

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

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

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 270

Award No. 246

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Laborer D.T. Schmitt for allegedly making inappropriate comments to other employees on March 20, 2005, was without just and sufficient cause, in violation of the Agreement, capricious and unsupported (System File UPSW-2125D/1425661).
2. As a consequence of the violation referred to in Part (1) above, Laborer D.T. Schmitt shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage lost suffered. Any reference to this incident shall be removed from his record."

FINDINGS:

By notice dated March 31, 2005, the Claimant was directed to appear for a formal investigation and hearing "to develop the facts and place responsibility, if any, in connection with the charge that you allegedly made inappropriate comments to other employees on March 20, 2005, which is a violation of Rule 1.6 (Conduct) and Union Pacific's EEO Policy dated December 5, 2000. such violations constitute a Level 5 – permanent dismissal under Union Pacific's UPGRADE Policy. You are being withheld from service pending the outcome of the investigation." The investigation was conducted, as scheduled on April 7, 2005. By letter dated April 25, 2006, the Claimant

was informed that as a result of the investigation, he was found guilty as charged, and that he was being dismissed from the Carrier's service. The Organization thereafter filed an appeal, challenging the Carrier's decision to dismiss the Claimant. The Carrier denied the claim.

The Carrier initially contends that there were no procedural improprieties in the handling of the investigation or the subsequent handling of the claim on the property. Rule 48's time limits were followed to the letter, and the Claimant was provided a fair and impartial investigation during which the Claimant and his representative were given full opportunity to present the Claimant's defense and interview witnesses called to support the charge.

As for the Organization's assertion that the Notice of Investigation was in violation of Rule 48 because it listed March 20 as the date on which the inappropriate comments were made, instead of March 18 and 19, the Carrier maintains that this argument is of no substance. The Carrier emphasizes that Rule 48 requires that the accused employee be apprised of the "precise nature of the charge(s)," and the Notice of Investigation in this matter satisfied this requirement, regardless of what date was indicated. The Carrier insists that the fact that March 20 was referenced in the Notice, rather than March 18 and 19, as the date of the inappropriate comments did not affect the Claimant's and his representative's understanding of the nature of the charges against the Claimant.

The Carrier argues that the Claimant's own testimony demonstrates that he knew full well who his accusers were prior to the investigation, and he also knew the precise

nature of the inappropriate comments that he was charged with making to his co-workers and the dates of those comments. The Carrier insists that the reference to March 20, instead of March 18 and 19, in the Notice of Investigation had no bearing whatsoever on the Claimant's ability to understand the charge against him and, in turn, receive a fair and impartial investigation. The Carrier contends that the Board should disregard the Organization's argument on this point because it clearly is nothing more than an attempt to capitalize on an error in hopes of finding a technicality to excuse conduct for which there is no excuse. The Carrier maintains that such inconsequential errors should not be used to overturn discipline, particularly where, as here, the Claimant and his representative fully understood the nature of the charge against the Claimant.

The Carrier goes on to emphasize that the Organization did not raise this argument until well into the investigation. The Carrier points out that if the reference to March 20 was so significant as to compromise the Organization's ability to defend the Claimant, the Organization could have requested a recess, but it did not do so. The Carrier urges the Board to reject this argument as a basis for overturning the Claimant's dismissal.

The Carrier further asserts that there can be no disagreement that the nature of the conduct attributed to the Claimant violated Rule 1.6 and the Carrier's EEO policy. The Carrier argues that the statements and testimony of the two complaining employees, if true, constitute more than substantial proof of the charges at issue. The Carrier emphasizes that the Organization never argued that the nature of the conduct described by these two employees, if true, did not violate Rule 1.6 and the Carrier's EEO policy, as charged.

As for the Organization's argument that the testimony and statements of these two employees were fabricated, the Carrier points out that the Organization has presented nothing of substance to advance its theory that these two employees were prejudiced against homosexuals. The Carrier further argues that given that these two employees roomed together and were a captive audience of the Claimant for two days, it is logical to expect that they would give similar statements. The Carrier insists that nothing in their testimony smacks of prejudice, much less collusion. The Carrier points to the testimony of one of these employees that they were "good" with the fact that the Claimant had informed them that he was gay; this witness further stated that he found the Claimant to be very pleasant and had no problems with the Claimant. The Carrier asserts that there is no basis for the accusation that these two employees took it upon themselves to "punish" the Claimant, as the Organization has speculated.

The Carrier then points out that there are questions about why the Claimant would even discuss his sexual orientation with his co-workers. The Carrier maintains that this revelation alone provides a more than sufficient basis to question the credibility of the Claimant's denial, as opposed to the statements and testimony of the complaining witnesses. The Carrier argues that the hearing officer logically determined that the complaining witnesses were not out to get the Claimant, but they simply became fed up with the Claimant's comments and conduct of a sexual nature, and they took steps to ensure that it no longer would interfere with their ability to perform their work. The Carrier therefore contends that there is more than sufficient evidence to support the finding of guilt in this case, and the Board should not substitute its judgment on questions

of credibility.

The Carrier also maintains that the Claimant's dismissal was not arbitrary or capricious. Instead, dismissal was fully warranted by and consistent with the Claimant's violation of Rule 1.6 and the Carrier's EEO policy. Moreover, the Carrier's UPGRADE Discipline Policy requires the assessment of Level 5 discipline, permanent dismissal, in this case. The Carrier insists that a number of Board Awards have found that this policy, and the consistent discipline meted out under this policy for a proven rule violation, is fair and equitable, not arbitrary or harsh.

The Carrier further contends that its EEO Policy is well communicated to all employees, including the Carrier's "zero tolerance" policy regarding any type of harassment. It is undisputed that the Claimant was fully aware of both Rule 1.6 and the Carrier's EEO Policy, and he was well informed about the Carrier's zero tolerance policy and the fact that conduct such as his could lead to dismissal. The Carrier insists that it cannot be said that dismissal in light of the Claimant's proven conduct was arbitrary or harsh. Instead, the discipline was fully consistent with the Carrier's policies and practice, of which the Claimant was fully aware.

As for any argument that dismissal was excessive in view of the Claimant's years of unblemished service, the Carrier argues that when the Claimant elected to engage in conduct that had the effect of interfering with his co-workers right to work in an environment free of harassment, the Claimant surely gave up any consideration that his years of service otherwise may have afforded him. The Carrier argues that it has the responsibility not to condone actions, such as the Claimant's, that have the effect of

restricting the rights of others to work in an environment free of harassment and intimidation. The Carrier insists that it cannot mitigate the consequence of the Claimant's conduct for any reason, as recognized by many Board Awards.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends the Carrier failed in its duty to provide the Claimant with a fair and impartial hearing, and violated Rule 48, by officially charging the Claimant with events that allegedly occurred on March 20, 2005, and then changing the dates to March 18 and 19, 2005, during the investigation. The Organization argues that the record proves that the Claimant did not make any inappropriate comments or statements on March 20, 2005.

The Organization goes on to assert that in the situation giving rise to this dispute, three employees conducted a daily conversation in the closed confines of a machine cab. Two of the employees accused the third, an openly gay male, of inappropriate behavior. The Organization points out that no one else heard the alleged conversations. The Organization emphasizes that the record fails to unequivocally substantiate the charges against the Claimant. The Organization argues that it is open to speculation whether the accusations are true or whether the two heterosexual male employees are prejudiced against homosexuals and testified in a manner to punish the third employee. The Organization asserts that the testimony of these two employees is suspect in that they gave virtually identical written statements. Moreover, neither of these employees reported the alleged violation for three days, even though they had ample opportunity to

make such a report, and these employees also did not call the Hotline as required.

The Organization emphasizes that the record demonstrates that the Claimant had worked for the Carrier for more than twenty-eight years without similar complaints being made against him. The Organization also points out that Gang 9066 is comprised of about sixty employees, but only two employees made accusations against the Claimant, who had worked with this gang for three years. The Organization insists that there is no basis for the Hearing Officer's decision to credit the testimony of the two complaining employees, while completely disregarding the Claimant's denial.

The Organization insists that the Carrier's mere suspicion that the testimony of the two complaining employees was truthful, while the Claimant's was not, does not satisfy the Carrier's burden of proof of showing guilt and upholding the dismissal of an employee with almost twenty-nine years of service with the Carrier.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. We hold that Rule 48's time limits were followed by the Carrier and that the Claimant was provided a fair and impartial investigation, as well as enough notice as to the nature of his alleged rule violations.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was

guilty of making inappropriate comments to other employees in March of 2005. The comments were of a sexual nature and clearly inappropriate for the workplace.

Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case has been employed by the Carrier for nearly thirty years. There is no question that he engaged in serious wrongdoing, but to terminate his employment as a result of this after all of his years of service for the Carrier constitutes unreasonable and arbitrary discipline. This Board orders that the Claimant shall be reinstated to service, but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.

AWARD:

The claim is sustained in part and denied in part. The Claimant shall be reinstated to service, but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 5-30-07



CARRIER MEMBER

DATED: May 30, 2007