

PUBLIC LAW BOARD NO. 6621

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION –
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
[FORMER SOUTHERN PACIFIC TRANSPORTATION COMPANY (WESTERN
LINES)]**

Case No. 60

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

1. The dismissal of Track Laborer M.R. Moore for his alleged racial and disparaging remarks to members of his gang on May 24, 2005 was without just and sufficient cause and excessive and undue punishment (Carrier's File 1435741).
2. Because of the excessive and undue punishment assessed Track Laborer M.R. Moore, we respectfully request that the Claimant's Level 5 be expunged from his personal record. We also respectfully request that Claimant be immediately reinstated to the service of the Carrier to his former position with seniority and all other rights restored unimpaired and that the letter of dismissal also be expunged from his personal record. In addition, Claimant Moore shall also be compensated for net wage loss, both straight time and overtime, and benefit loss suffered by him since Claimant's wrongful and unwarranted removal from service and subsequent dismissal.

Background:

Claimant Michael Moore holds seniority with the Carrier as of April 14, 1998.

On May 24, 2005,¹ although holding a track laborer position, he had been working as an upgraded ballast operator on Gang 8891, until the new regulator operator who had bid on the position (Greg Wilson) arrived. On May 24, the regular foreman of the gang was on vacation, and truck driver Arturo Castillo had been upgraded to the position of relief foreman. Francisco Peña, load operator for Gang 8891, wrote a letter (subsequently translated from Spanish to English) regarding Claimant's conduct on May 24:

¹ Unless otherwise stated, all dates hereafter are 2005.

Tuesday morning at approximately 7:35 a.m., as we were doing our daily [exercises] before starting work after the conference call. Mr. Mike Moore made a racial remark, when he was asked to come to work with the gang 8891.... He became very upset and refused to do what Arturo [Castillo] told him to do, when Arturo was in charge of the crew that week. Arturo asked Mr. Moore to work with the crew because we were short handed. [Moore] then said "I can't stand to work with these god dammed Mexicans." [H]e also said he was tired of all the Mexicans getting in his business.... The next day he again refused to go to work with the crew, Arturo told him again that we needed his help.

(Car. Exh. A at 163.) The letter was also signed by Albert Herrera, Jose Rosales, and Arturo Castillo. On June 1, Peña gave the letter to gang supervisor Felipe Ayala, who in turn passed it to G. S. Thompson, Manager of Track Projects. Thompson subsequently spoke with the manager of the EEO Compliance Group, and it was decided that Claimant should be removed from service pending investigation.

Thompson spoke with Claimant on July 11. Claimant said that he did not recall making the statements alleged. He admitted, however, that on two days in a row Castillo had asked him about helping the gang and Claimant had reminded him he needed to run the regulator. The next day, according to Claimant, another gang member was "getting into Claimant's business," and Claimant said, "I'll be glad when these Mexicans get out of my business."

The Carrier's EEO Policy states in pertinent part:

Union Pacific is committed to providing a work environment free from offensive behavior or statements directed at a person's race, gender, or any other protected status. This policy prohibits such offensive behavior and remarks in the presence of other employees, contractors, customers, visitors, and any other persons....

By letter dated June 7, Claimant was instructed to report on June 21 for an investigation regarding his alleged remarks on May 24, and "to develop the facts and place responsibility, if any, in connection with your actions on the above listed date[]". This is a

possible violation of the following rules for all employees: • Rule 1.6 – Conduct (#6 – Quarrelsome); • Union Pacific’s Equal Employment Opportunity/Affirmative Action and Related Policy Directives, revised May 1, 2005.” After one postponement, the investigation was held on June 30.

At hearing, Castillo testified:

... I was the relief foreman for that week because Mr. Perez went to vacation and Mr. Perez told me to take over the gang. And I told Mr. Michael to come and work with me. He said, but I’m running the regulator. So I told him, okay, that’s fine. So he went to work ... and somebody else told him, he, Mike, we only got 4 people to work on the gang, we need your help. And then that’s when Mike got mad. He said, I’m tired to work with these fucking goddam Mexicans. And he turned around and then he said, I’m tired already to get into my fucking business.... That’s all I heard. I ... didn’t got offended about what he said.

(Car. Exh. A at 110 – 111.) He also stated that after Wilson showed up, Claimant said he was supposed to instruct him on the regulator. However, Fernando Lisea—also on Gang 8891—said that he could teach Wilson to run the regulator because Castillo needed Claimant’s help. According to Castillo, Claimant said, “But Felipe [Ayala] told me to work with these guys.” Castillo testified, “So okay, if Felipe told you, it’s—I mean, I can’t say nothing.” (Id. at 112.) Castillo also stated, “[L]ike I said, I’m not offended or I’m not saying that he disobeyed my order....” (Id. at 115), and, “I mean, if Felipe told him to go—to keep working with the surfacing gang, I can’t say anything about that. Because Felipe was the one who gave him the orders to work with those guys.” (Id. at 120.)

The Carrier issued a letter dated August 18 finding Claimant guilty of the charges, and assessing a penalty of UPGRADE Level 5 (dismissal). The Organization filed a claim by letter dated October 7, which was denied. The Organization then appealed the

denial by letter dated January 5, 2006, which the Carrier denied by letter dated February 10, 2006. The parties discussed the matter in conference on June 6, 2006, but did not resolve it and therefore have presented it to this Board for final decision.

Carrier's Position:

The Carrier contends that Claimant was afforded all due process rights and a fair and impartial hearing. The Carrier further argues that substantial evidence demonstrates that Claimant violated Rule 1.6 as well as the Carrier's EEO Policy by making racial and disparaging remarks to other employees on Gang 8891. Claimant admitted at hearing that he had made derogatory remarks concerning Mexicans. In addition, numerous witnesses testified that Claimant refused to do what Castillo instructed him to do—work with the gang—and then got mad and made racially derogatory comments.

It is the Carrier's additional position that the discipline assessed in the instant case, Level 5 – dismissal, was within the guidelines of the Carrier's UPGRADE Policy and not arbitrary, capricious or an abuse of discretion. The Carrier has a zero tolerance policy regarding racial or discriminatory remarks. While the Organization argues that the gang members only wanted an apology, the Carrier asserts that the gang members' willingness to forgive Claimant does not mitigate his misconduct. According to the Carrier, the Organization's argument is tantamount to a plea for leniency, and leniency reinstatements are a matter of Carrier discretion.

Organization's Position:

The Organization argues that Claimant did not violate Rule 1.6 (6) – Quarrelsome. The Organization points to relief foreman Castillo's testimony that he couldn't override instructions if Ayala had told Claimant to keep working with the

regulator that week, and that Castillo neither was offended nor considered Claimant to have disobeyed Castillo's order. According to the Organization, Claimant was "antagonized by his fellow gang members that day and the previous days. They knew very well that Mr. Felipe Ayala told [Claimant] to run the regulator, but they thought they would stir things up, which they did. Each day they tried to get under his skin. On the 24th of May they succeeded." (Org. Exh. A-2 at 2.) The Organization contends that Claimant's reaction to this antagonization does not equate to being quarrelsome. Rather, according to the Organization, Claimant was willing to go with the gang but was following Ayala's instructions.

The Organization further argues that the matter was not properly reported, so that the investigation should not have been held and Claimant's dismissal is invalid. The Organization points out that the EEO Policy requires such matters to be reported "at once," which Peña did not do. The Organization further submits that all but one of the Carrier's witnesses said that they were not offended.

Testifying on his own behalf at hearing, Claimant asserted that he never refused to work with the gang, but rather only stated that someone had to run the regulator and there was no one else to do it. According to Claimant, even after Wilson arrived, it was necessary to instruct him regarding that particular regulator. Claimant also testified:

Q. [D]uring the morning exercises, did you make some derogatory remarks ... in front of the rest of the gang concerning Mexicans?

A. Yes, I did. The statement that I made was that, you know, just out of frustration, I said ... I wish these Mexicans would stay out of my business ...

Findings:

The Organization argues that the matter was not reported promptly enough to permit the Carrier to validly investigate and subject Claimant to discipline. While the EEO Policy requires employees to report violations "at once," no particular number of days is set forth after which the matter becomes stale. In the instant case, the asserted delay was only from May 24 to June 1—one week and one day. The Board finds that the matter was still ripe for investigation under the EEO Policy, and the investigation was properly held.

The Carrier contends that Claimant was quarrelsome, in violation of Rule 1.6(6). The Board disagrees. Claimant's loose remarks cannot be characterized as quarrelsome. He wasn't *arguing* or even disagreeing with anyone when he made the remarks. The remarks weren't directed toward any particular person, and no quarrel resulted from Claimant's remarks. The Board therefore finds that Claimant did not violate Rule 1.6(6).

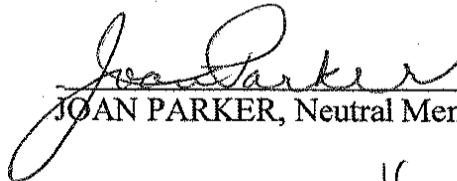
Claimant admitted at hearing to having made derogatory remarks targeting Mexicans on May 24. The Carrier's EEO Policy specifically prohibits "[a]ny offensive or demeaning epithet or remark referring to race, gender, or other protected status...." The Policy also sets forth that there will be zero tolerance of violations, and that proven violations "will result in appropriate discipline of the employee, up to and including termination." (Car. Exh. A at 153.) It therefore cannot be disputed that Claimant violated the EEO Policy and that some level of discipline was warranted.

However, the Board finds that the penalty assessed—discharge—was excessive in the circumstances of the instant case. Claimant did not target any particular person by his remarks. Rather, it is clear upon the record that Claimant was—albeit inappropriately—

simply blowing off steam. Claimant has no history of such remarks, and in fact, the Carrier's Gang 8891 witnesses testified that they got along well with Claimant and would not have expected such remarks from him. Only Peña stated that he had been offended by the remarks, and even he wanted nothing more than an apology. The Board is satisfied that Claimant's remarks on May 24 constituted an isolated slip triggered by what he perceived as interference by other gang members with the orders he had received from Ayala. While Claimant's remarks were certainly wrong, they did not rise to a level warranting dismissal, and the Board finds that the Carrier's assessment of that penalty was unduly harsh. Therefore, the claim will be sustained in part. Claimant will be reinstated, but without any back pay. In addition, if required by the Carrier, Claimant shall attend counseling and/or sensitivity training sessions before returning to work.

Award:

The claim is sustained in part. Claimant shall be reinstated, but without any back pay. In addition, should the Carrier require it, Claimant shall attend counseling and or sensitivity training sessions as a prerequisite to his reinstatement.


JOAN PARKER, Neutral Member


CARRIER MEMBER


ORGANIZATION MEMBER

DATED: May 7, 2007

DATED: 5-7-07