

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 203, (Case No. 209)**

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

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: April 10, 2012

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

- 1. The dismissal of B&B Foreman S. Tate for violation of Rule 1.6 (Conduct) in connection with entering into an altercation with B&B Assistant Foreman J. Harris on May 15, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File B-1019C-104/1542085D).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Tate have his record cleared of the alleged offense and be reinstated to his former position with all rights unimpaired and compensated at his applicable rate of pay for all time lost as result of the improper discipline assessed."**

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.

On May 17, 2010, Carrier notified Claimant and Mr. Jimmie Harris to appear for a formal Investigation on May 24, 2010, which was opened on that date, recessed, reconvened, and held to its conclusion on June 11, 2010, concerning in pertinent part the following charge:

"...to develop the facts, hear testimony and place responsibility, if any, that while employed as a B&B Foreman and as a B&B Assistant Foreman, at MP 19.9 Geneva Subdivision, you allegedly were hostile and/or quarrelsome when you allegedly entered into an altercation with each other on Saturday May 15, 2010.

These allegations, if substantiated, would constitute a violation of Rule 1.6 (Conduct) as contained in the General Code of Operating Rules, effective April 7th, 2010 and the Union Pacific's Violence & Abusive Behavior in the Work Place policy. Please be advised that if you are found to be in violation of this charge, the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Policy may result in permanent dismissal."

On June 18, 2010, Claimant was found guilty as charged and was assessed a Level 5 discipline and dismissed from the service of the Carrier.

It is the position of the Organization that the Claimant was involved in a verbal exchange with B&B Assistant Foreman J. Harris concerning Mr. Harris's instructions to the Gang working at the Lombard, Illinois, station on May 15, 2010, which became heated. It argued that the record established that Claimant withdrew from the work location after the initial exchange of words walking across the street and returned a short time later after the discussion had ended. According to it, subsequent to Claimant's return to the work location, the verbal exchange resumed at which time another employee stepped between Claimant and Mr. Harris to defuse the situation and during the exchange Mr. Harris was either inadvertently touched or backed up and fell off the platform onto the adjacent track. It argued there were no blows exchanged between the parties and while the discussion did become heated, no life threatening remarks were made. It further stated that the witnesses described the exchanges between the Claimant and Harris as "trash talking". The Organization explained it does not condone such activity by its members, but based on the circumstances of the incident Claimant's action, assuming the Carrier had proven its case which it did not, did not rise to the level to warrant the ultimate discipline of dismissal. It further argued the Carrier failed to meet its burden of proof that Claimant committed any of the activities listed in the "Violence & Abusive Behavior in the Work Place Policy". It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the record substantiates that Claimant was engaged in a hostile and quarrelsome confrontation with a fellow co-worker (Jimmie Harris, Jr.) while working at M.P. 19.9 (Geneva Subdivision) which is directly contrary to the clear language of Rule 1.6 (Part 6) as well as the Carrier's Violence & Abusive Behavior in the Work Place Policy. It argued the record reveals that while the Claimant only admitted to having a heated argument with Mr. Harris, the testimony provided by several witnesses confirmed that the verbal altercation ended in a physical altercation when the Claimant pushed/shoved Harris, causing him to fall onto the tracks. It further argued that dismissal was appropriate as hostility and quarrelsome behavior cannot be tolerated in the workplace because it is the Carrier's responsibility to provide a safe work environment for all of its employees. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the record and determined that the Claimant received a "fair and impartial" Hearing and was afforded his Agreement "due process" rights, therefore, the dispute will be resolved on its merits.

This is the first of two cases involving the same incident and/or altercation that occurred on May 15, 2010, at Mile Post 19.9 (Geneva Subdivision). There is no dispute between the parties that a verbal/physical altercation occurred between the Claimant who is a Foreman and Assistant B&B Foreman J. Harris regarding their past working relationship, and over their respective abilities to lead on the project being handled on May 15th. Several witnesses testified that initially the Claimant was the aggressor and instigated the altercation.

On page 39 of the transcript Foreman Shandro explained that the confrontation began with a verbal argument which became heated and then escalated. He was questioned in pertinent part as follows:

"Q. And can you give me a brief synopsis of what you saw?"

A. What I saw was an argument which was behind me, to my left, and guys were in between them. Sherman charged forward and reached over and I - - It looked like he pushed Jimmie in the chest. Then Jimmie stumbled backwards and he tripped over the rail with his right heel and then he fell on the - - in between the rails.

Foreman Lovett provided additional testimony that confirmed Foreman Shandro's explanation of the incident. On pages 68 - 71 of the transcript he testified that the Claimant engaged in a verbal and physical altercation that started with a verbal altercation that lasted about five minutes and then seemingly died down before escalating again, with the entire confrontation lasting approximately 15 minutes. Lovett was adamant that he saw the Claimant push Employee Harris and explained that he was attempting to separate the two employees when he saw Claimant's arm extend out and push Harris.

Employee Harris also provided testimony regarding the incident. Harris admitted that he had engaged in a verbal altercation with the Claimant that was heated and that profanities were exchanged. Employee Harris stated that the Claimant not only verbally threatened him **"whip my ass"**, but that he also physically shoved him (See Transcript pages 83 and 88).

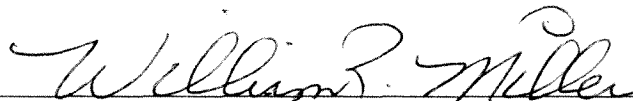
Review of the Claimant's testimony substantiates that the Claimant admitted there was a verbal altercation that was heated enough that other employees felt that it was necessary to intervene (See Transcript pages 101 - 102 and 106). Claimant testified there was considerable shoving and pushing between him and Employee Harris which confirmed the prior testimony of Employees Shandro, Lovett and Harris.

The Carrier has an obligation to maintain a safe work environment free of all forms of violence, including verbal and physical threats. It is clear that the Claimant and Employee Harris were both in leadership roles and that Claimant failed to exhibit proper behavior to his subordinates with his hostile and quarrelsome conduct, when he engaged in a verbal and physical altercation with a co-worker that was contrary to Rule 1.6 (Conduct) and the Violence & Abusive Behavior in the Work Place Policy. It is determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

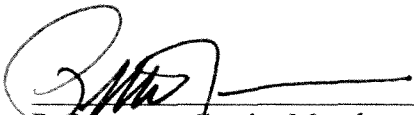
The only issue remaining is whether the discipline was appropriate. The Board does not excuse the Claimant's behavior, however, due to longevity of service with a good prior work record the Board finds and holds that the dismissal is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's UPGRADE Discipline Policy. Claimant will be reinstated to service with seniority intact and all benefits unimpaired with no back-pay on a **"last chance basis"** after successfully completing an Employee Assistance Program (EAP) for anger management. Upon return to service the Claimant will be at a Level 4 Disciplinary status for a 24 month probationary period during which time if the Claimant engages in similar and/or like behavior he will automatically revert to a dismissed status without the benefit of a formal Investigation.

AWARD

Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: June 18, 2012