

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO. 152, (Case No. 173)

**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 18, 2010

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

1. The discipline (removed and withheld from service beginning on November 11, 2009 and subsequent Level 5 - dismissal by letter dated December 15, 2009) imposed upon Mr. G. Grant, Jr. for alleged violation of Rule 1.6 of the General Code of Operating Rules and Workplace Violence and Related Policy Directives in connection with allegedly making inappropriate comments to fellow employees and allegedly engaging in workplace violence, acts of hostility and threatening behavior at Houston, Texas, on November 10, 2009 at approximately 7:00 A.M., was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File UP-500-JF-10/1525952D).
2. As a consequence of the violation referred to in Part 1 above, Mr. G. Grant, Jr. shall now have the aforesaid discipline removed from his record and he shall be reinstated to service with all rights unimpaired and compensated for all time lost beginning on November 11, 2009 and continuing until he is returned to service and he shall be paid all expenses, including mileage and meals, incurred in attending the formal investigation on December 9, 2009."

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 November 16, 2009, Carrier notified Claimant to appear for a formal Investigation on November 25, 2009, which was mutually postponed until December 9, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place your responsibility, if any, in connection with your alleged conduct unbecoming an employee by making inappropriate comments to fellow employees, allegedly engaging in workplace violence, acts of hostility and threatening behavior, at Houston, Texas, at approximately 07:00 a.m., on November 10, 2009.

This is a possible violation of Rule 1.6 of the Union Pacific General Code of Operating Rules and Workplace Violence and Related Policy Directives."

On December 15, 2009, Claimant was notified that he had been found guilty as charged and his record was assessed with a Level 5 UPGRADE discipline and he was dismissed from service.

The facts indicate that the Claimant entered the service of the Carrier on February 3, 1998, and at the time of the alleged rule infraction he was assigned and working as Trackman in the Houston, Texas, area. The Claimant was accused of a serious Rule violation wherein it was alleged that he threatened bodily harm to his immediate supervisor Foreman G. W. Axel on November 10, 2009.

It is the Organization's position that the Investigation was not fair and impartial and the Carrier did not meet its burden of proof. It argued that the alleged incident was a "one on one conversation" between the Claimant and his Foreman and according to it the Claimant did not threaten his Foreman. It further argued that when it is "one against one" with no supporting testimony or evidence as was the situation in the instant case the Carrier must lose because it did not meet its burden of proof as the scales of justice balanced evenly. The Organization also objected to the fact that the Carrier entered documentation from 20 years earlier indicating that the Claimant was found guilty of a misdemeanor charge for possession of a weapon. It asserted that the Claimant did not work for the Carrier at that time and he made restitution and then joined the military. It contended that action showed intent to taint the Claimant's character and a bias against him. It concluded by requesting that the discipline be set aside and the Claim be sustained as presented.

It is the position of the Carrier that there were no procedural violations involved in the handling of the dispute. It argued that Claimant threatened Foreman Axel with physical violence when he told him that if he caught him on the street off Company property he was going to "f... him up". It further argued that based on the testimony, it was determined that Mr. Axel was a

more credible witness which is in accordance with several Awards including P.L.B No. 6402, Award 28 that stated the following:

"The hearing officer analyzed the demeanor of the two witnesses and their testimony and concluded that the Track Supervisor was the more credible witness. As an appellate body, we do not observe the witnesses and are in a poor position to evaluate their credibility. Consequently, we defer to credibility determinations made on the property. We see no reason to deny the credibility determinations made in the instant case the deference to which such findings are generally entitled...." (Underlining Board's emphasis)

The Carrier further argued that it has a responsibility to maintain a workplace environment free of threatening behavior and/or violence, therefore, when the Claimant threatened his Foreman it was justified in dismissing him. It closed by stating that the discipline was appropriate and asked that it not be disturbed and the Claim remain denied.

The Organization advanced numerous procedural arguments. The Board thoroughly reviewed the record and finds that Claimant was afforded his "due process" Agreement rights and none of the procedural arguments provide a basis for setting aside the discipline.

The facts of the case are simple. The Carrier alleged that the Claimant threatened bodily harm to his immediate Foreman G. W. Axel on November 10, 2009. Axel testified that the Claimant threatened him and Claimant testified that he did not threaten his superior. The Carrier and the Organization were equally adamant that their respective witness was more credible than the other.

The argument made by the Organization in this case regarding situations where there is one primary Carrier witness against the Claimant with no collaboration of either person's testimony was also made in Award No. 138 of this Board. In that Award the Board wrote the following:

"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 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."

The Board continues to agree with the above stated logic, therefore, this case will be determined on its factual circumstances. Furthermore, the Board has been given no reason to believe that Foreman Axel fabricated his testimony nor have we been given any reason to disbelieve the Claimant. The Carrier has forcefully argued that based upon the Hearing Officer's determination of the witnesses demeanor and credibility the Board should follow his determinations. In many instances that argument will prevail provided there is proof that either the Hearing Officer rendered the disciplinary decision or had input in that determination. In this case there is no proof that the Hearing Officer made any credibility decisions determining that Foreman Axel's testimony was more credible than the Claimants. The dismissal decision was rendered by the General Superintendent who was not at the Hearing and did not indicate that he had any discussion with the Hearing Officer about anyone's demeanor or credibility who testified at the formal Investigation. In a very similar case involving the same parties to this dispute P.L.B. No. 6302, Award No. 144 that Board determined the following:

"...There is no evidence in the record corroborating the Track Inspector's testimony. Claimant testified and denied making the threatening remark attributed to him. Furthermore, although we typically defer to credibility determinations made on the property and accept resolutions of conflicting testimony made on the property, we do so because those determinations and resolutions are made by the hearing officer who observed the witnesses testify. In the instant case, however, the hearing officer was the Manager of Train Operations but the disciplinary determination was made by the DTM. There is nothing in the record to indicate that the hearing officer made any credibility determinations. Thus, there is no basis in this record for deferral to the resolution of the conflicting testimony made on the property. On the basis of the record presented, we are compelled to find that Carrier failed to prove this aspect of the charge by substantial evidence." (Underlining Board's emphasis)

As previously stated there is no proof in this case that the Hearing Officer made any credibility decisions or had any input in the disciplinary decision. Absent that proof the logic of Third Division Award No. 32890 is directly on point wherein the Board stated the following:

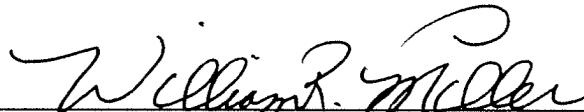
"The Board has thoroughly reviewed the record in this case. In sum the Board finds that the Carrier has not carried its burden of persuasion, which is a particularly heavy one in the case of dismissal. The record contains a direct conflict of testimony between the Claimant and Carrier's primary witness against him, with no supporting testimony for either's position. In such situation, where the contradictory evidence can truly be said to result in a "net wash", the party with the burden of persuasion - this case the Carrier - must lose. Accordingly, the instant claim is sustained.

The aforementioned logic and reasoning applies in the instant case as well, therefore, the Claimant's termination is set aside because the Carrier did not meet its burden of proof. The Board finds and holds that the Claimant is to be reinstated to service with seniority rights intact, benefits unimpaired and full back pay at the straight time rate of pay from November 11, 2009, until restored to service.

The Claim also seeks that Claimant be compensated for expenses incurred in attending the Investigation. Award No. 10 of this Board determined that: **"...absent an express Agreement provision for payment of expenses incurred in attending an investigation, such payment is not required even where the claim is sustained."** The same reasoning will be applied in this case as well and we will sustain the Claim minus the Claimant's request to be reimbursed for expenses incurred on the date of the Investigation.

AWARD

Claim partially 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: Nov 1, 2010