



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301**

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

June 28, 1985

Keith Allen
Box 133
Hilltop, WV 25855

Re: Allen v. The Chesapeake
and Ohio Railway Company
ER-152-79

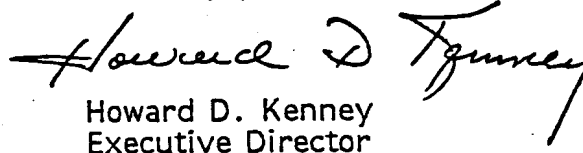
Dear Mr. Allen:

Herewith please find the Findings of Fact, Conclusions of Law and the Order of the WV Human Rights Commission in the case Keith Allen v. The Chesapeake and Ohio Railway Company.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If

no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

cc: Chief Executive Officer
Chesapeake & Ohio Railway Company
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Huntington, WV 25718

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STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

KEITH ALLEN,

Complainant,

vs.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,

Respondent.

DOCKET NO. ER-152-79

RECEIVED
MAY 27 1985
W.V. HUMAN RIGHTS COMM.
[Signature]

EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This case came on for hearing on March 21, 1985. The hearing was held at the Conference Room of the West Virginia Human Rights Commission, 1036 Quarrier Street, Charleston, West Virginia. The panel consisted of Theodore R. Dues, Jr., Hearing Examiner and the Honorable Russell Van Cleve, Hearing Commissioner.

The Complainant appeared in person and by counsel, D. Clinton Gallaher, IV. The Respondent appeared by its representative, Joe Cremmins and by Counsel, Barbara L. Ayres. The West Virginia Human Rights Commission appeared by its counsel, John Richardson.

FINDINGS OF FACT

1. The Complainant, Keith Allen, is a black male.
2. The Complainant was hired as a probationary trackman on July 5, 1978.
3. The Complainant was disqualified and his employment ^{/terminated} was pursuant to the provisions in the applicable ^{/collective} bargaining ~~bargain~~ agreement between C & O and the Brotherhood of Maintenance

of Way Employees which provides for a sixty (60) day probationary period during which the Company may disqualify employees without a Board of Inquiry.

4. The Complainant was rehired by the Respondent on or about May 23, 1981 and voluntarily quit after working one day for reasons unrelated to employee misconduct.

5. By stipulation of the parties the date of rehire is agreed to terminate any period of liability for those wages which may be determined by the Commissioner to be due in payable.

6. The Complainant's principal supervisor was Oder Shelton, section foreman.

7. The crew of which the Complainant was a member consisted of sixteen trackmen.

8. Four of the sixteen including the Complainant, were hired on or about July 5, 1978 and were within their sixty day probationary period at all times relevant hereto.

9. Of the four probationary employees, the Complainant and his brother, Thomas Allen, were the only blacks. The nonprobationary crew consisted of senior employees who are full members of the collective bargaining unit and acquired full protection under the agreement then in effect.

10. One of the probationaries was disqualified for excessive absences and other problems with his employment approximately one week prior to the Complainant's disqualification.

11. The other three probationers, including the Complainant, were disqualified on July 24, 1978.

12. The Complainant and the other probationary employees, were given job assignments different in nature than that of the more senior nonprobationary employees during their tenure with the Respondent.

13. That due to the hazardous and strenuous nature of railroad employment it was necessary for the health and welfare of probationary employees to be assigned jobs more remote to operating equipment and less physically demanding than more senior employees with more experience and reasonably anticipated more stamina.

14. There was no competent evidence of the occurrence of racial harrassment or slurs to the effect that the Respondent or its agent knew or should have known of such matters.

15. That due to the job assignment that the nonprobationary employees received there would be intermittent times when the probationary employees would be engaging in completing their job assignments and the nonprobationary employees would be relizing a break in their job activity. This experience is one reasonably expected when persons assigned to perform activities oriented to be accomplished by machinery or with the assistance of machinery, as well as, manual laborers with experience and knowledge of cutting the corners of assignments are compared with the requisite completion time of persons with assignments without the use or assistance of machinery or possessing less knowledge and/or skill.

16. The atmosphere in the working enviroment which the Complainant indicated had the effect of isolating him and the other nonprobationary employees was effected by human nature to the extent one would expect close-knitted relationships to more likely form between persons assigned to perform job tasks in physically close areas and/or who have worked together for a longer time.

17. During the tenure of his employment, the Complainant violated several of the safety rules explained to him by agents of the Respondent, including standing and sitting on the track rails. In addition, the Complainant was on notice of these rules as a result of the safety handbook setting forth such policies of the Respondent in this regard which was disseminated to him and the other new employees at the time of hiring.

18. That the work assignments made to the Complainant during his tenure of employment with the Respondent are assignments that were assigned to similarly situated whites.

CONSLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties in this matter.

2. As in all cases, the Complainant bears a burden of proving the allegations of his complaint that the Respondent discriminated against him because of his race during his employment and affected the decision to discharge him.

3. In order to establish a prima facie case, the Complainant must show that:

- a. he is a member of a protected group;
- b. that his employment was terminated;
- c. that similarly natured persons not in
the protected group were not terminated;

4. The testimony of the Complainant viewed in its most favorable light provides the proof needed for (a) and (b) of the above-referenced criteria.

5. The evidence in its totality clearly indicates that the Complainant was in fact discharged for failure to comply with safety violations for which similar situated whites have been and were discharged;

6. That there was no credible proof that the Respondent condoned or acquiesced ^{/in} the use of racial slurs or racially motivated work assignments;

7. Likewise, there existed no credible evidence to ^{/effectively} effect ~~the~~ conclude that the Complainant was socially isolated from his co-workers on the basis of his race;

8. The Respondent articulated a legitimate ^{/tory} nondiscriminate reason for the difference in job assignments for the Complainant and the non-probationary employees.

9. The reasons of safety and health are hereby deemed to be job necessity considerations.

10. The Complainant in no way rebutted the reasons articulated by the Respondent as being pretextual.

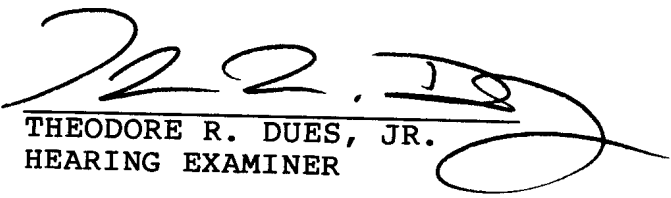
11. Accordingly, the Complainant has failed to meet his burden of establishing that he was ^{/treated} differently than similarly ^{/situated} whites in his employment conditions and that his discharge was in part motivated by his race.

RELIEF

Therefore, it is the recommendation of this Examiner that the Respondent is entitled to judgment and the Complainant take naught.

DATED: May 6, 1985

ENTER:


THEODORE R. DUES, JR.
HEARING EXAMINER