

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 162, (Case No. 183)**

**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 Machine Operator E. Fedon for violation of Rule 1.6, Parts 3, 5 and 6 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-217-WF-10/1536467).**
- 2. As a consequence of the violation outlined in Part 1 above, the charges against Mr. Fedon shall be dropped and he shall have 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 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 January 26, 2004, and on the date of the incident was working as a Machine Operator.

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 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 as he did not engage in a verbal altercation with Mr. Ortiz and Mr. Deleon nor did he threaten anyone. It argued that the Claimant left MP 518 to travel to MP 532 to offer work assistance under the auspices of Foreman Cervantes thus he did not leave without authority. According to it Claimant was never insubordinate or quarrelsome and only entered Mr. Ortiz's machine for a job briefing so as to find out how their crew could help. It argued that employee Beza confirmed the Claimant's testimony that Ortiz for unknown reasons became argumentative and was the aggressor while the Claimant withdrew from the situation in short order, even as Ortiz continued to cuss at him. It concluded by requesting that the discipline be rescinded and the Claim sustained as presented.

It is the Carrier's position that the Claimant left his assigned tasks to drive to Mr. Ortiz's tamper machine for the purpose of threatening and intimidating that employee. It argued that the Claimant verbally attacked Ortiz and such behavior is immoral and exemplifies a willful disregard for the interest of the company and its employees. It asserted that the Carrier cannot condone such violent behavior and because of the seriousness of the offense the discipline was warranted. 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."

Review of the transcript indicates that the Claimant and Foreman Cervantes and Machine Operator Beza were working at MP 518 on June 13, 2010, when shortly after 3:00 p.m. the three drove in Claimant's vehicle to MP 532 where employee Ortiz was performing tamping duties. Claimant entered the cab of Ortiz's machine followed by Benza who proceeded to watch the altercation.

On page 14 of the Transcript, Manager Maintenance of Way Equipment, T. C. Kirk read from a statement he took from employee Ortiz regarding the incident which stated in pertinent part:

"...At that that time, I hear the door slide open and hear Eric's voice, 'Hey- it says, Hey trouble maker, what's the bullshit about?'

Anything, it didn't make sense. I blew it off and ignored him. Eddy came behind me; put his hands on my processor. I turned around and said- asked him to- asked him what the problem was. Eric proceeded to use foul language, 'you took my name off the sub group. How can you be a sub group if you're not at roll call. You're going to get your mother f---ing ass run off.'

(Underlining Board's emphasis)

On page 36 of the Transcript, Foreman Deleon who witnessed the incident testified as follows:

A No, I was uh- they were walking up. I stepped out and I said, 'Can I help you?' Mr. Fedon said uh- 'Can we talk to Danny?' I said, 'Well I mean I'm- I guess so.' So I let them in the machine. I was standing outside the machine. They went in, and that's when they started the confrontation. Then I seen it- that inside, so I walked in and I told them, 'What are you all doing here? You all need to get out, get out.' So I just, you know, told them to leave.

Q Did uh- did Mr. Fedon, at any time, use any foul or profane language to you?

A Not to me.

Q Not to you? Did you hear him use any profane language to Mr. Ortiz?

A There were- yes sir, they were cussing, yes sir. *(Underlining Board's emphasis)*

Foreman Deleon who had no personal interest in the outcome of the Investigation confirmed Ortiz's written statement and testimony that the Claimant was the instigator of the confrontation. He further confirmed that both men cursed. Foreman Deleon further confirmed on page 93 of the transcript Ortiz's testimony on pages 80 and 81 that Claimant and his crew were not called for assistance at MP 532.

On pages 48 and 49 of the Transcript, Tamper Operator Calhoun was questioned about the incident as he was in the cab when Claimant and Beza entered and he testified as follows:

"Q Okay. And did you hear uh- did you hear the confrontation between Mr. Fedon and- and Mr. Ortiz?

A Yes sir.

Q Do you- can you tell me- I know I- I- I understand earlier there was quite a bit of profanity used and uh-

A Yes, on both sides." *(Underlining Board's emphasis)*

Operator Calhoun's who like Foreman Deleon had no vested interest in the outcome of the Investigation confirmed Ortiz's statement and testimony as well as Deleon's testimony that a confrontation occurred and both men cursed.

On Page 53 and 54 of the Transcript Foreman Munzo who was called by Ortiz to come to defuse the situation was questioned about what he did when he arrived at the worksite. He read

from a prepared statement that he wrote on the date of the incident which stated in pertinent part:

"...I also looked at Eddy Beza as well and I asked him the same question. He replied that he- he was there just to keep the peace...."

Foreman Munzo's statement confirms that Claimant and his co-workers did not come to have a job briefing with Ortiz.

The Claimant did not agree with any of the aforementioned testimony nor Ortiz's statement. He suggested that Ortiz asked him and the other crew members to come to MP 532 to assist and there was no confrontation. On page 76 of the Transcript, he was questioned about the incident as follows:

"Q Okay, did you have a confrontation between you and Mr. Ortiz that day?"

A Explain confrontation.

Q Well verbal confrontations, anything verbal?

A On my behalf, no."

On pages 79 and 80 of the Transcript, the Claimant was further questioned about the incident and he testified as follows:

"Q Did you threaten or have any hostility toward Mr. Ortiz at any given time that day?"

A No.

Q So what you're saying is that uh- that these uh- these charges are- are false?

A Yes."

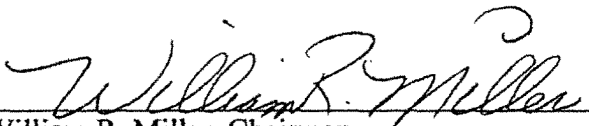
Interestingly the Board notes that Ortiz never denied that he became agitated or cursed after being provoked, whereas the Claimant clearly stated he never cursed or threatened Ortiz in the slightest manner. On that basis alone Ortiz's testimony had more credibility than the Claimant's testimony that was self-serving at best and does not hold true when measured against witnesses Deleon, Calhoun and Munzo's testimony. Despite the Organizations able defense of the Claimant it could not overcome the fact that the Claimant had been assigned to other tasks miles away and there is no evidence that he was asked to assist Ortiz's crew or that calls were made that the Claimants group was allegedly out of water. Nor, could the Organization

overcome the fact that Beza told several employees immediately after the confrontation that he was there because he could handle the Claimant and to "keep the peace", see pages 35, 52 and 54 of the Transcript. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant left his worksite to travel to another location to confront and intimidate another employee in violation of Rule 1.6 Conduct.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant was a relatively short time employee with five plus years seniority. The Claimant was the instigator of a confrontation wherein the other employee had reason for fear of his safety. As previously stated the Carrier has an obligation to provide a safe work environment free of threatening or verbally abusive behavior and does not have to condone such behavior. Due to the seriousness of the matter 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