NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 198
AWARD NO. 198

PARTIES TO DISPUTE

CARRIER
Union Pacific Railroad

Carrier's File
1529511

AND

ORGANIZATION
Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File
C-0948U-157

STATEMENT OF CLAIM

1. The dismissal of Machine Operator Marcelino Fuentes for alleged violation of General Code of Operating Rules (GCOR) 1.6 (3) and 1.6 (6) is based on unproven charges, capricious, excessive and in violation of the Agreement.

2. As a consequence of Part 1 above, we request that Mr. Fuentes be returned to active service with all rights unimpaired and he must be compensated for all time lost and have any reference to the investigation removed from his personal record as outlined in Rule 48 of the July 1, 2001 Agreement.

STATEMENT OF BACKGROUND

At the time the events occurred that subsequently resulted in Claimant's dismissal from service, Claimant had accrued seniority of eleven plus years (11+) of service with the Carrier having commenced employment on May 26, 1998, and held seniority as a machine operator. On November 9, 2009, the date of the incident that is the subject of this claim, Claimant was assigned to System Tie Gang 9063 under the supervision of Tie Gang Track Supervisor Josh Richins. On that morning, Claimant commenced work at 6:00 a.m. assuming the duties of operating a Tie Removal Machine hereinafter known as the TKO machine. The work of the TKO machine involves extracting old crossties so that new crossties can be installed by gang members following behind the

TKO machine. The general expectation is that the TKO machine will be operated at a pace to remove between 300 and 350 crossties per hour.

In and around 2:00 to 2:30 p.m., as Claimant was removing crossties, he observed Supervisor Richins approaching his TKO machine. As a result, Claimant ceased working, and powered down the machine to allow Richins to safely board the machine. Richins had come to talk to Claimant about his work pace which, according to Richins was removal of 220 crossties per hour, well below the expected pace of 300 to 350 crossties per hour and well below the pace Claimant generally and usually operated the machine. Upon boarding the machine, Richins inquired of Claimant as to whether there was something wrong with the machine and according to Claimant he responded in the affirmative explaining that the clamps on the rail lifter were not operating properly and, as a result, were at times hitting the joint bars. The record reflects however that the work that day was being performed on continuous rail (CWR) and therefore there were not too many joint bars to be encountered, though there were some that were hit. Richins next asked Claimant if he had reported the problem to the mechanics that work on the TKO machine and Claimant indicated he had reported the problem. Richins subsequently verified with the mechanic supervisor that, in fact, Claimant had reported the problem with the clamps on the rail lifter. However, according to Richins, the mechanic supervisor told him there was no pressure on the clamps, that they did release but they did not come up. Even so, it was the opinion of the mechanic supervisor that the problem was not going to hurt the machine in any way.

Notwithstanding being apprised by Claimant there was a problem with the clamps on the lifter, Richins nevertheless told the Claimant he was going too slow and that he needed to pick up the pace to the expected 300 to 350 crossties per hour. Claimant responded he believed the pace he was going at was safe under the circumstances to which Richins, in turn told him, don't worry about the machine and reiterated he needed to pick up the pace. Claimant, recalling a prior incident that occurred some two (2) years before where Richins ordered him to resume working at times trains were moving on the track and when he complied with the order, part of his machine hit a train, he asked Richins if something happened to the TKO machine if he picked up the pace, was he willing to back him up and Richins said he would, Claimant responded he did not believe him asserting that if something did happen to the machine, supervision would take the position that it was his responsibility as the machine operator to take care of the equipment. Claimant recounted that with respect to this previous incident, Richins assessed him discipline for having hit the train. The record evidence reflected that in investigating the accident, it was determined that Claimant had failed to lock the pin to the boom on the proper side and, as a result, the boom hit the moving train as it passed by. According to Claimant, Richins again told him he wanted him to pick up the pace or, he (Richins) was "going to do something". Claimant indicated that while he did not know what that "something" Richins might do might be, he nevertheless perceived the utterance as a threat. Richins, on the other hand denies that he ever said to Claimant during their verbal interchange in the TKO machine that if he did not pick up the pace he

would "do something". The record evidence reflects that Claimant did not as Richins had directed, pick up the pace for the remainder of the work day that ended at 5:30 p.m.

According to Claimant, at 5:30 p.m. when he was parking the TKO machine and getting ready to wait for the bus with his other co-workers to go to scan out from work, Richins called out to him from his hyrail truck and informed him he wanted him to wait at the job briefing area and not to check out because he wanted to talk to him. Claimant responded by saying to Richins that if he wanted to talk with him at that time, he needed to have a Union representative present. Claimant explained he felt he needed to have a Union representative present since he perceived that Richins had earlier threatened to do something if he did not pick up the pace and was under the impression that Richins was going to discipline him. According to Claimant, Richins then said to him, he was not to leave and was not released from work until he, Richins told him he was released. Claimant related that at this point, Richins began raising his voice and, as a result, he started to walk toward the crossing to wait for the bus with the other gang members. According to Claimant, Richins was now acting in an erratic way telling him to get on his hyrail truck because he wanted to talk to him. As he continued to walk away, he heard Richins tell Supervisor Mike Gipfert to grab him. Hearing that, Claimant related he did not feel safe so he kept on walking towards the crossing where everybody was waiting for the bus. Before the bus arrived, Claimant recounted Richins reached the crossing and yelling at him from his truck to get on the truck because he needed to talk to him. According to Claimant, he again responded telling Richins that if he wanted to talk to him, he needed to have a Union representative present. Claimant related that Richins then told him he better not get on the bus or he was going to call a special agent to remove him. Claimant further related that when the bus arrived, he followed his co-workers onto the bus. While on the bus Work Equipment Supervisor, Greg Porter came to the door of the bus and asked the bus driver to tell him that he, Porter wanted to talk to him. According to Claimant, he proceeded to the door of the bus where Porter informed him that Richins wanted to talk to him. Claimant explained to Porter that if he was going to talk to Richins he wanted a union representative present. Porter counseled Claimant that if he did not get off the bus, he would get in trouble. At that point, Claimant related, he agreed to leave the bus but he wanted someone to come with him as a witness. Co-worker, Danny Woods volunteered to accompany Claimant and they both got off the bus.

Richins account of their interchange at the end of the work day differs from that recounted by the Claimant. According to Richins, he informed Claimant he wanted to talk with him and Claimant refused to do so for the first two (2) times he made the request. In response to the first time, Claimant stated he did not have the time. In response to the second time, Claimant simply stated he was not going to talk to him. It was only on the third time he told Claimant he wanted to talk to him that Claimant then responded he was not going to talk to him unless he had Union representation. Richins maintained that all of Claimant's responses to his entreaty to Claimant that he wanted to talk to him was of a quarrelsome and argumentative nature. Richins explained that

what he wanted to talk to Claimant about was his performance during the day; to determine what was wrong with him in that he had not performed work at the pace he is capable of performing. According to Richins, Claimant walked away from him and he tried to stop him but Claimant continued walking. Richins recounted his next attempt was to get Claimant in his truck to talk to him and that he asked him twice to get in the truck but Claimant just ignored him and walked away. Richins further related that after he parked his truck, he walked over to where Claimant was waiting at the crossing for the bus and told him to stay there and not to get on the bus and again, Claimant simply ignored him and got on the bus anyway.

Richins explained he was at a loss as to why Claimant would not talk to him as they have had such discussions about performance in the past and they have always come to some sort of agreement. Richins conceded that typically, for the most part, Claimant does a good job operating his machine producing at a pace on occasion of between 350 and 400 crossties per hour. Richins asserted that Claimant's pace on the day in question of 220 crossties per hour was so unusual and that is why he thought there was something wrong with him. Richins related that he was told by the mechanic supervisor that while there was a problem with the clamps on the lifter it would not have been the reason for Claimant operating the TKO machine at the much slower pace. Richins recounted that Claimant has in the past acted to challenge supervisory authority mostly at job briefings but with respect to his conduct on the day in question, his actions constituted a blatant disrespect for authority which, in his view is sufficiently egregious as to warrant dismissal from service.

The record evidence reflects that by Notice dated November 10, 2009, the first day following the date of the incident reviewed above, Claimant was cited for a formal investigation to determine the facts and place responsibility, if any, that while employed as Sys TKO Operator on Gang No. 9063 on November 9, 2009, while Supervisor Josh Richins was trying to talk to you about work related issues, you became insubordinate and quarrelsome toward Supervisor Richins. The Notice continued to state the following:

> ***These allegations, if substantiated, would constitute a violation of Rule 1.6 (3) (Conduct – Insubordinate) and, Rule 1.6 (6) (Conduct-Quarrelsome), as contained in the General Code of Operating Rules effective April 3, 2005. Please be advised that if you are found to be in violation of this alleged charge the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal.***
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> * * * *
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> ***You are being withheld from service pending the results of the investigation and hearing.***

As per the Notice of Investigation, a formal hearing was held on November 17, 2009 and thereafter, Carrier Officer, J. Mike Haverstick, Manager Track Programs informed Claimant by Notification of Discipline Assessed dated December 2, 2009, that he had carefully reviewed and considered all the testimony contained in the hearing transcript and found more than a substantial degree of evidence presented to warrant sustaining all charges brought against him. The Notification further informed Claimant he was assessed a Level 5 discipline and dismissed from the service of the Carrier.

CARRIER'S POSITION

Carrier asserts Claimant was justifiably assessed with Level 5 discipline for his egregious quarrelsome and contentious conduct on November 9, 2009 in which he blatantly ignored the proper requests and directives given to him by his supervisor, Josh Richins. At the formal investigation, multiple Carrier witnesses, as well as Organization witnesses, Claimant's representative and Claimant himself rendered testimony which conclusively established Claimant's violation of GCOR Rule 1.6 (3) and 1.6 (6). Carrier submits it proffered the required substantial evidence to prove Claimant violated sub-sections 3 and 6 of Rule 1.6 (Conduct).

Carrier further submits it met the standards of review of discipline set forth by Referee Dana Eischen in Third Division Award No. 27867, to wit: that **1)** Claimant received a full and fair investigation with due notice of charges, opportunity to defend, and representation; **2)** Substantial evidence showed that Claimant was culpable of the charged violation; and **3)** The penalty imposed was not arbitrary, capricious, discriminatory, or unreasonably harsh given the facts and circumstances of the particular case. As such, Carrier avers there is simply no basis to overturn the administered discipline which was properly imposed under the UPGRADE Discipline Policy.

Based on the foregoing, Carrier asserts it has met its burden of proof and that Claimant's rights have been carefully guarded. Accordingly, the Carrier respectfully requests the Board to rule it is not required to vacate the properly assessed discipline notation issued to the Claimant.

ORGANIZATION'S POSITION

As noted by the General Chairman in his post conference letter of June 8, 2010, the Organization submits the following points in argument to substantiate its position that there is insufficient evidence to support the imposition of any discipline much less the imposition of the ultimate disciplinary penalty of dismissal from service

1) Carrier did not meet its burden of proof;

2) Testimony adjudicated at the investigation/hearing revealed that Claimant had been threatened with discipline earlier in the day in question by his supervisor, Supervisor Josh Richins if he did not increase his production, so when Richins indicated to Claimant at the end of the work day he wanted to meet with him, Claimant simply requested a witness be present to keep the conversation honest.

3) Richins testified he would not allow Claimant to have a witness to their impending conversation but would not divulge the reason why he took this position.

4) The discipline of dismissal is harsh, unwarranted and contradictory to other incidences involving employees feeling threatened or intimidated and revealing that fact to their supervisor.

5) Supervisor Richin was employee in charge and allegedly has been trained to handle supervision of many different employees but, in this instant case, Richins created a hostile situation first by threatening Claimant with discipline then by refusing to have the conversation with Claimant he desired to have in front of any witnesses. It is obvious that in this situation, Richins did not want any witnesses to observe his threat making or bullying of an employee in his charge, here the Claimant.

6) Claimant had been offered a leniency reinstatement during the investigation phase of the process but declined the offer citing the reason he did not want to be wrongfully disciplined in any way. The Organization submits the offer of a leniency reinstatement agreement serves as proof that the charges against Claimant were improper and without merit.

The Organization submits that at the time of the incident Claimant had in excess of eleven (11) years of otherwise satisfactory service with no recent blemishes on his work record. The Organization further submits that it has long been held that the purpose of discipline is to rehabilitate, correct, and guide employees. However, in this instant case, the Organization avers the imposition of the discipline of dismissal under all the given circumstances serves no purpose other than pure punishment. The Organization asserts it is fully convinced that an objective analysis and evaluation of the transcript will clearly and conclusively establish that the testimony and evidence (or lack thereof) introduced at the investigation fails to justify the discipline assessed against the Claimant. Arbitral authority has consistently held that, when it is shown that discipline is excessive, capricious, improper and unwarranted, it cannot stand.

Based on the foregoing argument asserted, the Organization submits that Claimant is entitled to the full remedy requested and that the Board sustain the Claim in its entirety.

FINDINGS

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The Board has thoroughly reviewed the record evidence including close scrutiny of the hearing transcript containing the testimony of the witnesses all of whom witnessed in varying part the interchange that occurred between the Claimant and Supervisor Richins. There is no doubt that Claimant disobeyed directives given to him by Supervisor Richins but the Board is persuaded Carrier did not attribute any weight or merit to the fact that Claimant's contrary conduct was as a result that he acted in the belief that Richins had, earlier in the day threatened to do something to him if he did not increase his pace. Even if arguendo, Richins' testimony is credited as representing the truth of the matter that he did not utter the words he would do something if Claimant did not increase his pace, Claimant nevertheless perceived his verbal interchange with Richins that occurred in the early afternoon and took place in the TKO machine as a threat, as the evidence makes quite apparent that Richins was perturbed that Claimant was underperforming and would not accept Claimant's assessment that because there was a problem with the clamps on the lifter, it was not safe to increase the pace from 220 crossties to the standard 350 crossties per hour demanded by Richins. In checking with the equipment supervisor about the problem prior to the end of the work day, Richins view that it was safe to operate the TKO machine at the increased pace of 350 crossties per hour notwithstanding the clamps problem was bolstered and served as the motivating factor in his wanting to talk to the Claimant in an attempt to assess the real reason for his underperformance that day as Claimant did not, as Richins had requested, increased his pace. Claimant's refusal to comply with Richins earlier directive to increase the pace of removing old crossties cannot be deemed to constitute insubordination as their difference of opinion centered on a matter of safety. It is well established arbitral authority that the principle of conduct of "obey an order now and grieve later" is subject to the exception where safety of an order is involved. Claimant made quite clear to Richins in light of his insistence to increase the pace that he believed it was not safe to go beyond the pace of 220 crossties per hour and Richins acknowledged Claimant's position by saying before departing the TKO machine, so that's where we are at.

The record evidence makes quite clear that when Richins first approached Claimant and told him he wanted to talk with him, given their verbal interchange earlier in the day and the fact that Claimant had not acceded to Richins desire for him to increase his pace, Claimant believed that the purpose of the talk would result in his being disciplined. The Board is of the view that Richins erred in failing to indicate to Claimant at the outset that the purpose of the talk concerned his wanting to determine if there was anything

wrong with him as the day's underperformance was an anomaly. Claimant was wrong in assuming that the purpose of the talk was that Richins was going to discipline him for failing to increase the pace of his work, however, within this context his request for Union representation was understandable. Claimant was also wrong to respond in a curt manner the first two (2) times Richins asked to talk to him before scanning out of work before submitting to a third request to talk but only under the condition of having union representation. Finally, Claimant was wrong to ignore Richins directive not to get on the bus. The record evidence makes quite clear that both Claimant and Richins were stubborn and locked into their own respective positions; a prime example of two ships passing in the night with absolutely no awareness of the presence of the other ship. Still another prime example of their respective conduct, "it takes two to tango".

While Claimant's conduct can be explained within the context of the overall situation reflecting his mental state at the time and his perception he was about to be subject to the imposition of discipline, at the same time his conduct cannot and should not be condoned. On the other hand, given all the prevailing circumstances, it is our judgment that the discipline imposed of dismissal particularly in light of the fact that Claimant had an almost pristine work record over the entire eleven (11) years of his employment was excessive. **On this ground, we rule to convert the dismissal into a suspension the length of which shall cover the period beginning with his separation of employment and ending with the date of his reinstatement. Claimant's seniority shall be unimpaired but he shall not be entitled to any back pay or other employment benefits he may have been entitled to receive in accordance with the Agreement had he not been held out of service by Carrier for the subject length of time involved.**

This Award is to become effective within sixty (60) days from the date signed by the Parties.

AWARD

CLAIM SUSTAINED AS PER FINDINGS

George Edward Larney
Neutral Member & Chairman

B. W. Hanquist

T. W. Kreke

Chicago, Illinois
Date: November 9, 2011