

SPECIAL BOARD OF ADJUSTMENT NO. 947

Case No. 175

Award No. 175

Claimant: G. V. Acord

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE Southern Pacific Lines -- =-

STATEMENT
OF CLAIM

1. That the Carrier's decision to assess Claimant a sixty (60) calendar day suspension without pay was excessive, unduly harsh and in abuse of discretion and in violation of the terms and provisions of the Collective Bargaining Agreement.
2. That because of the Carrier's failure to prove and support the charges by introduction of substantial bona fide evidence, that Carrier now be required to reinstate and compensate Claimant for any and all loss of earnings suffered, and that the charges be removed from his record.

FINDINGS

Upon reviewing the record, as submitted, I find that the Parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Special Board of Adjustment is duly constituted and has jurisdiction of the Parties and the subject matter; with this arbitrator being sole signatory.

The Claimant, a Truck Driver and Relief Foreman has worked for the Carrier since 1971. By letter dated January 10, 1996, he was advised to attend a formal investigation on Wednesday, January 24, 1996 to determine if was guilty of violating the following cited rule:

Rule 1.6.1 .

Employees must be conversant with and adhere to the Company's Affirmative Action Policy. Instances of discrimination. . .may result in disciplinary action up to and including dismissal.

Following two postponements, the hearing was held on February 6, 1996, in Klamath Falls, Oregon.

During the time period in question, the Claimant was serving as a Relief Foreman replacing the Foreman who was on vacation. One of the men he was supervising was a recently hired black man who was in his probationary work time. During this time, the Claimant complained to management that the black man was not performing as he should. What exactly was said to management is not known. In any case, the black man was not retained in service and was let go.

Witnesses reported that the Claimant seemed to boast that he had something to do with the black man's being let go. He allegedly had commented to another employee, prior to the black man's arrival that he wasn't happy about the black man coming to the gang because he did not get along with "them". Another witness testified that the Claimant said "they should have sent two white men instead of this black man". There was one other statement attributed to the Claimant regarding his intentions to get the black man fired.

After reviewing the transcript, the Carrier determined that the Claimant had violated the Carrier's Affirmative Action policy and suspended him for 60 calendar days without pay.

POSITION OF THE PARTIES

The Claimant testified honestly. He is in a responsible position and in order to adhere to the rules you must understand them. The Company has not provided enough training on the Affirmative Action Policies. Mr. Acord, being from the old school of railroading may have said things which, while not intended to be racially motivated may have appeared to be.

The Organization believes the black man was disgruntled for being let go and is playing the race card. In fact, he was let go for laziness, but, wants to blame the Claimant. The Claimant only reported the employee to the Roadmaster once. Even then he did not ask that the man be removed, he merely wanted him to be told to do his share of the work. Finally, the Organization argues that the Carrier failed to meet its burden of proof.

The Carrier contends the evidence adduced at hearing established that the Claimant was guilty of discrimination and the use of racial slurs against the newly-hired black employee. His behavior is unacceptable and violates the Company's Affirmative Action Policy. The discipline was appropriate.

DECISION

Much of the testimony against the Claimant was hearsay evidence. The probative evidence did show that the Claimant was insensitive and had a bias towards blacks. However, there was no concrete evidence that the Claimant acted on this bias by using

racial slurs or behaving antagonistically towards the blacks with whom he worked. To the contrary, Mr. Ortega, who had been the Claimant's Foreman throughout the years, indicated the Claimant got along with co-workers of all colors. The allegation that the Claimant boasted about getting the black employee removed from service was without any substantiation. Of course this perception was fueled by the Claimant's alleged threat to get the black man fired. This may be considered circumstantial evidence which shows that the Claimant went to the Roadmaster with that intent. However, there is no concrete evidence that the Claimant had that purpose in approaching the Roadmaster or that he fabricated a story in order to get the black employee removed from service. If he had it would be a clear case of discrimination. The Claimant testified that he only went to the Roadmaster because the black employee refused to do the work he assigned and was not doing his share of the work. He stated he did not ask that the black man be dismissed. There was no testimony which contradicted his account of the events and we cannot base our decision on assumption, especially when there was someone with firsthand knowledge available. The Roadmaster could have provided testimony which would have been enlightening, but he did not testify. Furthermore, it was ultimately the Roadmaster's decision to remove the black employee from service. The Claimant had no such authority.

The Board was further influenced in their decision by the fact that there was no testimony to indicate the Claimant mistreated or acted in a discriminatory manner toward the black employee while the Claimant was serving as Relief Foreman. There is nothing in the record which shows that the black employee complained to management about the Claimant and no one testified that there was ever any problems with the Claimant and any black employee. To the contrary, the Foreman testified that the Claimant had worked for years on the same gang as a black employee and he never noticed any problems between the two.

In conclusion, the Board does believe the Claimant is insensitive and biased against blacks. Furthermore, there was sufficient proof that he told other employees that he would rather have whites put on his crew than blacks and that he would get the black employee fired. Admittedly, that kind of conversation is not acceptable and could be considered an incitement to others with similar bias. However, the Carrier did not prove that the Claimant used racial slurs or discriminated against the black employee.

The Board does not believe the Claimant's proven actions support a 60 calendar day suspension. This is especially true in light of the fact the Claimant has worked many years in a multi-ethnic, multi-racial environment and there is no evidence that he has shown any inclination to be discriminatory or problematic.

His lengthy tenure (24 years) is also a mitigating factor for a first offense, even one as potentially serious as this one.

AWARD

The 60 calendar day suspension is to be reduced to a 20 calendar day suspension. The Claimant is to be reimbursed the difference in salary from what he lost in the 60 calendar day suspension and what he would have lost under this order. The Carrier is to comply with this Award within thirty (30) days of receipt.



Carol J. Zamperini, Neutral

Submitted this 18th of June, 1996.
Denver, Colorado