

PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 28

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service and subsequent dismissal) imposed upon Mr. M. T. Shannon for alleged violation of '*** the Union Pacific Company Policy of Equal Employment Opportunity/Affirmative Action and related Directives' while assigned as a crane operator on July 8, 2000 was excessive, unduly harsh and in violation of the Agreement.
2. As a consequence of the violation referred to in Part (1) above, Claimant M. T. Shannon shall now '...be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss suffered by him, and the alleged charge(s) be expunged from his personal record.'

Background

Claimant M. T. Shannon entered the service of the Union Pacific Railroad Company (formerly Southern Pacific Transportation Company – Western Lines) on December 15, 1999. Thereafter, he established seniority rights in various classes within the Track Sub-department, Oregon Division, Western Seniority District. Claimant was dismissed for making discriminatory and racially demeaning remarks to a co-worker on July 8, 2000. On that day, Claimant was working as a crane operator in Dunsmuir, California.

The events that triggered Claimant's discharge were as follows. At around noon on July 8, Manager Track Maintenance Gary Mahon was told that Claimant had been making unwelcome and profane remarks to co-worker Bob Murillo. MTM Mahon spoke

to Claimant and counseled him about cursing at fellow employees. He reminded Claimant about his involvement in a prior heated exchange with another worker and directed him to treat others on the job with respect. Claimant said he understood and would comply. Later that afternoon, however, Mahon was informed that Claimant was involved in another hostile incident with Bob Murillo, in which he had cursed at Murillo and made racially derogatory remarks.

By letter dated July 14, 2000, Claimant was noticed for an investigation, and a hearing was held on July 27, 2000. Thereafter, it was determined that Claimant made discriminatory statements to a co-worker in violation of Carrier Rule 1.6 and Union Pacific's Policy of Equal Employment Opportunity/Affirmative Action and Related Directives, which states, in relevant part:

Harassment

The Company is committed to providing a work environment free from offensive behavior directed at a person's race, color, national origin, religion, gender, sexual orientation, age, veteran status or disability ("protected status"). This includes offensive behavior directed at other employees, contractors, customers, and visitors to Company facilities, as well as others that employees may come in contact with during the normal course of work or while representing the Company. Harassment could include but is not limited to the following:

4. Use of any epithet, remark or gesture to or about another person's protected status, including that which is intended as humor.

Claimant was assessed a Level 5 permanent dismissal. The Organization appealed the dismissal through the grievance procedure, but the parties were unable to reach a resolution. Therefore, the matter was submitted to this Board for review and decision.

Opinion

The Organization concedes that Claimant made inappropriate remarks. It contends, however, that Claimant was provoked by Bob Murillo who falsely accused him of mishandling his tools. The Organization also argues that Claimant's language was not directed to Murillo, but rather, was "an angry outburst that was general in nature." (Carrier Ex. A-5).

The Record evidence does not, however, support the Organization's position. Both the written statements and oral testimony offered by several members of Claimant's gang who observed the July 8 incident conclusively prove that Claimant repeatedly made racial slurs, which he directed at Bob Murillo personally.

Mechanic G. Casey heard Claimant tell Murillo that he was a "f-----g nigger" and that he needed to go back to Redding "where all the other niggers live." (Carrier Ex. C, p. 24). Curve Lube Maintainer P. Jimenez heard Claimant say that Bob Murillo was "a Mexican nigger and that all the guys from Redding were a bunch of niggers and cry babies." (Carrier Ex. C, p. 28). Corroborating testimony was also offered by Surfacing Gang Manager J. Allen, who reported that Claimant ranted that Murillo was a "fucking nigger" and that all the employees from Redding were "fucking niggers who needed to go back to Redding" and to "niggerville." (Carrier Ex. C, p. 38). According to Allen, Claimant used a variety of curse words toward Murillo. Moreover, this incident was not an isolated event. Allen testified that he had witnessed Claimant's anger in the past, as well as his throwing of tools.

Almost every witness confirmed that Claimant made offensive remarks both to and

and about Bob Murillo. Significantly, Claimant even admitted that he called Murillo a “dog fucking nigger” and told him that it was “dog fucking nigger shit” that Murillo had complained to Mahon about Claimant’s allegedly assembling his tools incorrectly. (Carrier Ex. C, p. 60).

That fact that Claimant felt he was falsely accused of mishandling his tools did not excuse his hostile and offensive statements. He was expressly counseled that very day by Mahon about treating co-workers respectfully, and he promised to correct his behavior. Yet, as soon as Mahon left the site, Claimant unleashed a disgusting, racially charged diatribe that offended not only Murillo, but other employees as well.

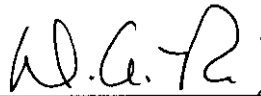
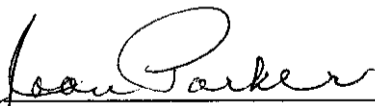
Even in the absence of Mahon’s counseling, Claimant should have known that racial slurs are not tolerated in the workplace. The Carrier has a legal obligation to provide a work environment that is free of harassment, discrimination, and intimidation. It has promulgated and posted an Equal Employment Opportunity policy, which it enforces through annual mailings of EEO compliance materials, staff and safety meetings, EEO-related classes, and the upgrade discipline policy. It is well-recognized that racially demeaning remarks are not condoned in the workplace and employees who make such remarks subject themselves to discharge. (See, *Special Board of Adjustment, Award No. 176 (Euker)*; *Public Law Board No. 5301, Award No. 16 (Peterson)*; *NRAB, Third Division, Award No. 31441 (Malin)*).

While the Organization suggested that Claimant’s behavior was arguably attributable to his having suffered brain damage in a car accident, there was no documented evidence to this effect introduced into the Record. Thus, the Organization’s argument on this point

was highly speculative. The simple fact is that Claimant behaved in a mean and bigoted manner, and the Carrier was well within its rights in terminating his employment.

Award

The claim is denied.

 _____ Carrier Member	 _____ Joan Parker, Neutral Member	 _____ Organization Member
Dated: <u>May 6, 2004</u>		Dated: <u>5-6-04</u>