

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 180 (Case No. 201)**

**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
K. D. Evanski, Employee Member
K. N. Novak, Carrier Member

Hearing Date: June 19, 2012

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

- 1. The dismissal of Welder W. P. Bohannon for violation of Rule 1.6 of the General Code of Operating Rules in connection with threatening to issue bodily harm to a fellow employee at approximately 2:00 P.M. on May 4, 2011 along with additional threatening comments made to the welding team at approximately 11:00 A.M. on May 4, 20-11 while employed as a welder on Gang 9137 at Pearsall, Texas is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File UP-242-WF-11/1551309).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Bohannon shall have his personal record cleared of all charges, be paid for all lost time, have all seniority and vacation rights unimpaired and all other rights due to him by the Collective Bargaining Agreement."**

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employees 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 9, 2011, Claimant was directed to attend a formal Investigation on May 19, 2011, which was mutually postponed until May 22, 2011, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, on the following charges:

While employed as Welder on Gang 9137, at Pearsall, Texas, at approximately 1400 hours, on May 3, 2011, you allegedly threatened to issue bodily harm to a fellow employee, along with additional threatening comments allegedly made to the welding team at approximately 1100 hours, on May 4, 2011, while working near Pearsall, Texas.

These allegations, if substantiated would constitute a violation of Rule 1.6 as contained in the General Code of Operating Rules effective April 7, 2010, and the Workplace Violence Policy."

On May 27, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level 5, permanent dismissal.

The facts indicate that Claimant along with co-worker, Mr. Moran, were working as Welders on May 3, 2011, near Pearsall, Texas. During their work the Claimant and Mr. Moran had to wait for permission to get onto the track to perform their duties. Once they received permission, Mr. Moran had difficulty properly moving his machine onto the track. It was asserted that Claimant became frustrated and allegedly threatened Mr. Moran with physical assault, while using profanity.

It is the Organization's position that the Carrier did not meet its burden of proof. It argued any comments made by the Claimant were made in jest and the Claimant had no intention to physically harm Mr. Moran. It asserted dismissal under the circumstances of the case was wrong because: (1) Claimant was a hard working, ten year career employee; (2) Claimant had no prior history of disciplinary action; (3) that, while he admitted he made the comments, the record revealed that they were made in response to an on-going discussion with his co-worker; and (4) Claimant possessed no intent to harm, injury or anyone. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that Claimant made statements that violate the Carrier's Workplace Violence Policy, which prohibits threatening or aggressive behavior towards another employee. The Claimant's statements also violate Rule 1.6 of the General Code of Operating Rules, which in part states that employees must not be quarrelsome or discourteous. It argued that Claimant's statements made threats of physical violence towards another employee and his hostile misconduct cannot be condoned or ignored, therefore, Level 5-dismissal was warranted. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that the Investigation and appeal process afforded the Claimant his "due process" Agreement rights.

The transcript reveals that the Claimant was working with Mr. Moran as Welders on May 3, 2011, near Pearsall, Texas, and at approximately 2:00 p.m. the Claimant and Moran were awaiting permission to get onto the track to perform their duties. After receiving permission, Moran encountered some difficulty in properly moving his machine onto the track. Subsequently, the Claimant became frustrated and threatened Mr. Moran with physical assault, while using profanity. On pages 35 - 37 of the transcript Mr. Moran was questioned about the incident as follows:

"Q: Will you please state for the record your knowledge of what happened that day?

A: Okay. We were trying to get onto the track and we didn't have that track at the time -- we had the tracking time, but we didn't have permission enter limit -- into limits with the other -- who we were joint with. And he was trying to -- Bo -- Bohannan was trying to -- started to back me up, but Javier to me to stop. Okay?

You know, I stopped because we hadn't got permission to enter the limits yet. I said okay. And I didn't get a chance to tell Bo, you know, wait, hold on, you know, don't get near the track yet or don't try to grab me back yet, you know, because we don't have the track yet.

I tried to get back. You know, once we did get the track, I tried to get back on the track and he, you know, got kind of frustrated because I didn't get it right, onto the track right. So, I was like, okay, you know, sorry.

We get back onto the track -- we finally get onto the track. We get on, we get to where we need to be and I said, you know, can you (indiscernible)? I mean, can you give me some hand signals, you know, and, you know, just help me out back here so I can back up to where we need to work?

And he proceeded to say that, you know something to the effect of, you know there's a lot of trees, there's a lot of woods and bushes out her that I can, you know take you to the side and kick your ass. And I was like okay, where did that come from? I was like -- it just kind of took me by surprise kind of and I was like -- and it sat for a while, you know, and it did just kind of -- and just mulled it over for a while to what actually happened. And that's --

Q: Mr. Moran, did you feel like Mr. Bohannan was joking? Or did you take his threats very seriously?

A: I took it kind of serious, because I knew he was kind of frustrated because I didn't get on the track and that maybe it was frustration and it may have started from there. I don't know.

But it wasn't normally the way we've talked to each other, you know. It was in a different tone, and you know, I was like, and that's why I thought, well shoot, this could be serious. I mean this is, whoa, I never had, you know, no one talk to me in that tone before, you know, and not really mean it, you know? (Underlining Board's emphasis)

On page 44 of the transcript, Welder, J. Obregon was questioned as to what he knew about the May 3rd incident. He testified as follows:

"A: ...I - - before I jumped back in the truck - - when I was getting in the truck, the individual had told me that some threatening remarks were made to him.

At that time, I asked him - - now I did hear the remarks that were actually said, but at that time I asked the employee if he would like me to call someone or do anything...."

On the following page Obregon corrected the aforementioned statement testifying that he did not actually hear the Claimant's comments, however, he verified that Mr. Moran was concerned over what the Claimant had said to him.

On page 58 of the transcript the Claimant was questioned about a written statement that he offered on May 5th regarding the May 3, 2011, incident. He was asked to read his written statement that stated the following:

"Upon arriving at location of weld I was telling Albert how he does not follow directions and he turned around an smart mouthed me and I said don't make me take you to the bushes and whoop your ass" (Underlining Board's emphasis)

It is clear from that statement and the testimony of Mr. Moran that the Claimant used threatening language towards the Claimant on May 3, 2011. The Claimant testified that it was just "words" and he did not mean any actual harm. The problem with that argument is that words often reflect intended actions.

Claimant made the situation worse and his argument less tenable on May 4, 2011, when he was pulled out of service for his alleged behavior the previous day by Supervisor Garcia. On this occasion the Claimant could not keep his "words" to himself. On page 52 of the transcript

Mr. Garcia was questioned about the allegation that Claimant had allegedly told his welding gang that if he ever found out who reported the prior behavior, he would *"take care of them"*. Garcia stated in pertinent part the following concerning the alleged threat made to the welding gang as they left the Carrier property:

"A: As soon as we got in the vehicle, we proceeded going to Pearsall. At that time, he just addressed what he had told the guys, you know, that if he ever found out who had put these allegations, you know, he would basically take care of them. And that was basically it."

Q: What was your interpretation of that comment?

A: Well, I mean, either just, just take them - - to me, at that time, is, you know, either, injure somebody or hit them or fight them..."
(Underlining Board's emphasis)

On page 67 of the transcript the Claimant made a closing statement wherein he said in pertinent part:


"...one individual in particular that's making statements that are false and it's the person that I said bad thing to and - - but they were only words."
(Underlining Board's emphasis)

The record again reflects another admission by the Claimant of inappropriate language used towards employee Moran and it does not indicate any improper behavior on the part of Mr. Moran or that the Claimant had any reason for provocation. Substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of incident Claimant had approximately 10 years of service with a good work record, however, he committed a serious offense on consecutive days and contrary to his assertion the words that are used are important. The Carrier's Work Place Violence Policy states in part **"...the Company will not tolerate or condone any forms of threats or violence committed by or against employees."** The Carrier has an obligation to provide a safe working environment where employees are comfortable in their surroundings and not fearful of their co-workers. Claimant made threatening remarks when he was unhappy with Moran's work and again when he was removed from service. The Board finds and holds the dismissal assessed against the Claimant will not be set aside as it was in accordance with the Carrier's UPGRADE Discipline Policy and it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

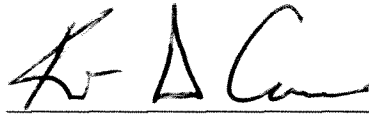
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 10-23-2012