

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO 138, (Case No. 159)

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
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

B. W. Hanquist, Carrier Member

Hearing Date: August 17, 2010

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

1. The Carrier's discipline (Level 5-withheld from service and subsequent dismissal) of Mr. S. Thrash, issued by letter dated September 9, 2008, in connection with alleged violations of Company Rule 1.6(6) (Conduct (Quarrelsome)) as contained in the General Code of Operating Rules and in the Union Pacific's EEO/Affirmative Action Policy and related policies, UPPR's Violence and Abusive Behavior in the Workplace Policy in connection with allegations that Claimant's communication with Mr. R. Martinez on March 8, 2008 violated the EEO Policy and all allegations that Claimant was quarrelsome and hostile in remarks to Mr. R. Martinez on March 9, 2008 was unjust, unfair, based upon unproven charges and in violation of the Agreement (System File MW-08-115/1509743D).
2. As a consequence of the Carrier's violation outlined in Part 1 above, Mr. Thrash shall now be allowed a remedy as allowed for in Rule 21(f), including all his vacation rights beginning March 9, 2008 and continuing."

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.

On March 13, 2008, Carrier notified Claimant to appear for a formal Investigation on March 31, 2008, which was mutually postponed several times and subsequently held on August 25, 2008, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, that on March 8, 2008, you were allegedly in violation of the EEO Policy in a communication with Richard Martinez. Also, on March 9, 2008, you were allegedly quarrelsome and hostile in your remarks to Richard Martinez.

Your alleged actions indicate possible violation of Rule 1.6(6) (Conduct (Quarrelsome)), and that part reading including that part reading: "Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal..." as contained in the General Code of Operating Rules, effective April 3, 2005, and in the Union Pacific's EEO/Affirmative Action Policy and related policies, Revised May 1, 2005, UPRR's Violence and Abusive Behavior in the Workplace Policy, revised November 11, 2003.

Please be advised that if you are found to be in violation of this alleged charge, that the discipline assessment may be a Level 5 and may result in your dismissal...."

On September 9, 2008, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 5 discipline and dismissal from the Carrier's service.

It is the Organization's position that the Carrier did not meet its burden of proof in connection with the charges. It argued that Claimant denied he ever used the "N" word or that he ever threatened bodily harm to R. Martinez. According to it, this is the classic case involving testimony wherein it is "one against one" and neither the Claimant or Mr. Martinez can prove what was said, which means that because there was a direct conflict in testimony it cannot be resolved in favor of the party (Carrier) who had the burden of proof. It further argued that Supervisor Earley's testimony was not first-hand knowledge, but was based upon Trackman Martinez's statements and should not be given any consideration. It concluded by requesting that the dismissal be set aside and the Claim be sustained as presented.

It is the position of the Carrier that Claimant was removed from service pending an Investigation after he became angry and threatened his co-worker R. Martinez, offering to "bust his lip and/or whoop Richard's ass and inviting him across the fence." Additionally, it argued he was overheard using the "N" word on his cell phone while on company time and company property. It closed by stating that the discipline was appropriate and asked that it not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the record and we found no procedural errors which require setting aside the discipline as the Claimant was afforded his "due process" Agreement rights.

The Organization developed a worthy defense when it argued that if there is a direct conflict of testimony at an Investigation between a Claimant and the Carrier's primary witness against him, without supporting testimony for either's position, it is a "net wash" and the Carrier must lose because it did not meet its burden of proof (See Third Division Award No. 32890 and P.L.B. No. 7357, Award No. 1). This Board takes no exception to that concept of reasonable proof and would endorse it, if it fit this dispute, but that argument is not consistent with the factual circumstances of the case.

Carrier witness Martinez testified on pages 30 and 32 of the Transcript that he heard the Claimant using the "N" word on his cell phone and he further threatened him with physical harm. Claimant testified to the contrary on pages 33 - 35 stating that he invited Martinez over the fence only because it was too loud by the machinery to hear, as it was stuck on high idle and he never used any offensive language nor did he threaten him. If that was the extent of the testimony the Organization would be correct in its coloration of the case, but Supervisor Earley's testimony makes the case distinctly different. Earley's testimony is not based solely on the comments made to him by Martinez, but also includes those of the Claimant. On page 23 of the Transcript, Earley read from his written statement of March 9, 2008, which stated in pertinent part the following:

"At 12:30, same date, I asked Shawn Truh- Shawn Thrash to get his gear and come to my truck. I wanted to get his version of what had taken place. As we drove away from Carl Siding, going back to Spofford, I asked Thrash several questions about the confrontation with Mr. Richard Martinez. Shawn confirmed that the problem had indeed taken place. He also admitted threatening to whoop Richard's ass and inviting him across the fence." *(Underlining Board's emphasis)*

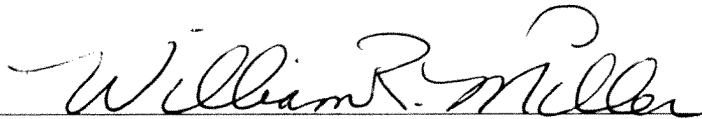
Supervisor Earley further reiterated on pages 24 - 25 of the Transcript that Claimant admitted he threatened Martinez. There is nothing in the record which suggests that Earley had any ulterior motive not to be forthright. The Board also notes that when the Claimant testified he never denied that he admitted to Supervisor Earley he threatened to hurt his co-worker.

After careful review of the Transcript the Board does not find conclusive evidence that the Claimant was in violation of the EEO Policy on March 8, 2008, in a communication with employee Martinez as there was no supporting evidence and/or testimony that he used offensive language, therefore, we will dismiss the charges against him for that date. However, we find that the Carrier met its burden of proof with substantial evidence and collaborating testimony that the Claimant threatened physical harm to his fellow work R. Martinez on March 9, 2008.

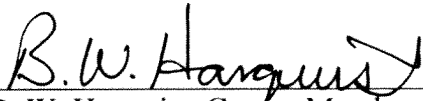
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had a little over four years service. The Carrier has a duty and obligation to provide a safe working environment for its employees, free of threatening behavior. In this instance, there was no excuse for Claimant's actions and we find no reason for mitigating the discipline as it was not arbitrary, excessive or capricious and was in accordance with the Carrier's UPGRADE Policy. The discipline will not be set aside.

AWARD

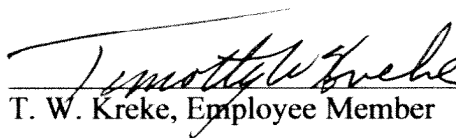
Claim denied.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: October 4, 2010