

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5905
AWARD NO. 52, (Case No. 52)**

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

vs

GARY RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Ryan Hidalgo, Employee Member
Lauren K. Hart, Carrier Member

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

- 1. The dismissal of Mr. J. Martinez for violation of U.S. Steel Corporation Code of Ethical Business Conduct Principle 2, U.S. Steel Prevention of Workplace Violence Policy, Maintenance of Way Safety Rules 1.14, 1.15, 1.44 and 1.52 in connection with allegedly entering into a verbal confrontation with a coworker, conducting himself in a careless, discourteous, quarrelsome, unprofessional and/or harassing or threatening manner toward another coworker and smoking in a company vehicle is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File A 2 3 15/GW-1-15 EJE).**
- 2. As a consequence of the violation referred to in Part 1 above, the Organization requests that Claimant J. Martinez be exonerated of all charges in accordance with Rule 57(c) and be reimbursed for all wage loss sustained as a result of the Carrier’s action. Claimant J. Martinez should have his record cleared of all charges and not affected by this decision.”**

FINDINGS:

Public Law Board No. 5905, 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 undisputed facts indicate that on December 6, 2014, Claimant was working as a Trackman on a Maintenance of Way track crew in the U.S. Steel, Gary Work Plant. It was alleged that at approximately 11:30 p.m. on the aforementioned date the Claimant smoked in violation of Carrier Rules in a Carrier vehicle and had a verbal altercation with a coworker wherein he was careless, discourteous, quarrelsome, unprofessional, and/or harassing or threatening toward

other coworkers. Because the Carrier believed there could be validity to the allegations which were of a serious nature the Carrier brought charges against the Claimant.

On December 9, 2014, Carrier notified Claimant to appear for a formal Investigation on December 11, 2014, concerning in pertinent part the following charge:

"...to develop all facts and determine your responsibility, if any, in connection with the following charges, wherein you allegedly:

- 1. Entered into a verbal altercation with a coworker.**
- 2. Conducted yourself in a careless, discourteous, quarrelsome, unprofessional and/or harassing or threatening manner toward other coworker.**
- 3. Were smoking in a company vehicle.**

These actions are alleged to have occurred on December 6, 2014 at about 11:30 p.m. and may be in violation of the U.S. Steel Corporation Code of Ethical Business Conduct Principle 2, U.S. Steel Prevention of Workplace Violence Policy, Maintenance of Way Safety Rules 1.14, 1.15, 1.44, and 1.52."

On December 17, 2014, Claimant was notified that he had been found guilty as charged and was dismissed from service.

The Board notes the instant case is a companion to Case No. 53 which involves the same Claimant and is a disciplinary dispute involving similar behavior and Rules that resulted in a suspension that occurred prior to the subject dispute.

Relevant Carrier Rules that are pertinent to this dispute are as follows:

1.14: Civil, courteous and socially acceptable conduct is required of all employees in their dealings with the public, their subordinates and each other. Boisterous, profane, vulgar or abusive language is forbidden. Employees must not enter into altercation with any person, no matter what provocation may be given, but will make note of the facts and report to their immediate superiors.

1.15: Employees who are insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious, or who are careless of the safety of themselves or others, or who do not have, or fail to exercise, good judgment will not be retained in the service.

1.44: Smoking is not allowed in Gary Railway vehicles, equipment or buildings. Smoking is allowed only in designated areas.

1.52: Scuffling, fighting, horseplay or playing jokes on fellow employees will not be tolerated. Violation of any part of this rule is sufficient cause for dismissal.

Additionally, there are two corporate policies that are pertinent to this case which are U.S. Steel Corporation Code of Ethical Business Conduct Principle 2 and U.S. Steel Prevention of Workplace Violence Policy which will not be reiterated, but were attached as Carrier's Exhibit C and are incorporated as a part of this Award.

It is the position of the Organization that the Carrier did not provide credible evidence or testimony that the Claimant violated any serious Rules set forth in the charges. Instead it argued the record shows that the Claimant was honest and forthright about the fact that he had been smoking in a company vehicle on the date in question, but ceased when told not to smoke. It next argued that the transcript substantiated that Claimant's coworker, Mr. Morganelli, did not immediately report Claimant's alleged threat to a Supervisor nor did he attempt to contact security personnel, whose duties and responsibilities included protecting Carrier property and employees. It asserted the question that begs to be asked is: "If the Claimant's comment was such a serious threat, then why was no immediate action taken to remove that threat?" It reasoned and suggested that if Mr. Morganelli had truly felt that the Claimant had made a threatening comment towards him while they were sitting in the vehicle it would seem more likely than not he would have taken immediate action to resolve the matter. It further concluded that based upon the evidence presented at the Investigation the Carrier failed to meet its burden of proof. The Claimant also testified that Carrier Witnesses Morganelli and Darrol fabricated the incident of December 6, 2014, and there was no threatening or inappropriate behavior on his part. Lastly, and without prejudice to the Organization's position it asserted that even if the Carrier provided sufficient evidence in support of the charges against the Claimant (which it did not do) the discipline was excessive as the Claimant was a good employee. It concluded by requesting that the termination of the Claimant be rescinded and the claim be sustained as presented.

It is the Carrier's position that it properly terminated the Claimant from its service and the discipline was appropriate for a serious offense. It argued that a review of the transcript reveals that two witnesses to the alleged incident, Messrs. Morganelli and Darrol gave consistent and non-conflicting testimony during the Investigation that confirmed that the Claimant's demeanor during the incident of December 6th was aggressive and both employees

further testified that they perceived a physical threat by Claimant towards Mr. Morganelli. Additionally, the Carrier argued that the Claimant offered no plausible reason as to why Morganelli or Darrol would offer falsified statements whereas the Claimant had a motive to falsify his testimony in the hopes of not being found responsible for his actions.

The Carrier next argued that the discipline assessed was appropriate as this incident was the Claimant's second offense for the same Rules and Policy infractions. It stated that the Claimant was previously found responsible for similar charges of entering into a verbal altercation and threatening behavior toward another coworker, which occurred less than three months prior to the subject incident. The Carrier also noted that after the Claimant was disciplined, it was brought to the Carrier's attention that, on December 28, 2014, Claimant began leaving Mr. Morganelli numerous threatening messages that were verified by the local police. Lastly, it argued the Carrier cannot risk another occurrence of this nature and is obligated to provide a safe workplace for its employees, therefore, dismissal was the only appropriate discipline. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation was held in compliance with Rule 57(a). Furthermore, the Board notes it has not considered allegations made against the Claimant about his alleged activities after his dismissal because they were not relevant in determining what transpired on December 6, 2014. The claim will be resolved on its merits.

The Carrier has an obligation to do everything in its power to discourage and prevent violence in the workplace and ensure that its employees are not subjected to a hostile work environment. With that responsibility comes the equally important requirement that the Carrier must meet its burden of proof regarding an accusation that an employee's behavior has contributed to a hostile environment.

The Carrier has alleged that the Claimant threatened a coworker in an aggressive and hostile manner in violation of multiple Carrier Rules. There is no dispute between the parties that on the night of December 6, 2014, the Claimant lit up a cigarette in a company vehicle in violation of Rule 1.44 and was instructed by Mr. Morganelli, RMO, to step out of the vehicle to smoke. Claimant testified on pages 15 and 16 of the transcript that when instructed to step out of the vehicle he immediately put out his cigarette and flicked it out of the vehicle without saying anything to Mr. Morganelli. The testimony of Witnesses Morganelli and Darrol contradicts the Claimant's testimony as to what happened after the Claimant was asked to step out of the vehicle to smoke. On pages 8 and 9 of the transcript Mr. Morganelli was questioned as follows:

KAK: And as you are cleaning out the truck, what occurred?

MAM: Mr. Martinez lit a cigarette in the back of the truck.

KAK: At that time were any windows or doors open?

MAM: He had his window cracked.

KAK: And where was he positioned?

MAM: In the back seat.

KAK: And when Mr. Martinez lit a cigarette in the vehicle did you say anything to him?

MAM: I did. I asked him to step outside to smoke the cigarette.

KAK: Did Mr. Martinez comply with that request?

MAM: No.

KAK: Did Mr. Martinez say anything at that time?

MAM: He did, he said that it was too cold outside and that he wasn't going outside to smoke.

KAK: And after he made that statement, what happened next?

MAM: I stated that it was a company rule, policy, not to smoke in the truck, to quit smoking in the truck.

KAK: Did Mr. Martinez comply after you stated that it was a company policy not to smoke in the vehicle?

MAM: No.

KAK: Then what happened?

MAM: I opened the passenger side door to let the truck air out while he was smoking.

KAK: Was this a front passenger?

MAM: Front passenger.

KAK: Front passenger door. Is that where you positioned in the vehicle?

MAM: Yes.

KAK: And what occurred after you opened the front passenger door?

MAM: I left the door open a few minutes. Mr. Martinez started complaining that it was getting cold in the truck and told me to shut the door.

KAK: What happened next?

MAM: I refused to shut the door, letting it air out. Mr. Martinez said if I don't shut the door that he was coming to the front and he was going to put his foot in my ass.

KAK: Did you consider that a threat?

MAM: I did, and I asked him if that was a threat and that is when he stated no, a threat would coming to Portage, since it's a small town where I live, find me, and when he does only one man is leaving.

KAK: And did you consider that a threat as well?

MAM: I did.

KAK: What occurred after that?

MAM: After that I didn't say anything because he was showing aggression and I didn't want it to escalate so I said nothing else until we had got back into the camp.

KAK: How was Mr. Martinez showing aggression?

MAM: You know, saying that he was going to come up to the front, put his foot in my ass. Saying, you know, his voice sounded very aggressive like it was a serious threat, it wasn't kidding around." (Underlining Board emphasis)

On pages 12 and 13 of the transcript, Mr. M. R. Darrol, Track Foreman, confirmed Mr. Morganelli's version of the incident as being accurate.

As previously stated the Claimant's version of the incident is contradictory to that of his coworkers, therefore, the question to be resolved is which version of the incident was correct and whose testimony was more credible, that of the Claimant or Messrs. Morganelli and Darrol. The Claimant's defense in the instant matter is essentially the same defense that the Claimant offered in his suspension dispute, Award No. 53, Case No. 53, namely that his coworkers were not telling the truth.

The Organization forcefully argued in behalf of the Claimant that the record indicates that Messrs. Morganelli and Darrol did not report the alleged incident immediately and it reasoned that because the incident was not reported until the following morning that shows that Mr. Morganelli did not feel threatened and should somehow mitigate the actions of the Claimant. The argument is resourceful, but it is not persuasive. Morganelli and Darrol offered an explanation as to why they waited until morning to report the incident to their superior. They testified that because of the lateness of the hour and the fact that the Claimant had departed it was not necessary to awaken their superior as the threat had subsided. Additionally, both testified that Mr. D. J. Groebner, Maintenance Supervisor, was apprised of the incident at the start of the new workday. The Board finds that explanation to be reasonable and even assuming for the sake of argument the report was somewhat tardy it did not change the facts as to what transpired nor was it a violation of any Carrier Rules.

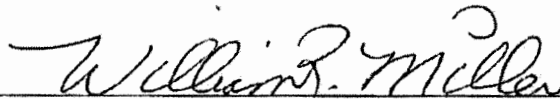
Examination of the transcript reveals that the testimony of Morganelli and Darrol was consistent with the report they made to Mr. D. J. Groebner, Maintenance Supervisor, following the incident. Additionally, there has been no showing that either employee had any reason to fabricate their testimony or that they would conspire to the detriment of the Claimant, therefore, it is determined that the testimony of Messrs. Morganelli and Darrol was far more credible than that of the Claimant whose testimony is best described as being self-serving. The key difference between this case and Award No. 53 is there were two witnesses who offered substantive and credible testimony in the instant dispute whereas in the other case it was "one against one" with no probative evidence offered to verify either witness's recollection of the incident covered by the charges. It is determined that substantial evidence was adduced at the formal Investigation that the Carrier met its burden of proof that Claimant threatened Mr. Morganelli and was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant was a short term employee who had less than two years of service with 33 demerits on his record. Claimant's suspension in Award No. 53 was not considered because that discipline was set aside by the Board, however, the Claimant's infraction in this instance was of a very serious nature and is a potential standalone dismissible offense. Claimant's comments directed to Mr. Morganelli were not the result of a heated argument, but instead arose from a reasonable request by his coworker to not smoke in a company vehicle in violation of Carrier Rules. Claimant's statements included in pertinent part as recalled by Messrs. Morganelli and Darol the following: **"...he was going to put his foot in my ass."** and **"...a threat would coming to Portage, since it's a small town where I live, finding me, and when he does only one man is leaving."** The aforementioned conversation was clearly of a threatening nature. It is further noted that even though it was determined by this Board the Carrier did not meet its burden of

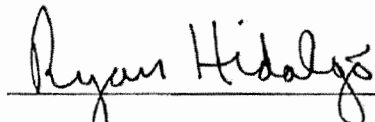
proof in the Claimant's suspension case, Award No. 53, it did show in that instance an effort to use corrective measures to modify the Claimant's future behavior as it required the Claimant to attend Anger/Management Training which unfortunately did not deter the Claimant's actions in the instant dispute. As previously stated Claimant's behavior directed towards Mr. Morganelli after the issuance of his dismissal was not considered in the determination of Claimant's guilt in the subject case, however, that behavior is worthy of consideration regarding the issuance of discipline. The record substantiated that after the Claimant's termination the Claimant began leaving Mr. Morganelli numerous threatening messages for which felony level 6 charges were filed and a warrant was issued for Claimant's arrest (See Carrier Exhibit B). Claimant's post-termination actions are continuing evidence that Claimant's behavior has not improved and it reinforces the fact that the Claimant had the potential and inclination to do harm to his fellow workers at the time this case arose. It is evident the Carrier made a good faith effort to rehabilitate Claimant's behavior with no progress and was left with no alternative to termination. The Carrier's assessment of dismissal was in accordance with its Disciplinary Policy and because it was not arbitrary, excessive or capricious it will not be set aside. The claim will remain denied.

AWARD

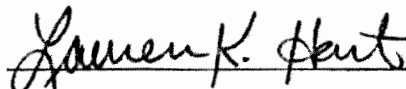
Claim denied.



William R. Miller, Chairman & Neutral Member



Ryan Hidalgo, Employee Member



Lauren K. Hart, Carrier Member

Award Date: 10-5-17