



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**  
215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.  
Governor

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April 28, 1986

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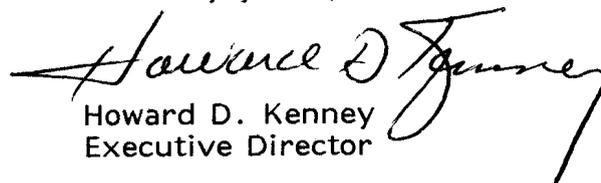
RE: Robert Protka V. Chesapeake & Ohio Railway Co.  
Docket No.: ER-102-79

Dear Above Parties:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Robert Protka V Chesapeake & Ohio/Docket No.: ER-102-79.

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/RR

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERT PROTKA,

Complainant,

vs.

Docket No. ER-102-79

CHESAPEAKE AND OHIO  
RAILWAY COMPANY,

Respondent.

O R D E R

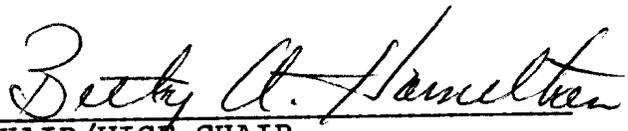
On the 11th day of March, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Theodore R. Dues, Jr. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 21<sup>st</sup> day of March, 1986.

Respectfully Submitted,

  
\_\_\_\_\_  
CHAIR/VICE-CHAIR  
WEST VIRGINIA HUMAN  
RIGHTS COMMISSION

RECEIVED

DEC 27 1985

W.V. HUMAN RIGHTS COMM.

WEST VIRGINIA SUPREME COURT OF APPEALS  
FOR THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

*gfg*

ROBERT PROTKA,

Complainant,

vs.

Case No. ER 102-79

DEC 17 1985

CHESAPEAKE AND OHIO RAILWAY CO.

Respondent.

EXAMINER'S RECOMMENDED FINDINGS  
OF FACT AND CONCLUSIONS OF LAW

This matter matured for public hearing on June 28, 1985. A pre-hearing conference call was held on April 29, 1985. The hearing was held at Conference Room E, Building 7, State Capitol Complex, Charleston, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr. The presence of a hearing commissioner was previously waived by the parties. Appearing at the hearing were the Complainant in person and by his counsel, David L. Grubb. The Respondent appeared by its counsel, Barbara Lee Ayres. Also present on behalf of the Respondent was Joseph Crimmins.

The Examiner received proposed findings from the Complainant and the Respondent on July 22, 1985 and August 22, 1985, respectively. The Examiner received his copy of the transcript of these proceedings on November 29, 1985. After considering the testimony of record, the documentary evidence and the proposed findings submitted by the respective parties, the Examiner makes the following recommended decision.

The parties agreed to a change in venue to Kanawha

*Approved  
ARS  
12/24/85*

County.

#### ISSUE

Whether the Complainant was discharged from his employment with the Respondent as a result of his association with black co-workers.

#### FINDINGS OF FACT

1. The Complainant, Robert Protka, is a White male.
2. The Complainant was hired by the Respondent on July 5, 1978, in the capacity of a probationary trackman.
3. The Complainant's primary supervisor was Oder Shelton, section foreman.
4. At the time the Complainant was hired the probationary crew, of which he was a part, consisted of two blacks and one other white.
5. The other white probationary employee was disqualified subsequent to his employment due to excessive absences and other job-related reasons.
6. The Complainant and the two black probationary employees were disqualified on July 24, 1978.
7. The disqualifications of the Complainant and the other probationary employees were perfected pursuant to the provisions of the applicable collective bargaining agreement as it existed at that time between the Respondent and the Brotherhood of Maintenance of Way Employees which provided for a sixty (60) day probationary period during which the Respondent may disqualify employees.

8. The Complainant and the two probationary employees rode to work with Philip Vest, the white member of the probationary crew who was disqualified for excess absenteeism.

9. That subsequent to Mr. Vest's disqualification, the Complainant drove his car and the two black probationary employees rode with him.

10. During the Complainant's employment, he violated several of the Respondent's safety rules.

11. Also during the tenure of the Complainant's employment his work performance was unsatisfactory.

12. The Complainant was on notice of the safety rules he violated as a result of the safety handbook which was given to him at the time of hiring and as a result of the safety meetings conducted by management of the Respondent.

13. The environment in which the Complainant and the other probationary employees worked did result in job assignments which would place the permanent employees at a physically different location on the work site than the probationary employees.

14. This difference in placement was due to the type of work being performed as opposed to an attempt to isolate the probationary employees from the permanent employees.

More specifically, the type of danger associated with the machinery and the complexity of the job function of the crew were the primary reasons for the differing locations of placement of probationary employees and the permanent employees.

15. Management of Respondent was unaware of any racial slurs by other crew members directed toward the black

probationary employees.

#### CONCLUSIONS OF LAW

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

2. As in all cases, the Complainant bears the burden of proving the allegation of his complaint that the Respondent discriminated against him because of his association with black co-employees.

3. The Complainant established a prima facie case by introducing testimony that he was told that he would be fired if infact he did not cease and desist traveling with the two black probationary co-employees. In addition, the Complainant testified that his work was satisfactory at all times, that he violated no work rules and yet he was disqualified by the Respondent.

McDonnell Douglas Corporation vs. Green, 411 U.S. 792 (1973); Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975).

4. The Respondent articulated a legitimate nondiscriminatory reason for the Complainant's disqualification by establishing that the Complainant had violated safety rules of which he was on notice and that his work performance was unsatisfactory.

Texas Department of Community Affairs vs. Burdine, 450 U.S. 248 (1981).

#### DETERMINATION

Accordingly, the Examiner concludes that the Complainant

has failed to show by a preponderance of evidence that he was disqualified as a result of his association with the black probationary employees. The evidence and the credibility of the witnesses indicate that the Complainant was discharged due to poor performance and violation of Respondent's safety rules.

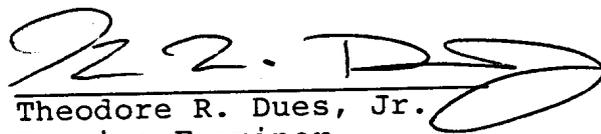
PROPOSED ORDER

The Hearing Examiner recommends the Commission take the following action:

- a. That the Complainant's complaint be dismissed with prejudice; and
- b. That judgement be awarded to the Respondent.

DATED Dec. 13, 1985

ENTER:

  
Theodore R. Dues, Jr.  
Hearing Examiner