

**PUBLIC LAW BOARD NO. 7633**

**Parties to Dispute:**

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**Brotherhood of Maintenance of Way Employees )**

**Division – IBT Rail Conference )**

**and )**

**Union Pacific Railroad Company (former )**

**Missouri Pacific Railroad Company) )**

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**Award No. 189**

**Statement of Claim: Claim of the System Committee of the Brotherhood that:**

1. The Carrier's discipline (dismissal) of Mr. J. Smith, by letter dated October 6, 2020, for an alleged violation of Rule 1.6: Conduct – Discourteous and additionally, Rule 1.6: Conduct stipulates that 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 was exceedingly harsh, imposed without the Carrier having met its burden of proof and in violation of the Agreement (System File UP520JF20/1745822 MPR).
2. As a consequence of the violation referred to in Part 1 above, the Organization requests that Claimant J. Smith have:

‘\*\*\*the discipline of dismissal to be removed and removed (sic)from the Claimant's Personnel Record. Also, to be paid and compensated for any and lost time at the Claimant's respective straight time rate of pay, and any and all overtime to be paid at his respective overtime rate of pay that the gang the Claimant was assigned to and the employee performing the Claimant's highly recognized work the Carrier afforded the opportunity for had the Claimant not been unjustly and excessively disciplined.

Also, to be returned to active service of the Union Pacific Railroad with all seniority unimpaired, to be paid for “any and all holidays and all lost time to be credited to Railroad Retirement, hospitalization to include physician office visit, dental, prescriptions and vision beginning September 1, 2020 through(sic) and including on a continuous basis until this matter is settled. To include any, and all expenditures the Claimant may have acquired to include meals, lodging and mileage at the negotiated rate of \$.58 cents a mile from Mr. Smith's place of residence, 271LCR 793, Grosebeck, Texas 76642 to the Holiday Inn & Suites

College Station-Aggieland, 2500 Earl Rudder Freeway and Texas 6 College Station, Texas and returning to the Claimant's place of residence regarding his attendance at the Formal Investigation on September 24, 2020, account the Carrier unjustly and excessively charged and disciplined Mr. Smith without sufficient evidence forcing him in a worse position, and causing him a loss of work opportunity, wages and causing the Claimant financial hardship.

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We now request that all charges be dismissed, the discipline of dismissal be removed, the Claimant be returned to active service immediately and the Claimant be paid and compensated as outlined in the first paragraph of this letter in addition to any and all other compensation the Claimant may already have received for the before mentioned date and continuing.

The Organization also requests that within such time in which the Claimant is reinstated to active service he would not be subject to any additional probation under the Current Union Pacific MAPS Policy, specifically "Rule 3.7 Arbitration Decision" in which case the Carrier can revert the employee's status to a second triggering/training event with a thirty-six (36) month retention period.' (Employees' Exhibit 'A-2')."

## **Findings**

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934; the Board has jurisdiction of the dispute herein; and the parties were given due notice of hearing and participated.

The Claimant has worked for the Carrier for almost eleven (11) years and held seniority in the Carrier's Maintenance of Way Department at the time of the incident giving rise to this claim. Via letter dated October 6, 2020 the Claimant was notified that he was dismissed, based upon the following charge,

"On 08/21/2020, while employed as a Welder, you made inappropriate, threatening, and or violent comments directed toward another employee, both verbally and through a Facebook post on 08/21/2020 and 08/23/2020. This is a violation of the following rule(s) and/or policy: 1.6: Conduct – Discourteous

Additionally, Rule 1.6: Conduct stipulates that 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.”

The Organization appealed the discipline and the Carrier denied the appeal. The parties were otherwise unable to resolve the dispute and this matter is now pending before the Board for a final and binding resolution.

In August 2020, the Carrier became aware of a statement allegedly made by the Claimant, specifically that he was angry about another Foreman bumping him, and said he hoped his co-worker’s “truck catches on fire and he never comes back.” This led the Carrier to investigate Claimant’s behavior and conduct with respect to his co-workers. The investigation was done by Jessica Marsa, Corporate Investigation Analyst, who issued a Corporate Audit report summarized below.

Subject: Substantiated Case – Jeremy Smith – Case #131178029. Updated on September 21<sup>st</sup>. From Jessica Marsa to Keagan Niles. September 21<sup>st</sup>, 2020, at 16:04 p.m

Paragraph 2: Employee #1 said that Jeremy Smith was angry that Employee #2 was bumping him, and that Mr. Smith stated: "I hope his truck catches on fire and he never comes back." There were no other witnesses to this incident. When questioned about this, Mr. Smith stated he didn't recall having said this, but if he did quote -- "whatever" – end quote. This is a violation of the Workplace Violence Policy.

Paragraph 3: Employee #1 and Employee #3 both witnessed Mr. Smith saying that he dislikes Employee #4 due to the Employee #4 reporting Mr. Smith to the Values Line in the past and that Mr. Smith stated quote -- "He better not get out of the fucking truck or I'm going to hit him over the head with a fucking hammer." Mr. Smith admitted that he dislikes Employee #4 for reporting Mr. Smith to the Values Line in the past, but denied having threatened that he would hit the Employee #4 with a hammer. A substantiated Values Line report involving Mr. Smith was located in the Values Line system from 2018. The Employee #1 stated he was fearful of retaliation. This is a violation of the Workplace Violence Policy.

Paragraph #4: Employee #1 and Employee #3 reported that, 2 to 3 weeks ago, Mr. Smith made a comment in reference to the Employee #4. The Employee #1 heard the Foreman say quote, "This stupid mother fucker, he is shooting his sparks onto the gas line, he's going to blow us all up." Employee #3 heard the Foreman say that he hopes a weld that Employee #4 was shooting blows up and starts him on fire. Mr. Smith denied that he made either of these comments. This is a violation of the Workplace Violence Policy.

Paragraph 5: Employee #1 reported that Mr. Smith recently posted on Facebook, "How does one advertise to be a hitman." Mr. Smith admitted to posting this as a joke. This is a violation of the Workplace Violence and Social Media Policies.

Paragraph #6: Employee #1 reported that Mr. Smith stated that he would prevent Employee #3 from getting time on the backhoe and when his 60 days on the job ran out, Mr. Smith would disqualify Employee #3. Mr. Smith stated he couldn't disqualify someone because he was only the Foreman, not the manager. He couldn't prevent them from performing their job. Mr. Smith didn't recall if he had asked someone to- to back the backhoe off the trailer, if it's part of the job he would expect they would be able to do it. The Manager of Track Maintenance said that Mr. Smith could

witness something that was verifiable and that could result in the Backhoe Operator to be disqualified. The Manager of Track Maintenance said that he would expect- he would have expected that Employee #3 wouldn't know how to operate the backhoe his first time in the backhoe and that he should receive 306 days of training. The Manager of Track Maintenance said that moving the backhoe off a trailer would be advanced, he would expect that the person would be trained on safety controls- simple tasks to start out, and if a person told a new Backhoe Operator with no experience to move the backhoe off the trailer, first thing, that would sound suspicious, like he is being set up to fail. The Manager of Track Maintenance would have expected Employee #3 to refuse to do anything in the backhoe that he didn't feel comfortable with, which is what Employee #3 did. This is a violation of The How Matters Policy.

Paragraph #7: Employee #2 stated he called the Manager of Track Maintenance to tell him he would be bumping Mr. Smith. Employee #2 stated that later that night, Mr. Smith called him and asked quote-- "Are you really going to fucking bump me in the morning" – end quote. Employee #2 quote -- "Yes" – end quote -- and Mr. Smith said quote -- "I don't know why you're going to fucking bump me, you could fucking work somewhere else" – end quote. Employee #2 told Mr. Smith that this is the closest location to his house. Mr. Smith said quote -- "You could be my Backhoe Operator and report to me" – end quote. Employee #2 asked, quote -- "Why would I go work for less pay? I'm not coming to bump a backhoe, I'm coming to bump you in the morning" – end quote. Mr. Smith hung up on Employee #2. Mr. Smith denied that the conversation was like this at all. According to Mr. Smith, the conversation went like this: Mr. Smith said that he called Employee #2 and asked who he was going to bump. Employee #2 said that he was going to bump into the Foreman position. Mr. Smith suggested that Employee #2 bump into the Backhoe Operator position since he doesn't know the territory. Employee #2 said that he was bumping the Foreman- bumping into the Foreman position. Mr. Smith denied using any profanity. Then both Foremen mutually got off the phone with no negativity. Mr. Smith admitted that he comes across intimidating and offensive. This is a violation of The How Matters Policy.

Paragraph #8: Mr. Smith forwarded Corporate Investigations Analyst a sexual question in a text message that Employee #1 sent him. Following the question in the text message, Mr. Smith responded with quote -- "yes" – end quote -- but denied that this was in response to the sexual question. Employee #1 denied knowing what the vulgar term in the text message meant and that it was a term from a comedy. Mr. Smith neglected to report the sexual text message prior to the report that was made against Mr. Smith because he said he overlooked the entire message. Employee #1's disciplinary action was handled separately from this hearing. Mr. Smith's response to the text and his failure to report it to the EEO until after he was reported was concerning.

Paragraph #9: Employee #1 said that Mr. Smith has repeatedly said that he doesn't like his coworkers, he hates working with them and that he doesn't need this job. Mr. Smith admitted that he jokingly tells his coworkers that he doesn't like them. This supports the character of Mr. Smith and the context of the situation that is concerning.

Paragraph #10: Employee #1 advised Mr. Smith recently showed him a picture of a handgun he just acquired. The Employee #3 advised he did not see a picture of the gun, but stated that Mr. Smith told him that Mr. Smith's dad gave him the gun for staying in Grosebeck, and not relocating for work. Mr. Smith stated that he did show employees a picture of the handgun and was proud that he recently got the gun from his dad.

Paragraph #11: After the Corporate Investigations Analyst interviewed Mr. Smith, Employee #3 stated that Mr. Smith was spreading rumors that Employee #1 reported Mr. Smith to the Values

Line. Mr. Smith stated that he only told his coworkers that he was under investigation. This supports the character of Mr. Smith and the context of the situation that is concerning.

Paragraph 12: Employee #1 and Employee #3 reported that Mr. Smith wants the gang to blindly follow him, that he will not provide the gang with necessary information and that he does not hold job briefings. Mr. Smith denied this. This supports the character of Smith and the context of the situation that is concerning.

Paragraph 13: Employee #1, Employee #3, and Employee #2 reported that Mr. Smith was angry that Employee #2 bumped him and that the Manager of Track Maintenance would need to create a position for him and displace someone else on the gang. Mr. Smith denied being upset by the bump at all. The Manager of Track Maintenance denied saying this. This supports the character of Mr. Smith and the context of the situation that is concerning.

Paragraph 14: The recommendation for Mr. Smith is to be charged with a 1.6 termination for violating the Workplace Violence Policy, Social Media Policy, and the How Matters Policy (SSI 10-I). If Mr. Smith is offered and accepts a leniency, Mr. Smith would be required to work with Health and Medical Services for fitness for duty prior to returning to work and to take the online Equal Opportunity, Equal Responsibility training.

In addition, Jessica Marsa gathered two other pieces of information included in the investigative hearing:

- Text messages between the Claimant and Joseph Piccirilli in which the Claimant asked, “Can I see your whispering eye?”
- Facebook post by Claimant saying, “All my Facebook friends, period. How does one advertise to be a hit man, period. Asking for a friend.”

The Carrier argues that it found through its audit that the Claimant engaged in a series of activities that violated its policies prohibiting discourteous, threatening, and sexually harassing conduct. The Claimant admitted on the record that he said he would hit another co-worker over the head with a hammer. Due to the severity of his conduct, the Carrier argues that dismissal is warranted.

The Organization argues that the Claimant has over ten years of service and has no past incidents. There are no recordings or transcripts of the Carrier’s investigation and the conclusions and opinions of the investigator, not the Claimant’s co-workers, formed the basis for the Claimant’s dismissal, according to the Organization. The Organization claims that the Carrier failed to state precise charges against the Claimant, partly by relying upon multiple underlying policies to charge the Claimant with the Rule 1.6 violation. The Carrier failed to identify certain witnesses; and failed to call all the relevant witnesses at the hearing on the property. Therefore, the Organization contends that the Claimant did not receive a fair and impartial hearing.

On the merits, the Organization argues that many of the allegations against the Grievant have not been substantiated on the record. The Grievant’s statement about hitting his co-worker was a brash, off-handed comment, not said directly to the person and not meant to be taken seriously. Other comments were either off-duty, and/or meant as jokes. The imposition of

dismissal is excessive and harsh for the conduct that has been substantiated, according to the Organization.

The Carrier argues that it need not call all witnesses, and the Organization can call witnesses as well, as it did in this case. The Carrier argues further that it had a particular need to shield witnesses in this case from retaliation. However, the Carrier contends that all of the principal employee witnesses who provided information during the audit were called as witnesses during the hearing and were subject to questioning by the Claimant and his representatives.

The Board has considered the Organization's claims about whether the Claimant was afforded a fair and impartial hearing. The witnesses were not originally identified to the Union, but most of the primary witnesses were called by the Carrier to testify at the hearing. The Union had the opportunity to call witnesses and did so in this case. The Claimant was active in questioning witnesses.

The Organization argues that some of the information used to support the charges against the Claimant was not fully substantiated or does not prove a violation of the Employer's policies. The Board concludes that the Claimant showing Management a sexually-based text message from one of the witnesses to him and his one word reply probably is not sufficient to demonstrate a significant violation of the sexual harassment policy by the Claimant, even if he were charged for late reporting. Some of the information used to support the charges against the Claimant was not substantiated by the evidence at the hearing. However, the Board concludes that even discounting such evidence in this case, the hearing included testimony by witnesses who provided information about these incidents – as did the Claimant himself.

Most importantly, the Claimant admitted during the hearing that he did make the following statement to others while at work,

“Q And what about Paragraph #3, ‘he better not get out of the fucking truck or I’m coming to hit him over the head with a fucking hammer.’ Did you say that?

A Uh- I’m not going to lie. I mean I probably did.”

On its face, this statement is a threat to violently harm one of the Grievant's co-workers. The Claimant contended at the hearing on the property that he followed up his comment with a milder one, “But afterwards I probably also said that I can’t say things like that; it’s against UP rules.” The Claimant suggests that this demonstrates that he did not intend to seriously harm his co-worker because he recognized that making a threatening statement violates the Employer's rules. In determining whether the Carrier had substantial evidence to consider the statement as a serious violation of its rules and policies, or whether it should be treated as harmless “shop talk,” the context in which it was made must be considered. Employee Carlisle, who testified that he was with the Claimant when he made the “hammer comment,” testified that he did not hear the Claimant make this second comment. And even if the Claimant did make such a comment, it does not entirely excuse his earlier statement threatening a nearby co-worker with violence. Carlisle testified that the person about whom the Claimant made the comment was nearby, riding in a car stopping to pick up Carlisle. Employees who overheard the comment reported that they felt fearful.

There is convincing evidence in the record that the Claimant was upset about a co-worker bumping him out of his job at that time, and he had made his feelings known to other co-workers. He called the bumping individual, and profanely told him that he should take another job. That employee testified that he wasn't intimidated by the phone call but suggested that he might have been if they had had the conversation in person. The Claimant's Supervisor Knight testified that several employees told him that the Claimant was angry about being bumped; that he had made a threat; and that they felt fearful, even though Knight testified that he had not personally witnessed any intimidating behavior by the Claimant.

The Claimant acknowledges making a negative comment about the safety of the welding skills of an employee. This statement may have been discourteous, but it is difficult to conclude that the Carrier would have dismissed the Claimant under Rule 1.6 for making this comment. However, Carlisle also testified that he was present when the Grievant said that he "hopes a weld that the Employee #4 was shooting blows up and starts him on fire." The Claimant denies making this second comment. The second comment is so unusual that it was reasonable for the Carrier to conclude that the witness remembered it correctly. Even though this statement is not a threat by the Claimant to personally harm his co-worker, it is a wish for a violent injury to happen to a co-worker in the workplace. Employees of the Carrier work in a dangerous environment and must depend upon each other for their safety. This kind of comment is not only discourteous, but may also raise serious safety concerns about the Claimant's willingness to assist and provide safety protection to others at work for whom he has negative feelings.

In addition, the Carrier considered the Claimant's Facebook post referencing a hit man. This was off-duty conduct and the Carrier must establish a nexus between that conduct and the Claimant's employment. The Claimant stated at the hearing that there was a connection between the post and his recent bumping, thereby establishing a nexus himself. According to the Claimant, it was a joke that originated between the Claimant and his wife about looking for a different job, that is, as a hit man, because of his recent bumping at work. The Carrier considered the post because of the Grievant's strong feelings about his bumping, expressed at work, and the fact that the post closely followed the bumping. Given the Grievant's other violent comments during this period, the Carrier could reasonably consider this post about a hit man as contributing to an overall conclusion that the Claimant posed a safety risk and was in violation of the Carrier's Rule 1.6 and its anti-violence policies.

The Claimant testified at the hearing that he has been told that he is intimidating. Nevertheless, he made a series of violent comments to others relating to his job and his co-workers, including a threat to harm a co-worker. Even though the Claimant says that each of these comments either did not happen or was nothing more than a joke, the Carrier has provided substantial evidence that they did occur, and that they frightened other employees. The Carrier may reasonably consider the potentially serious risk created by an employee making violence-related comments at work and his co-workers, especially during a period when he was expressing that he was disgruntled and upset about being bumped out of his job. The Carrier must consider the safety of all the employees and, considering the evidence here, did not violate just cause by failing to treat the Claimant's violence-related comments as harmless "shop talk." On this record the Carrier

has demonstrated substantial evidence of a violation of Rule 1.6 and the Carrier's anti-violence policies.

In addition, the evidence does not establish that the penalty of dismissal was arbitrary, harsh or excessive. The Carrier has a zero tolerance policy against making threats at work, and the Claimant threatened to hit a co-worker in the head with a hammer while the co-worker was nearby. A serious violation of Rule 1.6 may provide grounds for dismissal in itself. The Board concludes that under these circumstances, the penalty imposed by the Carrier is not arbitrary or unduly harsh.

**AWARD**

The claim is denied.

Signature 

Jeanne M. Vonhof  
Neutral Member



John Schlismann  
Employee Member  
Date: November 22, 2023



Chris Bogenreif  
Carrier Member  
Date: 11/27/2023