NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 189
AWARD NO. 174

PARTIES TO DISPUTE

CARRIER
Union Pacific Railroad

Carrier's File
1519519

AND

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

System File
C-0948U-153

STATEMENT OF CLAIM

1. The Carrier violated among other rules violations of the July 1, 2001 Collective Bargaining Agreement, Rules 1, 14, 25, 26, 35 and 48, when, by letter dated April 14, 2009, it dismissed Claimant, Track Patrol Foreman, William T. Nua from his employment for alleged violation of General Code of Operating Rules (GCOR), Rule 1.6 Conduct and Rule 1.7 Altercations, in connection with the allegation that on the morning of March 17, 2009, he threatened fellow employee, Track Supervisor, Tyson Payne.

2. As a consequence of the violations set forth in Part 1 above, Claimant shall have the charge letter expunged from all Company records, Carrier to reinstate Claimant to his employment with seniority unimpaired, to restore Claimant's vacation rights, and to compensate Claimant for all loss of time including personal expenses incurred for his attendance at the investigation.

STATEMENT OF BACKGROUND

At the time events occurred that resulted in Claimant's dismissal from service of the Carrier, he had established and retained seniority in various classifications within the Carrier's Maintenance of Way and Structures Department for approximately ten (10) years. In this same time frame he was regularly assigned as a Track Patrol Foreman under Supervisors, Steve Hewitt and Tyson Payne.

On Monday, March 9, 2009, during a morning conference call, Supervisor Payne informed all foremen under his supervision that Carrier's annual Book of Rules test was scheduled to take place on the following Friday, March 13, 2009 and that any employee not available to take the test on that date, would be rescheduled to take the test either the following week or, within thirty (30) days of the latter date. Upon being informed of this information, Claimant contacted Supervisor Payne and apprised him he had scheduled doctor's appointments in Las Vegas, Nevada on both March 12 and 13, 2009 to have blood work done and that it was important for him to keep the appointments. Notwithstanding Claimant's explanation of the importance to him of keeping the appointments, Payne nevertheless asked Claimant if he could reschedule the appointments and Claimant responded he would inquire as to such a possibility. Although Claimant attempted to reschedule his doctor's appointments, ultimately he was unable to do so and therefore was not available to take the annual Book of Rules test on Friday, March 13, 2009.

On Monday, March 16, 2009 Claimant was scheduled to be at work but car problems he encountered prevented him from reporting to work that day and he informed Supervisor Hewitt of his situation. Hewitt gave permission to Claimant to be absent from work on March 16, 2009 and did not express any concern Claimant had been unable to take the Book of Rules test as he had two (2) other alternative times at which to take the test. On this same date of March 16, 2009, Payne called Claimant on his cell phone multiple times leaving Claimant voice mail messages he needed to make arrangements to input Claimant's payroll/time and expenses information. Upon getting his personal vehicle operable, Claimant contacted Payne at 7:30 pm while still in Las Vegas and he and Payne agreed to meet the following morning, March 17, 2009, in Roper Yard to determine his payroll/time and expenses information Payne was seeking to input. In this conversation, no discussion occurred regarding Claimant being scheduled to take the Book of Rules test the morning of his return to work, Tuesday, March 17, 2009.

Claimant departed Las Vegas the evening of March 16, 2009 in his personal vehicle and on the way to his destination of Salt Lake City, Utah to report to Roper Yard the following morning, Claimant was involved in an automobile accident which delayed his travel to Roper Yard and prevented him from getting anymore than thirty-five (35) minutes of sleep before his meeting with Payne. Claimant asserted knowing he had not had a sufficient amount of time to sleep, he had no intention to perform any service after meeting with Payne and thus, he reported to Roper Yard without his work boots. Following securing the information he needed for payroll for Claimant, Payne apprised Claimant he had made arrangements with the instructor to administer the Book of Rules test to him that morning. Claimant maintained he then explained to Payne he had been driving all night from Las Vegas to Salt Lake City, that he had, had only thirty-five (35) minutes of sleep as a result before meeting with him and, as he was in no condition to take the test that morning, he offered to take the test the following morning, Wednesday, March 18, 2009. According to accounts proffered by both Claimant and

Payne, the conversation regarding taking the test continued wherein Payne insisted on Claimant taking the test and Claimant resisted taking the test and, additionally, that he was not at work to perform any service due to his lack of sleep and that he had come to Roper Yard simply to give Payne the payroll/time and expenses information he had requested. Payne countered that if he failed the test that morning he had thirty (30) days to be retested but Claimant continued to hold firm his position that he would take the test the following day. According to Claimant's version of what happened next, Payne was upset at his resistance to take the test that morning and told him, he would pull him out of service if he did not take the Rules test that morning. At that point, Claimant related he suggested to Payne they needed to speak to another Carrier Supervisor for the purpose of obtaining a second opinion. To that end, Payne and Claimant met with Craig Merrill, Manager of Track Maintenance to request his opinion in order to resolve the dispute between them. However, according to Payne, in the course of looking for Merrill to meet with him, Claimant said to Payne that if he pulled him out of service, he (Claimant) would end his (Payne's) life. The record evidence reflects that there were no eyewitnesses to this verbal interchange between Claimant and Payne and, in any event, Claimant denies having made any threats to Payne.

According to the record evidence, when Claimant and Payne met with Merrill, Claimant initiated the discussion giving his version of the dispute that existed between him and Payne. According to Claimant, while he was relating his version of the dispute, Payne began and continued to interject and interrupt him, resulting in both speaking at the same time and talking over one another. Claimant related the conversation became heated to the point that both he and Payne started swearing at each other and that eventually Merrill slammed down his fist on the table and told them both to shut up, that, that is enough "bullshit" and to set themselves to the task of settling the issue right then and there. When asked by Merrill if he had showed up to go to work that morning, Claimant recounted he informed Merrill that he had only come to work that morning to report to Payne what his time and expenses were for payroll purposes and that because of his lack of sleep the night before, he was not prepared to take the Rules test that morning. Notwithstanding Claimant's explanation as to the reason why he was not prepared to take the test that morning, Merrill reasoned that because he had shown up to work at the designated time, Claimant's doing so indicated to him that he had come prepared to work so there would be no reason for his not taking the test that morning. In response, the record evidence reflects that Claimant stood up and declared he would take the "fucking test" and requested he be escorted by someone to the test location. At that point, Payne and Claimant exited Merrill's office and Payne alleged that he again asked Claimant if he was going to take the test even though Claimant had stated he was going to take the "fucking test" as he left Merrill's office, to which Claimant responded for a second time with the threat to "end" Payne's life. As was the case when Claimant allegedly voiced the first threat, there were no eyewitnesses to the verbal exchange that occurred between them. According to Claimant, Payne told him he would pull him out of service if he threatened him again or did not take the test that

morning to which he said to Payne, "do what you gotta do", at which point, Payne declared he was removing him from service. According to the record evidence, Claimant in disregard to what Payne had told him, proceeded to his personal vehicle, left the work area premises and went home to sleep. Next, Payne informed Merrill of what had transpired after he and Claimant had left his office and, Merrill, in turn, summoned Carrier Senior Special Agent, Rick Thornton to come to Roper Yard. The record evidence reflects that Claimant sent three (3) text messages to Payne the evening of March 17, 2009 wherein he apologized about their encounter, noting again he had a long night without sleep, that he was having a bad day and was not prepared to take the test. The following are the three (3) text messages Claimant sent to Payne which Payne recorded in a typewritten note and submitted to Special Agent Thornton as part of Thornton's investigation of the incident (Carrier's Exhibit A, p.81):

> 7:41 pm. hey, I just wanted to apologise (sic) 4 this morning, I'm sorry bro, I just had a long, long trip and I had no sleep. I like you man, I just had a bad night n day was exhausted.
>
> 7:46 pm. I wish you would have told me about the test n I would have flew up here n had sum (sic) sleep n been prepared, so I just wanted u 2 no (sic) I'm sorry Tyson, we all have bad
>
> 7:56 pm no sleep sais (sic) a lot bro we all have bad days and today was mine. I didn't even have my boots on cuzz (sic) I was gonna go hm (sic) n sleep I never got da (sic) chanc (sic)

The record evidence reflects that after completing his investigation of the incident, which consisted of having interviewed Payne in person and Claimant by telephone, notwithstanding the absence of eyewitnesses to the verbal exchanges between Claimant and Payne outside of the conversation that occurred between them in Merrill's presence, and notwithstanding Claimant's denial he made any threatening remarks to Payne, Special Agent Thornton filed a Class B Misdemeanor charge against Claimant of making "Terroristic Threats Against Life or Property" with the South Salt Lake Justice Court which in turn issued an Arrest Warrant for Claimant which stated in pertinent part the following:

> To any Peace Officer in the State of Utah:
> You are commanded to arrest and deliver the defendant to the Salt Lake County jail.
>
> The defendant must appear in Court before Judge Catherine M. Johnson on the next available court date.
>
> Bail is set at $5,000.00

This Warrant may be served day or night

Issued: March 30, 2009.

The record evidence reflects that prior to this warrant being issued, Carrier by letter dated March 19, 2009 notified Claimant he was to report for a formal investigation at 11:00 am on March 27, 2009 on charges to develop the facts and place responsibility, if any, that while employed as Track Patrol Foreman on Gang 6066, at Salt Lake City, Utah, near Milepost 742.4,at approximately 0700 hours, on March 17, 2009, you allegedly threatened a fellow employee with his life and entered into an altercation with the employee. Claimant was advised he was being charged with possible violation of GCOR Rules, 1.6 (3) Conduct Insubordinate; 1.6 (4) Conduct Dishonest; 1.6 (5) Conduct Immoral; 1.6 (6) Conduct Quarrelsome; and 1.7 Altercations. Claimant was further advised that if he was found to be in violation of the alleged charges, the discipline assessed might be a Level 5 pursuant to its UPGRADE Discipline Policy which might result in permanent dismissal. Claimant was additionally advised he was being withheld from service pending the results of the investigation and hearing.

By letter dated April 14, 2009 Carrier notified Claimant that a review of the testimony adduced at the investigation was found to contain more than a substantial degree of evidence to sustain warranting all charges brought against him and therefore he was being dismissed from service.

The Organization thereafter filed the instant claim contesting Claimant's dismissal and, as the Parties were unable to resolve the claim on the property, the claim comes now before the Board for a final resolution.

CARRIER'S POSITION

Carrier maintains that the record evidence supports its contention that it met the well established and accepted three-prong test applicable particularly to cases involving the dismissal from service of the charged employee, here the Claimant. Carrier asserts it met the first prong of the test by proving by substantial evidence that Claimant twice threatened the life of Supervisor Payne during their verbal exchanges the morning of March 17, 2009. Aside from just Payne's allegation that Claimant twice threatened his life in response to his warning Claimant he would take him out of service if he continued to object and refuse to take the annual Book of Rules test the morning of March 17, 2009, there is the fact that Supervisor Merrill witnessed part of the verbal altercation that occurred between Claimant and Payne where both were engaged in swearing at one another which compelled Merrill to intervene as a means of restoring order to the discussion by forcefully slamming his fist down on a desk to get their attention and to calm them down. Additionally, there is the fact that after investigating the verbal altercation that occurred between Claimant and Payne, Special Agent Thornton was

persuaded by the evidence he adduced to file a misdemeanor charge against Claimant of making "Terroristic Threats Against Life or Property" with the South Salt Lake Justice Court which, in turn, issued a warrant for Claimant's arrest.

As to the second prong of the test pertaining to whether Carrier provided Claimant his due process rights with regard to receiving a full and fair investigation with due notice of the charges alleged against him, the opportunity to present a defense and his right to have representation, Carrier maintains that it provided all these rights to Claimant noting that the only procedural objection raised by the Organization was its position that Claimant was wrongfully held out of service prior to convening the investigation and during the time it took Carrier to make the decision following the investigation to dismiss Claimant from service. The Organization's objection was two-fold, to wit, the first, that withholding Claimant from service preceding convening of the investigation represented a pre-judging by Carrier of Claimant's guilt and second, Carrier violated Rule 48 of the Controlling 2001 Agreement by taking Claimant out of service on the morning of March 17, 2009, the date of the alleged altercation. Carrier counters the Organization's objection by citing Paragraph (0) of Rule 48 as providing contractual authority for its action of suspending Claimant from service pending convening of a hearing. Said Paragraph (O) reads in whole as follows:

> ***It is understood that nothing contained in this rule will prevent the supervisory officer from suspending an employee from service pending hearing where serious and/or flagrant violations of Company rules or instructions are apparent, provided, however, that such hearing will be conducted within thirty (30) calendar days from the date the employee is suspended and a decision rendered within twenty (20) calendar days following the date the investigation is concluded.***

Carrier asserts that Claimant's threat to end Supervisor Payne's life meets the test of a serious and flagrant violation as provided by Rule 48 (O), and therefore supports its action of suspending Claimant from service pending a hearing offering the rationale that safety of its employees is paramount to its operation. Carrier further asserts the record evidence shows without doubt that it met the timelines associated with conducting the hearing and associated with rendering the decision.

As to the third prong of the test, to wit that pertains to whether the discipline assessed was arbitrary, capricious, discriminatory, and/or whether the quantum of discipline assessed was unreasonably harsh under all the prevailing facts and circumstances of the case in question, Carrier submits Claimant's dismissal was not arbitrary or capricious or discriminatory and certainly was commensurate with the egregious nature of the threat directed to Supervisor Payne that he would end Payne's life. Such a threat Carrier maintains cannot be viewed as merely a benign or idle one uttered by someone, here Claimant, who is accomplished as a professional fighter and in various martial arts.

Additionally, Claimant's propensity to engage in violence is substantiated by the fact that on July 10, 2009, he was arrested for having physically assaulted his father.

Carrier argues that once an employee threatens another with physical violence, especially a threat to take one's life, an employment relationship can no longer be maintained. Accordingly, Carrier urges the Board to deny the subject claim in its entirety.

ORGANIZATION'S POSITION

The Organization concedes that an altercation occurred between Claimant and Supervisor Payne but notes that the altercation was a "verbal" one, not a physical altercation. The Organization submits there is no dispute that no one other than Claimant and Supervisor were privy to the conversations they had with one another that allegedly involved Claimant twice threatening Payne to "end his life". Thus, the Organization argues, since Carrier was unable to produce either corroborative eyewitness testimony to substantiate Payne's allegation Claimant threatened his life or documentary evidence to that effect, the discipline of dismissing Claimant from service cannot stand as this case boils down to a he said, he said dispute wherein Payne maintains Claimant threatened him and Claimant maintains he did no such thing. The Organization cites the well established long-line of arbitral authority that bars the assessment of discipline in a he said, he said incident that lacks independent corroborative evidence to substantiate the validity of one account over another. Contrary to Carrier's position that Special Agent Thornton's filing of a misdemeanor charge constitutes such corroborative evidence, the Organization submits it does not as the basis for Thornton's charge rests solely on hearsay evidence he gleaned from interviews he held with both Payne and Claimant. That being the case, the charge filed by Thornton just like the Carrier's charges against Claimant cannot stand as it lacks corroboration by any other source of information or evidence. As to the information advanced in this record proceeding by the Carrier pertaining to Claimant's subsequent arrest on physical assault charges against his parents, the Organization asserts this information has no relevance to the incident that occurred between Claimant and Supervisor Payne three (3) months earlier.

As an aside, the Organization notes that Payne for his part also engaged in the very same argumentative conduct that Claimant was cited for and assessed discipline, yet, Payne received no discipline for his ill behavior. Additionally, Supervisor Merrill also acted badly when he became impatient with the rantings of both Claimant and Payne displayed before him and reacted by slamming his fist down on a table and instructing Claimant and Payne to cut the "bull shit", yet, Merrill received no discipline for his ill behavior. The fact that neither Payne nor Merrill was assessed discipline for their involvement in the subject incident constitutes proof that Claimant suffered disparate

treatment when Carrier sought only to discipline him for the verbal altercation that occurred.

In concluding its position, the Organization asserts there can be no dispute based on the foregoing argument advanced that Carrier's decision to dismiss Claimant from its service was disparate, unwarranted and in violation of the Agreement and therefore it submits to the Board the instant claim must be sustained 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.

While the Board fully concurs in the well established long-line of arbitral authority that shields employees from the assessment of discipline in cases involving a he said, he said incident, where no corroborative evidence exists to support one version of the incident over the other, the Board is persuaded by the record evidence before it that the instant case is not one that meets the criteria of such a he said, he said case. While it is factually correct that there were no eyewitnesses to the verbal altercation that occurred between Claimant and Payne when Claimant allegedly uttered the threat at two (2) different times to end Payne's life, there does exist circumstantial evidence that can serve to validate Payne's version of events over that of Claimant's version. The most significant circumstantial evidence is that of Claimant's not one, not two, but three (3) separate text messages to Payne on the same date of the incident but hours later and after the end of the work day apologizing for his conduct toward Payne. If Claimant had, as he maintained, that he did not, at any time threaten Payne during their verbal interchanges, he therefore had nothing to apologize for.

The second piece of circumstantial evidence is Supervisor Merrill's eyewitness account of just how heated the verbal interchange was that took place between Claimant and Payne that occurred before him. The Board is persuaded that if such heat of an argument between Claimant and Payne was displayed before Merrill, an indifferent third party to their dispute, an inference can easily be derived in support of a conclusion that their verbal interchanges with no other persons present were no less explosive in nature. Even though Special Agent Thornton was not an eyewitness to the incident, he was so persuaded by the information he ascertained to conclude that Payne's version represented the truth of the matter over that of Claimant's version, that he was compelled not only to submit a report of the incident but to also file a misdemeanor charge against Claimant for his terrorist conduct. The Board is persuaded that a person

in Thornton's position as a Special Agent just does not willy-nilly file such a criminal charge against someone if substantial proof does not exist to support the charge.

As to the third piece of circumstantial evidence, the Board finds, contrary to the Organization's position, that there is relevance pertaining to the incident in question to the fact that Claimant is an accomplished practitioner of the martial arts and that, combined with his arrest for assaulting his parents is a very good and compelling indication that Claimant possesses a predisposition toward violence as a means of resolving conflicts that arise between himself and others. Thus, the Board concurs in Carrier's position that Claimant's verbal altercation with Payne that involved a threat of violence toward Payne and proven here by substantial evidence cannot be ignored and treated as a benign event. This is so, because in the past two (2) decades, there have just been too many incidents of violence in the workforce brought on by disaffected employees that have resulted in the deaths of fellow workers. Therefore, we conclude that it is better to take preemptive measures to protect the safety of all employees than to overlook and tolerate an incident such as the subject incident by not addressing the incident with an assessment of firm and aggressive discipline. We find that Carrier's discipline of dismissing Claimant from its service given his conduct in violation of GCOR Rules 1.6 and its subsections thereof and Rule 1.7 to have been an example of such firm and aggressive discipline which was warranted and proper under all the prevailing circumstances surrounding the subject incident. Accordingly, we rule to deny the instant claim in its entirety.

AWARD

Claim Denied

George Edward Larney
Neutral Member & Chairman

B. W. Hanqdist
Carrier Member

T. W. Kreke
Employee Member

Chicago, Illinois
Date: Oct 4, 2010