

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO. 142, (Case No. 163)

**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
B. W. Hanquist, Carrier Member**

Hearing Date: August 17, 2010

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

1. The Carrier's discipline (Level 5 dismissal), issued by letter dated February 2, 2009, of Mr. A. Hunt in connection with alleged violations of Company Rule 1.6 Conduct (6) (Quarrelsome), Rule 1.7 Altercations and UPRR's Violence and Abusive Behavior in the Workplace Policy was unjust, arbitrary and unwarranted and in violation of the Agreement (System File UP-202-WF-09/M9-MOP-11).
2. As a consequence of the Carrier's violation outlined in Part 1 above, Mr. Hunt shall have his record cleared and be reinstated with all back pay with his seniority rights unimpaired and all other rights granted for all time unjustly disciplined beginning November 11, 2008 and continuing."

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.

On November 21, 2008, Carrier notified Claimant to appear for a formal Investigation on December 10, 2008, which was mutually postponed until January 13, 2009, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, that while employed as
Bridge Assistant Foreman on Gang 4228 at Dallas, Texas, near Milepost 259.5**

at approximately 12:15 p.m. on November 11, 2008, you entered into an altercation with a fellow employee.

Your actions are in possible violation of the General Code of Operating Rules, effective April 3, 2005, Rule 1.6 Conduct, Part 6 - Quarrelsome, that reading: "Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal..." and Rule 1.7 Altercations, and UPRR's Violence and Abusive Behavior in the Workplace Policy, revised November 11, 2003...."

On February 2, 2009, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 5 discipline and dismissal from the Carrier's service.

The undisputed facts indicate that Claimant entered service with the Carrier on January 24, 2005, and was working as an Assistant B&B Foreman on Gang 4228 on November 11, 2008, near Milepost 259.5 when this dispute arose. It was alleged that on that date Claimant may have been quarrelsome when he possibly entered into an altercation with his foreman.

It is the Organization's position that on November 11th around 12 to 12:15 p.m., two bridge gangs met for lunch at Miller Yard. Upon arriving at the "bridge compound" employee L. Mills (Carpenter B&B), a member of the second bridge gang pulled alongside Claimant's truck. According to the Organization he was talking to his wife on the phone when he saw that Foreman Daniels was unhappy about the music blaring from Claimant's truck. It argued that Manager Marvell testified that he got a call from L. Mills explaining what transpired between Foreman Daniels and the Claimant. Marvell stated that Mills told him that Foreman Daniels was angry about the music Hunt was playing and how loud it was and he testified that Mills said: **"...it aggravated Jon and to the point where Jon finally got mad and told him to get the f... out of the car..."** Additionally, it argued the Marvell stated: **"Alec got mad, jumped out of the car, got in his face and there was a verbal confrontation. Jon pushed Alec. Alec hit Jon back. In the meantime, Larry Mills was- he had been on his cell phone with- with his wife..."** made an attempt to break up the two from fighting and in the process was hit in the head by the Claimant while he and Foreman Daniels were fighting. Simply put the Organization argued that the Claimant was defending himself and Daniels was the instigator of the incident.

The Organization also argued that the Claimant was denied a fair and impartial Hearing because Foreman Daniels was not present at the Hearing and he should have been as he was a key participant in the incident in dispute. It further contended, without admitting any guilt on the part of the Claimant and assuming for the sake of argument that he had some culpability, the record substantiates that the aggressor was returned to service sometime around May 1, 2010,

which meant that Claimant was subjected to disparate treatment as he remained out of service. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the position of the Carrier that appeal was procedurally defective and on the merits it argued that Claimant entered into a physical altercation and became quarrelsome and threatened to harm another employee. According to it Claimant demonstrated he was responsible for the event when he apologized to Foreman Daniels for entering into an altercation with him, thus he admitted his guilt. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and we find no procedural errors by either party which require the resolution of this dispute on the basis of alleged technical problems. The case will be determined on its merits.

Review of the testimony confirms that on November 11, 2008, Foreman Daniels did not appreciate the Claimant's music or its volume. We do not know for sure why he was agitated as he did not attend the Hearing. Nonetheless, Manager Marvell testified on page 11 of the Transcript that Daniels was upset about the music and started yelling at the Claimant and told him **"...to get the f... out of the car."** He further testified that the Claimant got out of his vehicle at which time the argument escalated into a heated discussion. Based upon conflicting testimony it is unclear whether Foreman Daniels next shoved or punched the Claimant. However, it is clear that Daniels instigated the physical contact (See Transcript for Manager Marvell's testimony, page 11, Employee Mills' testimony, page 22 & 23, and Claimant's testimony, page 35) all of whom agreed that Foreman Daniels initiated and instigated a verbal altercation and then either made the first shove and or punch of the physical confrontation.

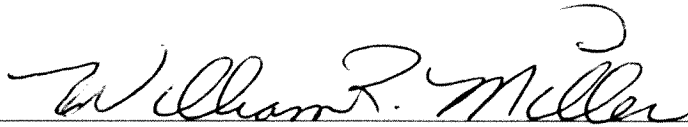
The record further substantiates that employee Mills attempted to intervene between the Claimant and Foreman Daniels to stop the altercation and in the process Claimant hit him. Mills testified that he did not think it was purposeful although he was not certain. It is clear that there was no motivation for the Claimant to intentionally hit Mills, as his target was Daniels, therefore, it is reasonable to conclude that Claimant inadvertently hit Mills who placed himself in jeopardy.

The Organization's argument that the Claimant was "merely defending himself" oversimplifies the altercation, as it overlooks the fact that when Foreman Daniels started yelling at the Claimant and invited him to step out of his vehicle the Claimant made the mistake of accepting that invitation which then turned into an argument as it "takes two to argue". Unfortunately, that argument escalated and subsequently became a physical altercation. It is clear that the Carrier met its burden of proof that the Claimant was quarrelsome and entered into an altercation on November 11, 2008.

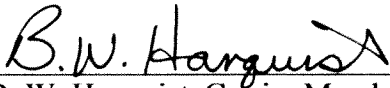
The only issue remaining is whether the discipline was appropriate. The Board does not excuse the Claimant's behavior as he was culpable for his actions, however, after review of the record the Board has determined that the discipline was excessive. Therefore, the Board finds and holds the Claimant is to be reinstated to service with seniority intact and all other rights unimpaired without backpay upon successful completion and evaluation for anger management by the Employee Assistance Program (EAP).

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



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: October 4, 2010