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing thereon. The Claimant was ably represented by the Organization.

The Claimant, Terry Lowman, has been employed by the Carrier since September 15, 1975 and held the position of System Tie Bed Scarifier Operator at the time of his dismissal. The Carrier alleged that the Claimant violated its Equal Employment Opportunity ("EEO") Policy on November 21, 2016 when he made a derogatory statement to another employee. A hearing and investigation was conducted on December 13, 2016. On December 30, 2016, the Carrier notified him in writing that he was dismissed from service. The Organization filed its claim on January 17, 2017. The record indicates that the Carrier denied subsequent appeals by the Organization and following a conference on May 5, 2017, upheld its decision to dismiss the Claimant. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. The Board does not find any procedural errors that would nullify a review of the merits of the dispute. Upon review of all evidence adduced during the on-property investigation, the Board here finds that the record contains substantial evidence that the Claimant violated the EEO Policy. We find, however, that the penalty imposed is an abuse of discretion and excessive.

The only reliable testimony regarding the actual events of November 21, 2016 is from the Claimant. He acknowledges he made a statement that was inappropriate to his co-worker Darryl Banks, who is African American. The Claimant explains that he had missed an attempted fist bump from Mr. Banks who said, "Don't leave me hangin". The Claimant, a Caucasian, responded, "I left my rope at home and I wouldn't leave you that way."

A written statement from Darryl Banks confirmed that the exchange with the Claimant was not hostile or derogatory. Mr. Banks did not file the complaint. His written statement and the record as a whole indicate that the two individuals worked together for ten years in a cordial and friendly manner without any previous incident. Mr. Banks indicates that he submitted his statement for the record only because he was directed to by supervision.

The record contains a written statement from Eldridge Glover who overheard the discussion and filed the complaint. Mr. Glover did not testify. His statement does not contain any indication that the Claimant's words were made in a discriminatory, harassing, or derogatory manner. In addition, there are eight written statements from other employees, some of whom were present on November 21, who claimed that they had never heard the Claimant use hostile or offensive language. The record indicates the Claimant immediately apologized and acknowledged that his words did not come out right.

Leniency is reserved to the Carrier except where there is an abuse of discretion or where the penalty imposed is excessive. The circumstances here are not comparable to those where dismissals where upheld when employees have used derogatory, hostile and offensive language. There is no testimony or documentary evidence that supports a conclusion that the Claimant's reply to Mr. Banks was discriminatory.

We also note that the EEO Policy states, in pertinent part, that " . . . offensive conduct that is intended to, or can reasonably be expected to, create a hostile work environment may be considered a violation of this policy, . . ." Nothing in the record provides a basis to conclude that the Claimant intended to offend Mr. Banks. However, the Claimant should have known that if heard by someone else, his statement could reasonably be interpreted as creating a hostile work environment.

We find that the Carrier had sufficient grounds to find a violation of its "zero-tolerance" EEO Policy since the Claimant's testimony confirms that during his conversation with Mr. Banks he made an inappropriate statement, which was overheard by another employee who filed a report. However, the Board also notes that the Claimant has 40 years of service with no prior disciplinary history. Based on Mr. Bank's written statement and the record in its entirety, we find the Carrier's decision to dismiss the Claimant to be arbitrary and excessive.

Yet, the Carrier has a policy that addresses such occurrences in the workplace and the Board must be mindful not to interfere or impede its efforts to prohibit discriminatory conduct, even where there is no malevolence intended or as part of an exchange between friends. As such, the Claimant must attend any necessary training that the Carrier provides

as part of its efforts to address conduct that could contribute to creating a hostile and offensive work environment. Once the training is completed, the Claimant is reinstated to service with no back pay or reimbursement for any out-of-pocket loss. He shall be returned to service with all other rights provided by the Agreement, including his Railroad Retirement benefits and seniority unimpaired. The Claimant is warned that he must refrain from using potentially offensive language, which even in jest, could lead to his dismissal.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Carrier has provided substantial evidence that the Claimant used inappropriate language while on duty and that the penalty imposed was an abuse of discretion.

AWARD

Claim sustained in part, denied in part.

Michael Capone
Neutral Member

Dated: January 17, 2019

Alyssa K. Borden
Carrier Member

Dated: 01/17/19

Andrew M. Mulford
Labor Member

Dated: 01/17/19