

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 158, (Case No. 179)**

**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
K. N. Novak, Carrier Member

Hearing Date: February 23, 2011

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

- 1. The Carrier's decision to impose a Level 5 discipline and dismiss Claimant David Suttles from service of the Carrier for the alleged violation of General Code of Operating Rules, Rule 1.6 (Conduct) and the Union Pacific Work Place Violence policy is harsh, excessive, unjust, unwarranted, an abuse of Carrier discretion, on the basis of unproven charges and in direct violation of the Agreement (System File UP-220-WF-10/1535534).**
- 2. As a consequence of the violation outlined in Part 1 above, we request that the Claimant be reinstated to service of the Carrier and that he be made whole as prescribed in Rule 21(f) of the Agreement."**

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.

Claimant entered the Carrier's service approximately seven years prior to the incident in dispute and was regularly assigned as a Machine Operator at that time on Surfacing Gang 3080 and reported to a Carrier headquarters located in Hondo, Texas.

On July 26, 2010, the Carrier advised Claimant to appear for a formal Investigation on August 16, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as

Operator on Gang 3080, at Hondo, Texas, near Milepost 258, at approximately 0700 hours, on July 18, 2010, you allegedly behaved in a manner that was quarrelsome, aggressive, or hostile and created a reasonable fear of injury to a person.

These allegations, if substantiated, would constitute a violation of Rule 1.6 (Conduct) as contained in the General Code of Operating Rules, effective April 3, 2005. Please be advised that if you are found to be in violation of this alleged charge, the discipline assessment may be a Level 5, and under the Carrier's UPGRADE Discipline Policy may result in permanent dismissal."

On September 3, 2010, Claimant was notified that he had been found guilty as charged and he was dismissed from service.

It is the position of the Organization that on July 18, 2010, there was a verbal altercation that took place between the Claimant and employee Cruz involving profanities that was instigated by Cruz wherein the Claimant made a concerted effort to calm the situation. According to it, Cruz lied at the Hearing regarding the encounter and had selective memory lapses as to what transpired. It argued that Claimant was subjected to disparate treatment because Cruz was only suspended for 2.5 days and required to complete a company directed anger management program provided through the Carrier's Employee Assistance Program (EAP) whereas the Claimant was dismissed. It further argued the violation was flagrant in view of the fact that Cruz was the aggressor, taunter and dishonest employee throughout the dispute. It concluded by requesting that the discipline be rescinded and the Claim sustained as presented.

It is the Carrier's position that the Claimant was justifiably assessed a Level 5 discipline for the confrontation because he shouted profanities at employee Cruz, and aggressively slammed the tool house door with such force as to knock the handle off, and had to be separated by a fellow employee after he stood toe-to-toe with Cruz. The Carrier also argued that the Claimant was not subjected to disparate treatment because he had a previous altercation some four months before and was given the opportunity to attend Anger Management which did not have positive results as evidenced by the latest confrontation. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board has thoroughly reviewed the record and determined that no procedural errors occurred during the Hearing and the Claimant was afforded his "due process" Agreement rights.

The Carrier alleged that the Claimant violated Rule 1.6 (Conduct) which states the following:

"Employees must not be:

- 1. Careless of the safety of themselves or others**
- 2. Negligent**
- 3. Insubordinate**
- 4. Dishonest**
- 5. Immoral**
- 6. Quarrelsome**
- or**
- 7. Dishonest**

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated."

There is no dispute that the Carrier has an obligation to provide a safe working environment for its employees, customers and general public free of threats and/or violence. On July 18, 2010, Claimant was involved in a verbal altercation while assigned to Gang No. 3080. At approximately 7:00 a.m., Claimant was at the Hondo, Texas, tool house preparing for the day's work when he was approached by Welder R. A. Cruz and asked whether he could drive one of the Carrier vehicles to job site since the other employee did not have the necessary CDL license (See Transcript, pages 10 and 44).

Testimony developed during the Hearing that Claimant became upset and told Cruz that he would not drive. Director of Track Maintenance D. B. Spainhower, investigated the matter and on page 10 of the Transcript he testified as to what he was told transpired after employee Cruz requested Claimant's assistance as follows:

"Suttles responded to this statement by jumping from his seat, stating f-you to Robert. Went to the section house door, opened it and slammed it, causing the doorknob on the inside to come off...."

Spainhower went on to testify that his discussions with those employees that were on site at the incident indicated that Claimant confronted Cruz in the walkway near the section house door with Foreman Gutierrez getting between the two employees to try to resolve the situation.

On page 24 - 25 of the Transcript Foreman Guitierrez was questioned by the Hearing Officer as follows:

"Q Norbe, which one is it?

A Well, I mean I'm not saying it was just him, you know, 'cause he asked me- David- I'm saying both of them were at each other's face, you know, and I got in-between 'em.

Q Were both yelling at each other? Both David and Robert yelling at each other?

A Yes, sir, they were.

Q Okay. So David was being hostile to Robert and Robert was being hostile to David? Is that what you're telling me?

A I mean, I guess if that's what it means."
(Note: David is the Claimant in this dispute)

On page 30 of the Transcript Trackman Swan read from a statement he prepared immediately after the incident on July 18th which stated the following:

A On 7/18, I was called in to work overtime to help install a panel at the rendering plant crossing. I arrived at 0645, approximately. David and Norbe came into the office where myself, Albert Moran, and Robert Cruz were discussing tasks for that day.

The issue that we were discussing was that we needed both trucks at the job site and Robert was the only driver. When David asked what Robert was going to do, Robert replied, I am not sure. David then asked again, and Robert said, I guess with magic.

David then stood up and shouted, f-you; let's go Norbe, and exited the door of the office, slamming it as he left...

David opened the door and said, come on Norbe. Let f-in' Houdini figure it out on his own...."

On page 33 of the Transcript Swan was questioned as follows:

"Q I have another one. Aggressive and hostile; that's what we're here to determine. Was Mr. Shuttles aggressive and hostile? And was he

aggressive and hostile verbally?

A Yes, he was."

A close reading of the Transcript reveals that Spainhower, Gutierrez and Swan's testimony was not effectively rebutted and despite the Organization's able defense wherein it characterized the Claimant as an innocent victim in this matter it could not overcome the Claimant's testimony on pages 35, 46-48 and 63 of the Transcript when he admitted that he used profanity towards employee Cruz and slammed the tool house door. The Organization and Claimant argued that he was trying to defuse the situation and avoid conflict, however, Claimant did state that he "stood his ground", and told Cruz to "get out of my f-in face", and further stated he called Cruz "Houdini" when he told him that he could "work his magic". Employee Cruz was not without fault, but it is equally clear that the incident started when the Claimant told Cruz he would not drive one of the vehicles and escalated when he cursed at Cruz and then chose to be confrontational requiring Foreman Gutierrez to step between the two employees. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged as he acted in a hostile, aggressive and quarrelsome manner.

The only issue remaining is whether the discipline was appropriate. The Organization argued that Claimant was subjected to disparate treatment as he was dismissed while employee Cruz was only disciplined for his part in the incident with a 2.5 day suspension and a requirement to attend a company directed anger management class. The Claimant was not treated in the same manner because approximately four months prior, Claimant had been insubordinate and involved in a verbal altercation. In a letter of April 6, 2010, the Claimant was instructed that he would be allowed to attend anger management classes, but that any future incidents of a similar nature would result in dismissal. The Board is not persuaded that the Claimant was subjected to disparate treatment. Because of the seriousness of the matter and the fact that it was the second occurrence within three months the Board finds and holds that the Carrier's discipline was appropriate because it was not arbitrary, excessive or capricious and was in accordance with the Carrier's UPGRADE Discipline Policy. The discipline will not be set aside.

AWARD

Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: June 27, 2011