

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 160, (Case No. 181)**

**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 dismissal of Assistant Track Foreman B. Cervantes for violation of Rule 1.6, Part 3 (Insubordinate), Part 5 (Immoral) and Part 6 (Quarrelsome) and that portion of the rule which provides '... *"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."*...' (Emphasis in original) (Employees' Exhibit 'A-1') in connection with the cited June 13, 2010 incident is unjust, unwarranted, based on unproven charges and in violation of the Agreement (System File UP-216-WF-10/1536191).**
- 2. As a consequence of the violation referenced in Part 1 above, the charges against Mr. Cervantes shall be dropped and he shall have his personal record cleared of all charges, be paid for all lost time, have seniority and vacation rights unimpaired and all other rights due 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 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.

The record indicates that the Claimant entered the service of the Carrier on October 6, 1997, and on the date of the incident was working as a Maintenance of Way Foreman.

On June 30, 2010, the Carrier advised Claimant to appear for a formal Investigation on July 13, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that on June 13, 2010, at approximately 1515 hours, you allegedly left your place of employment at MP 518 without authority and drove approximately 14 miles to MP 532 where you allegedly entered the forward cab of the CATS0501 and became quarrelsome and threatening towards Mr. Ortiz and Mr. Deleon in a face-to-face confrontation using foul and profane language causing Mr. Ortiz and Mr. Deleon to fear for their safety and calling for help to defuse the situation.

These allegations, if substantiated, would constitute a violation of Rule 1.6, Part 3 (Insubordinate), Rule 1.6, Part 5 (Immoral), Rule 1.6, Part 6 (Quarrelsome), and that portion of the rule which provides *"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 to the performance of duty will not be tolerated."*, as contained in the General Code of Operating Rules, effective April 7, 2010, and the System Special Instructions, effective April 7, 2010. 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 July 29, 2010, Claimant was notified that he had been found guilty as charged and assessed a Level 5 and dismissed from service.

It is the position of the Organization that the Carrier did not prove the charges against the Claimant because he did not physically enter the cab of the CAT tamper and did not curse at Mr. Ortiz or Mr. Deleon. It argued that employees Ortiz, Deleon, Fedon and Beza all of whom were at the incident of June 13th testified that Claimant did not quarrel or threaten anyone. It concluded by requesting that the discipline be rescinded and the Claim sustained as presented.

It is the Carrier's position that because the Claimant did not physically enter the cab of the CAT tamper and did not exchange foul language with Ortiz and Deleon he is not innocent of the charges because it is clear from the testimony of the transcript the Claimant permitted Mr. Fedon (a member of his gang) to go to where Mr. Ortiz was working and then allowed Fedon to verbally attack Ortiz. It argued that the Claimant did nothing to defuse the situation that took place in the cab, thus he was a willing participant in the intimidation and threatening of a fellow employee. According to it, as a Foreman, the Claimant had a duty to intervene and prevent the altercation, but instead willingly allowed it to happen as he left his assignment and allowed Fedon to leave his as well, knowing that Fedon was upset and angry with Ortiz and intended to

confront him. 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 and it has a zero tolerance policy regarding all forms of workplace violence.

Review of the transcript indicates that the Claimant and Machine Operators Benza and Fedon were working at MP 518 on June 13, 2010, when shortly after 3:00 p.m. the three drove in Fedon's vehicle to MP 532, where employee Ortiz was performing tamping duties. Employee Fedon entered the cab of Ortiz's machine followed by Benza. Claimant stood outside the tamper door while Fedon had a verbal altercation with Ortiz (See page 13 of the Transcript).

On page 69 of the Transcript, Track Supervisor Diazdeleon was questioned as to whether or not he allowed the Claimant and his crew members to leave MP 518 on the date in dispute and he testified as follows:

"Q Okay, so in other words, in your opinion as being the supervisor, and you

were the supervisor over these guys?

A Yes

Q Okay. And so you never gave them permission to leave that- that location.

A No I never did. Never did."

On page 73 of the Transcript, Diazdeleon was asked whether the Claimant's crew had completed their work at MP 518 and may have gone to MP 532 to assist at that location. He responded as follows:

"Q I believe the policy there said that uh- that they had ran out of doing Quality up there. Were they done finish- doing Quality so that they had enough time to go back there and work on the tampers instead?

A No. That- that is not correct. The end of the shift uh- and then I believe until 5:00 that afternoon, there was plenty of time to continue Quality back there."

Track Supervisor Diazdeleon's testimony was not effectively rebutted and confirmed that the Claimant and his crew had no valid reason to leave their work site and go to Ortiz's worksite.

On page 30 of the Transcript, Foreman Deleon who was in the cab of Ortiz's machine when the confrontation occurred was questioned as to whether he heard Ortiz ask the Claimant why he had brought employee Fedon to his work location and confirmed that the Claimant offered no reason. The questioning continued on page 31 as follows:

"Q And Mr. Cervantes didn't answer him or didn't say anything why he brought him up there?

A No Sir.

Q Okay. In your opinion there, you know as a foreman out there, should you allow there type of confrontations to go on?

A Oh no, sir.

Q Okay. Should Mr. Cervantes allow them type of confron- uh confrontations to go on?

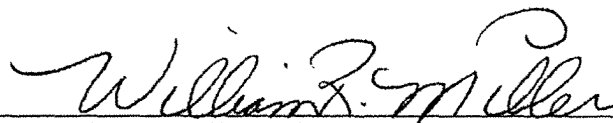
A No Sir."

Foreman Deleon's testimony was not refuted and taken together with that offered by Track Supervisor Diazdeleon confirm that the Claimant had no reason to be at MP 532 and did nothing to prevent a possible argument knowing full well that Fedon was upset with Ortiz. There was no showing that either Diazdeleon or Deleon's testimony was not believable or in error. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty of having left his assigned tasks and allowing his crew members to leave so that Mr. Fedon had the opportunity to verbally attack Mr. Ortiz and did nothing to intervene and prevent the incident.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had 12 plus years of service with a good work record who made a poor decision. 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 at a Level 3 disciplinary status without back-pay and a requirement to attend Anger Management Classes authorized by the Carrier.

AWARD

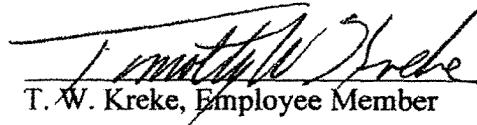
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: June 27, 2011