

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 161, (Case No. 182)**

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: February 23, 2011

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

- 1. The dismissal of Machine Operator E. Beza for violation of Rule 1.6, Parts 3, 5 and 6 and that portion of the rule which provides '... *"any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated."*...', (Emphasis in original) (Employees' Exhibit "A-1") in connection with the cited June 13, 2010 incident is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File UP-215-WF-10/1536466).**
- 2. As a consequence of the violation outlined in Part 1 above, the charges against Mr. Beza shall be dropped and he shall have his personal record cleared of all charges, be paid for all lost time, have seniority and vacation rights unimpaired and all other rights due him by the Agreement."**

FINDINGS:

Public Law Board No. 6402, 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 record indicates that the Claimant entered the service of the Carrier on May 27, 1997, and on the date of the incident was working as a Machine Operator.

On June 30, 2010, the Carrier advised Claimant to appear for a formal Investigation on July 14, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that on June 13, 2010, at approximately 1515 hours, you allegedly left your place of employment at MP 518 without authority and drove approximately 14 miles to MP 532 where you allegedly entered the forward cab of the CATS0501 and became quarrelsome and threatening towards Mr. Ortiz and Mr. Deleon in a face-to-face confrontation using foul and profane language causing Mr. Ortiz and Mr. Deleon to fear for their safety and calling for help to defuse the situation.

These allegations, if substantiated, would constitute a violation of Rule 1.6, Part 3 (Insubordinate), Rule 1.6, Part 5 (Immoral), Rule 1.6, Part 6 (Quarrelsome), and that portion of the rule which provides *"any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty to the performance of duty will not be tolerated."*, as contained in the General Code of Operating Rules, effective April 7, 2010, and the System Special Instructions, effective April 7, 2010. Please be advised that if you are found to be in violation of this alleged charge the Discipline Policy may result in permanent dismissal."

On July 29, 2010, Claimant was notified that he had been found guilty as charged and assessed a Level 5 and dismissed from service.

It is the position of the Organization that the Carrier did not prove the charges against the Claimant as he did not engage in a verbal altercation with Mr. Ortiz and Mr. Deleon. It argued that employees Ortiz, Deleon and Fedon all of whom were at the incident of June 13th testified that Claimant did not quarrel or threaten with anyone. It concluded by requesting that the discipline be rescinded and the Claim sustained as presented.

It is the Carrier's position that even though the Claimant did not exchange foul language with Ortiz and Deleon he is not innocent of the charges because it is clear that he went to Ortiz's worksite knowing that Fedon intended to confront Ortiz and did nothing to defuse the situation that took place in the cab, thus he was a willing participant in the intimidation and threatening of a fellow employee. According to it, the Claimant had a duty to intervene and prevent the altercation, but instead allowed it to happen. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and determined that no procedural errors occurred during the Hearing and the Claimant was afforded his "due process" Agreement rights.

The Carrier alleged that the Claimant violated Rule 1.6 Conduct which states the following:

"Employees must not be:

- 1. Careless of the safety of themselves or others**
- 2. Negligent**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**
- 6. Quarrelsome**
- or**
- 7. Dishonest**

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated."

Review of the transcript indicates that the Claimant and Foreman Cervantes and Machine Operator Fedon were working at MP 518 on June 13, 2010, when shortly after 3:00 p.m. the three drove in Fedon's vehicle to MP 532 where employee Ortiz was performing tamping duties. Employee Fedon entered the cab of Ortiz's machine followed by Claimant who proceeded to watch the altercation.

On page 23 of the Transcript, Tamper Operator Ortiz was questioned as to whether or not he asked the Claimant why he had come with Fedon to his work location and he testified as follows:

"Q Okay. Did you ask Mr. Beza what he was doing there?

A Yes sir.

Q What did he tell you?

A He said here to referee or- or I'm on your side or something like- ..."
(Underlining Board's emphasis)

On page 46 of the Transcript Foreman Deleon was questioned about the event and asked if he inquired about the Claimant's presence and he testified as follows:

"Q Did you ask him his purpose there or what he was doing there?

A Yes sir, I did.

Q And what did he tell you?

A He told me that he's the only one that could hold Fedon.

Q Okay. He's the only one that could hold Fedon back. Was Mr. Fedon pretty upset or what?

A Yeah, yeah I would say- yes sir."
(Underlining Board's emphasis)

On page 71 of the Transcript the Claimant confirmed Ortiz and Deleon's testimony (recopied above) that he was aware before he leaving his work location that employee Fedon intended to confront Mr. Ortiz and there was a likelihood of an altercation. He was asked what he said to EIC Foreman Munoz and Surfacing Gang Foreman Galvan when they appeared at the worksite moments after the incident and he stated the following:

"A Mr. Munoz and Mr. Fedon were talking and I was just like, I guess I- apparently now after Denny blew everything up- blew everything out of proportion. I said I guess I'm here to keep the peace. That's probably what I insinuated...." *(Underlining Board's emphasis)*

Claimant's statement is an admission that he left his worksite with the other crew members to attend a potential confrontation. Even assuming for the sake of argument he came for the purpose of not allowing it to escalate into a physical altercation it is clear that he did nothing to prevent a verbal altercation that consisted of profane language. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged and did nothing to intervene and prevent the incident.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had 12 plus years of service with a good work record who made a poor decision. The Board does not excuse the Claimant's behavior as he was culpable for his actions, however, after review of the record the Board has determined that the discipline was excessive. Therefore, the Board finds and holds the Claimant is to be reinstated to service with seniority intact and all other rights unimpaired at a Level 3 disciplinary status without back-pay and a requirement to attend Anger Management Classes authorized by the Carrier.

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 by the parties.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: June 27, 2011