

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 70
)
) Award No. 61
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: February 16, 2005

STATEMENT OF CLAIM:

1. The dismissal of Section Foreman Eric Wiezoerk for his allegedly making inappropriate and offensive remarks on October 16, 2003 was without just and sufficient cause and excessive and undue punishment (System File W-0448-152/1393466).
2. Section Foreman Eric Wiezoerk shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On October 22, 2003, Claimant was notified to report for an investigation on October 28, 2003. The notice charged Claimant with allegedly making inappropriate and offensive remarks on October 16, 2003, in violation of Rule 1.6 and Carrier's Equal Employment Opportunity/Affirmative Action Policy. The hearing was held as scheduled. On November 17, 2003, Carrier notified Claimant that he had been found guilty of the charges and dismissed from service.

The record reveals that on October 16, 2003, in the toolhouse, Claimant used an ethnic slur to refer to Mexicans or Mexican-Americans. Four individuals, including Claimant, were present. Their accounts differ as to the number of times Claimant used the slur and to whom the conversation in which the slur was used was directed. However, all witnesses agreed that Claimant used the slur. The use of an ethnic slur is entirely inappropriate, violates Carrier's EEO

Policy and violates Rule 1.6, as it is discourteous, at a minimum. Thus, we find that Carrier proved the charge by substantial evidence.

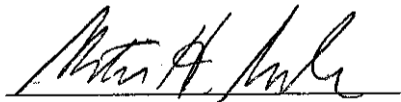
Accordingly, we turn to the penalty assessed. The day after the incident, Claimant apologized to the two coworkers of Mexican or Latino descent who were present when he used the ethnic slur. The record further reflects that Claimant had six years of service and there is no evidence of any prior discipline. It appears that Claimant's use of the ethnic slur was not a malicious act but was instead an act of gross stupidity. Under the circumstances, particularly considering Carrier's obligation to provide its employees with a workplace free from racial or ethnic hostility, a sever penalty was warranted. However, we find that the penalty of dismissal was excessive. We shall award that Carrier reduce the penalty to a lengthy suspension, equal to time held out of service. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time held out of service.

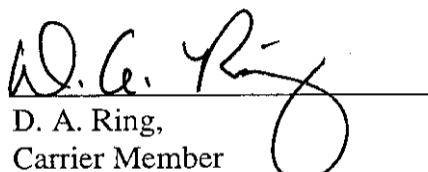
AWARD

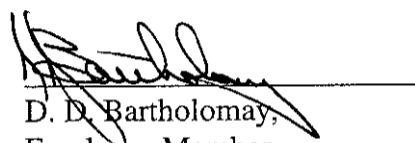
Claim sustained in accordance with the Findings.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto


Martin H. Malin, Chairman


D. A. Ring,
Carrier Member


D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, March 28, 2005