

PUBLIC LAW BOARD NO. 6375

**Case No. 3
Award No. 3**

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The dismissal of Assistant Foreman K. P. Gabriel for his alleged violation of Rule 1.6 (quarrelsome) on November 6, 1997 was without just and sufficient cause, based on an unproven charge and in violation of the Agreement (Carrier’s File 1133056 SPW).**
- 2) As a consequence of the violation referred to in Part (1) above, ‘... we respectfully request that Claimant K. P. Gabriel be immediately reinstated to his former assigned position of Spike Driver Operator Gang No. 8822 at Suisun California, that his seniority and all other contractual rights be restored unimpaired, that he be compensated all wage loss he has suffered since his wrongful dismissal, including any and all loss of benefits, and all charges be expunged from his personal record.’”**

FINDINGS:

This Board, after hearing upon the whole record and all the evidence finds that the Carrier and the Organization involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.

Following proper notice an investigation was held on December 18, 1997, into the facts surrounding a verbal altercation, in alleged violation of Rule 1.6 (Conduct), over “Quarrelsome” behavior. Claimant had been removed from service November 6, 1997 pending the outcome of the investigation. Subsequent to the investigation, Claimant was notified by letter dated January 26, 1997, that he had been found guilty and given that he had prior discipline assessed, he was dismissed from the service of the Carrier.

The Organization appealed discipline on two procedural grounds; wherein a

witness was not properly called, and time limits were violated. On merits, the Organization argues that there had been a history of problems between the Claimant and a fellow employee that the Carrier had failed to control. The Claimant had been the recipient of unwanted racial remarks from Mr. Zwart, which had been brought to the Carrier's attention without appropriate action. On November 6, 1997, after the Carrier had ignored an undercurrent of ongoing harassment by Mr. Zwart, the Claimant was dismissed due to an altercation attributable to the actions of Mr. Zwart. The incident which lasted less than a minute had no physical contact, but the Claimant was wrongfully dismissed.

The Carrier denies any procedural violation of the Agreement and argues that it met its burden of proof. It points out that the investigation was properly heard within the time limits of the Agreement. As for the failure to call a particular witness, the Carrier argues that his testimony was unnecessary as he was not present at the altercation. And on merits, the Carrier maintains that it provided proof that the Claimant violated Rule 1.6. The Claimant was responsible for the incident and his aggressive actions were proven and resulted in an appropriate discipline assessed under the Carrier's Upgrade Program.

This Board finds no procedural violations of the Agreement. Claimant was notified December 3, 1997, with the hearing held on December 18, 1997, fifteen (15) days later. Rule 45 requires that the hearing be held within 20 days. The Board finds that the Carrier's failure to call Mr. Davis to testify did not violate due process. Carrier's investigation and disciplinary decision were over the altercation, which Mr. Davis did not witness. The Board finds no procedural violation and therefore turns to merits.

The Board has reviewed the full facts and circumstances of this case. There is clear testimony and proof to reach the conclusion that the Claimant is guilty as charged. Claimant was well aware of the on-going problem of alleged racial comments from Mr. Zwart. The Claimant did not properly address this issue with his Supervisors. Even further, the record is clear that the Claimant was an Assistant Foreman. The testimony proves that the Claimant initiated the confrontation with Mr. Zwart. The facts indicate the seriousness of the confrontation. Rail Gang Supervisor Hillman testified in pertinent part that:

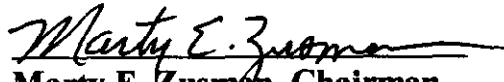
I witnessed Mr. Gabriel (Claimant) and Mr. Zwart confronting each other; appeared to be at the verge of becoming physical, in a fight. And I split them up, .. and tried to get them to calm down...

The Board concludes that the Carrier's findings of guilt were based on a clear record of proof.

Having determined that there were no procedural errors and that on merits, there was clear proof of guilt, the only remaining issue is that of discipline. We find mitigating circumstances. The Board has studied this record and finds that in full consideration of the situation at bar and as indicated in the bench decision of August 15, 2002, the Claimant is to be returned to service with seniority rights unimpaired, but without back pay.

AWARD:

Claim sustained as indicated in the Findings.


Marty E. Zusman, Chairman
Neutral Member


R. B. Wehrli
Organization Member


D. A. Ring
Carrier Member

Date: 10-10-02