

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7426
AWARD NO. 17 (Case No. 17)**

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

VS

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: July 20, 2011

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

- 1. The dismissal of Truck Driver T. S. Braniff for violation of Rule 1.6 (Conduct) of the General Code of Operating Rules in connection with failure to comply with the Union Pacific Work Place Violence Policy is unjust, unwarranted and in violation of the Agreement (System File L-1045S-457/1542083D).**
- 2. As a consequence of Part 1 above, we respectfully request that the Level 5 (dismissal) be expunged from Mr. Braniff's personal record and:**
 - * Claimant be immediately reinstated to service and compensated for any and all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service.**
 - * Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Dental benefits for himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad and 'a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters.**
 - * Claimant to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land and any other personal items that may be garnished from him for lack of income related to this dismissal.'(Employees Exhibit "A-3)."**

FINDINGS:

Public Law Board No. 7426, 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 July 19, 2010, Carrier notified Claimant to appear for a formal Investigation on July 27, 2010, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that while employed as Gang Truck Driver on Gang 8958, at Salem, Oregon, near Milepost 718.0 at approximately 6:30 a.m., on July 15, 2010, you allegedly failed to comply with Union Pacific Work Violence Policy."

On August 10, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

It is the position of the Organization that on the date in question Claimant was engaged in a telephone conversation with Manager Buena concerning the fact that a junior employee had been awarded a bulletined position even though he had submitted a bid for the position and possessed greater seniority. According to it, the Claimant was understandably upset over the fact that his seniority had not been respected when making the assignment and voiced his displeasure after the telephone call in an inappropriate manner. There were two witnesses to the Claimant's statement, T. D. Cardwell, the Claimant's Union Representative, and Track Foreman C. A. Sieber. Both witnesses gave different accounts of what was said, but both agreed that the Claimant did not raise his voice or seem dramatically upset at the time. The Organization stated that Cardwell admonished the Claimant for making the comment and Claimant immediately apologized and said he was not serious, but was just blowing off steam.

The Organization asserted that Cardwell contacted the BMW Vice General Chairman to report the seniority violation and in the course of the conversation commented on the Claimant's statement. Recognizing that the Local Chairman was disturbed by the comment and realizing the potential seriousness of the comment, the Vice General Chairman requested a written report from the Local Chairman so that he could counsel the Claimant and determine if professional counseling was warranted.

The Local Chairman prepared his statement and a little after 6:30 a.m., he received permission to use a Carrier fax machine to send the statement to the Vice General Chairman. The fax transmittal sheet which included a reduced copy of the statement was retrieved by a Carrier Officer after which it was provided to Director of Track Maintenance, A. J. Bernhard.

Bernhard reviewed the statement and according to the Organization with no apparent urgency requested the matter be investigated by the Carrier's Police Department. Claimant was permitted to work the remainder of the day and following his tour of duty was questioned by the Special Agent, but was not removed from service.

The Organization argued that the comment made by Claimant was out of line and was not meant as a threat and that both employees who overheard the comments did not perceive them to be a threat. It closed by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the record reveals that the Claimant was heard physically threatening harm to others on July 15, 2010. It argued that the only dispute is the exact words he used and it gave concern to his co-workers that overheard him talking on the telephone and his subsequent comments regarding that conversation. Regardless of whether he threatened to "blow the Mother _____'s head off" or to "kill the Mother _____" is not consequential because either statement is of a threatening and serious nature. It further argued a safe work environment is the Carrier's obligation and this type of behavior is not and should not be tolerated. It also stated that the Claimant is a short term employee, but even if he was not such, comments of the nature he made are not acceptable and dismissal was appropriate. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and is in agreement that the Carrier has an obligation to do everything in its power to prevent work place violence and insure that its employees are not subjected to a hostile work environment. That obligation is recognized by the Carrier in its **Violence and Abusive Behavior in the Work Place Policy** that states in pertinent part:

"Union Pacific is committed to maintaining a safe work environment free of all forms of violence, including verbal and physical threats. The Company has a zero tolerance policy with respect to all forms of violence in the workplace. It is our firm belief that a safe and secure work environment free from violence is fundamental to all employees, customers, contractors, vendors, guests, or members of the public.

Prohibited Behavior

The Company will not tolerate or condone any form of threats or violence by or against Union Pacific employees, contractors, customers/clients, vendors, suppliers, or visitors on Union Pacific premises or through its communications equipment, nor will Union Pacific tolerate or condone any forms or threats of

violence by its employees while engaged in business on behalf of Union Pacific."

It is clear from the evidence presented in this dispute that the Carrier and the Organization both take the issue very serious, but interpret the facts differently and disagree over the discipline exercised.

On pages 59 - 60 of the transcript, the Claimant was questioned about the incident and testified as follows:

"Q I'll ask again Mr. Braniff, when you were- said that you were going to blow the Mother _____ 's head off, who were you referring to?

A I would like to make clear that the reference was made to or about Antonio Buelna. Not to him. Not directed at him or in his presence. And I would also like to state that at the time that I made that statement, because of the events that took place that morning, there wasn't- I don't believe anybody, above suspicion of- in my mind, somebody manipulating the- the bid system. And the comment was made without intent and without malice. It was just blowing off steam and venting and to my Union Rep and really just trying to gain assurance that things were going to be looked into on my Union's end.

Q And about what time do you think you were making this statement?

A I would say between 6:15 and 6:30 a.m.

Q What was Mr. Cardwell's response to you, if you recollect?

A When I made that comment, he did say, Oh Todd, don't say stuff like that. And I said, you're right, that's out of line. And I continued to complain about the situation with the bid." (Underlining Board's emphasis)

On page 68 of the transcript, the Claimant made a closing comment wherein he stated the following:

"I would just like to reiterate my service to this Company has been honorable. I've always done quality work, and I work safely. I think I've been a leader and a teacher. I spent a lot of years working with all the new guys that hire on; they always went to be a welder helper. Nobody ever got hurt under my watch.

That comment was totally unacceptable. I take full ownership of it, but I want it very clear there was no malice or intent, I was blowing off steam. I was upset about

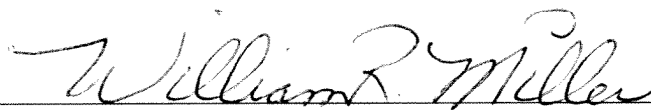
hearing facts that I just knew could not possibly be true. Not logging in. That's really all I have. Thank you." (*Underlining Board's emphasis*)

The record substantiates based upon witness's testimony, written statements and the Claimant's own admission that the language he used on July 15, 2010, was inappropriate, whether said with malice or not, and in violation of the aforementioned Carrier Rules. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

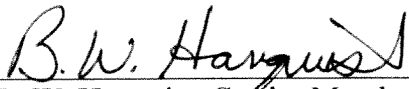
The only issue remaining is whether the discipline was appropriate. The Board does not excuse the Claimant's behavior as he was culpable for his actions, however, after review of the record the Board has determined that the discipline was excessive. Therefore, the Board finds and holds that the dismissal will be reduced to that of a lengthy suspension which will have served to have been corrective in nature. Claimant is to be reinstated to service on a "**last chance**" basis with seniority intact and all other rights unimpaired, without backpay upon successful completion and evaluation for anger management by the Employee Assistance Program (EAP).

AWARD

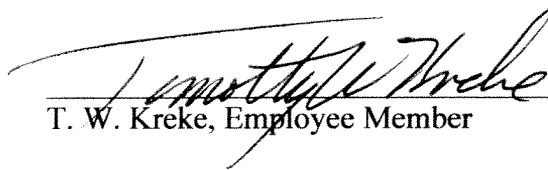
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: Sept 12, 2011