

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 204, (Case No. 210)**

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

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: April 10, 2012

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

- 1. The dismissal of Assistant B&B Foreman J. Harris for violation of Rule 1.6 (Conduct) in connection with entering into an altercation with B&B Foreman S. Tate on May 15, 2010 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File B-1019C-103/1542084D).**
- 2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Harris have his record cleared of the alleged offense and be reinstated to his former position with all rights unimpaired and compensated at his applicable rate of pay for all time lost as a result of the improper discipline assessed."**

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.

On May 17, 2010, Carrier notified Claimant and Mr. S. Tate to appear for a formal Investigation on May 24, 2010, which was opened on that date, recessed, reconvened, and held to its conclusion on June 11, 2010, concerning in pertinent part the following charge:

"...to develop the facts, hear testimony and place responsibility, if any, that while employed as a B&B Foreman and as a B&B Assistant Foreman, at MP 19.9 Geneva Subdivision, you allegedly were hostile and/or quarrelsome when you allegedly entered into an altercation with each other on Saturday May 15, 2010.

These allegations, if substantiated, would constitute a violation of Rule 1.6 (Conduct) as contained in the General Code of Operating Rules, effective April 7th, 2010 and the Union Pacific's Violence & Abusive Behavior in the Work Place policy. Please be advised that if you are found to be in violation of this charge, the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Policy may result in permanent dismissal."

On June 18, 2010, Claimant was found guilty as charged and was assessed a Level 5 discipline and dismissed from the service of the Carrier.

It is the position of the Organization that the Claimant was involved in a verbal exchange with B&B Foreman S. Tate concerning Claimant's instructions to the Gang working at the Lombard, Illinois, station on May 15, 2010, which became heated. It argued that the record established that Mr. Tate initiated the exchange of words with the Claimant as he took exception to the Claimant's "pep talk" to his fellow workers to get the pedestrian crossing project finished. It further argued that the record established that Tate withdrew from the work location after the initial exchange of words walking across the street and returned a short time later after the discussion had ended. According to it, subsequent to Tate's return to the work location, the verbal exchange resumed at which time another employee stepped between Claimant and Mr. Tate to defuse the situation and during the exchange Claimant was either inadvertently touched or backed up and fell off the platform onto the adjacent track. It argued there were no blows exchanged between the parties and while the discussion did become heated, no life threatening remarks were made. It stated that the witnesses described the exchanges between Claimant and Tate as "trash talking". The Organization explained it does not condone such activity by its members, but based on the circumstances of the incident Claimant's action, assuming the Carrier had proven its case which it did not, did not rise to the level to warrant the ultimate discipline of dismissal. It further argued the Carrier failed to meet its burden of proof that Claimant committed any of the activities listed in the "Violence & Abusive Behavior in the Work Place Policy". It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the record substantiates that Claimant was engaged in a hostile and quarrelsome confrontation with a fellow co-worker S. Tate while working at M.P. 19.9 (Geneva Subdivision) which is directly contrary to the clear language of Rule 1.6 (Part 6) as well as the Carrier's Violence & Abusive Behavior in the Work Place Policy. It argued that despite the Organization's defense of the Claimant, he was not the innocent "victim" as depicted by it as he was equally responsible for an altercation with a fellow co-worker by yelling, screaming and threatening that was confirmed by testimony of several witnesses. It further argued that dismissal was appropriate as hostility and quarrelsome behavior cannot be tolerated in the workplace because it is the Carrier's responsibility to provide a safe work environment for all of its employees. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the record and determined that the Claimant received a "fair and impartial" Hearing and was afforded his Agreement "due process" rights, therefore, the dispute will be resolved on its merits.

This is the second of two cases involving the incident and/or altercation that occurred on May 15, 2010, at Mile Post 19.9 (Geneva Subdivision). There is no dispute between the parties that a verbal/physical altercation occurred between the Claimant who is a Assistant B&B Foreman and Foreman S. Tate regarding their past working relationship, and over their respective abilities to lead on the project being handled on May 15th. Several witnesses testified that initially Foreman Tate was the aggressor and instigated the altercation, however, the Claimant was not the "victim" as he became hostile as each employee purposefully bumped into one another and had to separated by their co-workers twice.

On page 32 of the transcript the Manager of Bridge Maintenance on the Geneva Subdivision, S. Thompson, was questioned about his interview of the various witnesses and the charged employees shortly after the incident. Thompson was questioned by Foreman Tate as follows:

"Q. When you said 'pushing going on', did they actually state that him and I was pushing each other or there was pushing between us and the other guys, that's the question, to separate us from being, as you want to say, face-to-face addressing the situation?"

A. Well, yes, yeah, they had made the statement that there was some bumping going on between the two of y'all and that you had to be separated."
(Underlining Board's emphasis)

On page 33 of the transcript Manger S. Thompson continued to testify that all of the witnesses to the actual incident told him the following:

"A. They said you guys were bumping and they said you guys had bumped each other, and this was after arguing for awhile, and you were getting face to face and they had to come in and break the two of you up. That's the extent of what they said." *(Underlining Board's emphasis)*

Manager Thompson's summary of various witnesses' rendition of the incident was confirmed by Foremen Shandro and Lovett with their respective testimonies. The Claimant admitted that he had engaged in a verbal altercation with Foreman Tate that was heated and that profanities were exchanged. Claimant's colorization of the event, which was self-serving, omitted any physical touching on his part of Foreman Tate, however, other witnesses that had no vested interest in the outcome of the Investigation testified there was mutual bumping. The

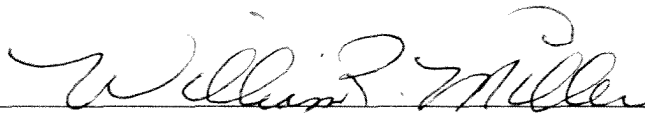
Board is convinced that the conduct of the Claimant and Mr. Tate was hostile and escalated to a degree that both men were face to face and each purposefully "bumped" into the other. Contrary to the Organization's argument, the Claimant was not an innocent victim as the record substantiates Claimant was also very physical by moving towards Mr. Tate in a hostile and threatening manner at least twice and had to be physically restrained and separated from Mr. Tate in order for the altercation to diminish. Additionally, at least one witness overheard Claimant challenge Mr. Tate to "hit him".

The Carrier has an obligation to maintain a safe work environment free of all forms of violence, including verbal and physical threats. It is clear that the Claimant and Employee Tate were both in leadership roles and that Claimant failed to exhibit proper behavior to his subordinates with his hostile and quarrelsome conduct, when he engaged in a verbal and physical altercation with a co-worker that was contrary to Rule 1.6 (Conduct) and the Violence & Abusive Behavior in the Work Place Policy. It is determined that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

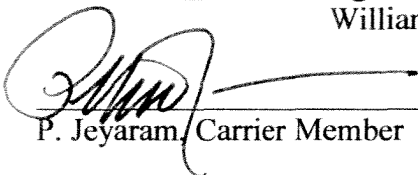
The only issue remaining is whether the discipline was appropriate. The Board does not excuse the Claimant's behavior, however, due to longevity of service with a good prior work record the Board finds and holds that the dismissal is reduced to a lengthy suspension which is corrective in nature and in accordance with the Carrier's UPGRADE Discipline Policy. Claimant will be reinstated to service with seniority intact and all benefits unimpaired with no back-pay on a "**last chance basis**" after successfully completing an Employee Assistance Program (EAP) for anger management. Upon return to service the Claimant will be at a Level 4 Disciplinary status for a 24 month probationary period during which time if the Claimant engages in a similar and/or like behavior he will automatically revert to a dismissed status without benefit of a formal Investigation.

AWARD

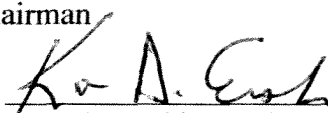
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: June 18, 2012