

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 6402  
AWARD NO. 200, (Case No. 224)**

**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  
K. D. Evanski, Employee Member  
K. N. Novak, Carrier Member

Hearing Date: June 4, 2013

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

- 1. The discipline (dismissal) imposed on Mr. Q. Kyle by letter dated January 20, 2011 for alleged violation of Rule 1.6 Conduct, Rule 1.13, Rule 1.15, and the Violence in the Workplace Policy in connection with allegations that Mr. Kyle acted in a hostile, aggressive and quarrelsome manner on December 7, 2011 was without just and sufficient cause, unwarranted and in violation of the Agreement (System File UP290WF12/1561794).**
- 2. As a consequence of the violation referred to in Part 1 above, the Carrier must remove the discipline from Mr. Kyle's record and compensate him for all losses, including straight time and overtime wages, benefits, seniority rights and any other losses suffered as a result of the Carrier's unjust and improper discipline."**

**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 December 9, 2011, Claimant was directed to attend a formal Investigation on January 9, 2012, concerning in pertinent part the following charge:

**"...to develop the facts and place responsibility, if any, that while employed as Machine Operator on Gang 9179, at approximately 0530 hours, on December 7, 2011, you allegedly failed to report to job briefing on time. In addition, after**

**being instructed to leave the property and go home by your supervisor, you allegedly approached him in a hostile, aggressive, quarrelsome manner, and cursed directly at him.**

**These allegations, if substantiated, would constitute a violation of Rule 1.6 Conduct (6) Quarrelsome, and the part that reads, "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." Rule 1.13 Reporting and Complying with instructions, and Rule 1.15 Duty - Reporting of Absence, as contained in the General Code of Operating Rules, effective April 7, 2010, and the Violence in the Workplace Policy, revised June 25, 2008."**

On January 20, 2012, Claimant was notified that he had been found guilty as charged and was assessed a Level 5 discipline and dismissed from service.

The undisputed facts indicate that on December 7, 2011, Claimant was employed as a Machine Operator on Gang 9179. Claimant arrived to work 30 minutes late and was instructed by Supervisor Winfrey to go home and to come back the next day which led to the incident under charge.

It is the Organization's position that the Claimant was denied a "fair and impartial" Investigation because the Carrier did not hold the Hearing within the required time limit, and it failed to provide the Claimant with a copy of the transcript, and it entered statements from alleged witnesses who were not present at the Investigation and were not subject to cross examination. It argued the claim should be sustained without reviewing the merits as the Carrier violated Claimant's "due process" rights. Turning to the merits it argued the Carrier did not meet its burden of proof that the Claimant was in violation of the cited Rules. It also argued the Claimant did not act in a hostile manner and the discipline was in retaliation to an EEO claim that was filed with the Carrier. Lastly, it argued that even if the Carrier had proven its charges, which it did not accomplish, the discipline was excessive and unwarranted in light of the circumstances of the incident. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that contrary to the Organization's assertions there were no procedural violations. The Carrier addressed the Organization's procedural arguments wherein it first argued that Rule 22(a)(1) states that the Carrier should try to schedule and hold a formal Investigation within 30 calendar days of the incident, but Paragraph (a)(2) states that a Hearing held outside of the 30 calendar period will not be a violation of the Rule, therefore, when it held the Hearing on the 33rd day it did not violate the Agreement. It also argued the reason why it

did not hold it within 30 days was because it was a holiday season and multiple individuals involved with the Hearing were on scheduled vacations. The Carrier also argued that it did not prevent the Organization from making arrangements for witnesses to be at the Hearing and the written statements it entered confirmed the Claimant's admission that he used profanity. Additionally, the Carrier explained that it mailed a copy of the transcript to the Claimant's address of record, but it was returned unclaimed which it substantiated by sending a copy of the letter and its return envelope to the Organization. It further argued there was no record of Claimant filing an EEO complaint, thus there was no merit to the retaliation argument. Regarding the merits it asserted the record shows that Supervisor Winfrey instructed the Claimant to go home and come back the next day after which the Claimant began using profane language. It argued the Claimant got up into Winfrey's face and that made Supervisor Winfrey feel threatened as Claimant also threw a trash can. It closed by stating that Claimant's behavior in the workplace was unacceptable and warranted dismissal and it asked that the discipline not be disturbed and the claim remain denied.

The Board has examined the Organization's procedural arguments and is not persuaded that the claim should be sustained without reviewing the merits. In summary the Board has thoroughly reviewed the transcript and record of evidence and it is determined that the Investigation and appeal process met the guidelines of the Agreement and Claimant was afforded all of his "due process" Agreement rights.

The record indicates that at the time of the incident Claimant was employed as a Machine Operator on Gang 9179 on December 7, 2011. Claimant arrived 30 minutes late for work and was instructed to go home by Supervisor Winfrey. Claimant after being advised to go home became agitated and used profanity towards Supervisor Winfrey. Winfrey testified that he felt threatened.

Supervisor Winfrey's testimony confirms the Claimant's testimony wherein he stated that he used profanity and that prior to leaving he had to move a trash can and a table as his car was blocked. Claimant's colorization of the event was somewhat different than Winfrey's as he stated he merely moved the table and trash cans.

Supervisor Winfrey further testified that his sending the Claimant home for being late to work was standard procedure on his part and that on the same date he sent another employee home for being tardy. On page 60 of the transcript Mr. Winfrey was questioned as follows:

**"Q: Mr. Winfrey, do you have a set of standing instruction for all employees and how they're supposed to report if they're going to be late or absent?"**

**A: Yeah.**

**Q: From the work location? Would you please state those?**

**A: Call a supervisor and let them know what your circumstances are. But if you gonna be late, then you're not gonna work. We don't let people that show up late work.** *(Underlining Board's emphasis)*

The record shows that the Claimant was not subjected to disparate treatment regarding his being sent home account of showing up to work late. Winfrey also testified on page 61 of the transcript that after he told the Claimant to go home one of his subordinates, Foreman Martin, advised him that the Claimant had called and said he would be late because he got lost trying to find the work site which was consistent with the Claimant's testimony.

In his defense the Claimant testified he left his home for work at 3:50 a.m. to ensure that he would be at work by 5:00 a.m., however, because he had never worked at the Bunkie worksite before and his "GPS" was not functioning and his cell phone service was intermittent he made a wrong turn and it took him awhile to find the work location and unfortunately because of that he was late.

Substantial evidence was adduced at the Investigation that the Claimant over-reacted to being sent home account of being tardy and was quarrelsome and disrespectful towards Supervisor Winfrey, however, there was no showing that he violated Rules 1.13 and 1.15 as he did contact Foreman Martin and explained that he would be late.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had almost six years of service with a good work record. On page 43 of the transcript Supervisor Winfrey was questioned about the Claimant as follows:

**"Q: Alright, thank you. Has- up and to this point, has Mr. Kyle ever been late for work? That you know of?**

**A: Not that I know of.**

**Q: Has he been a good worker?**

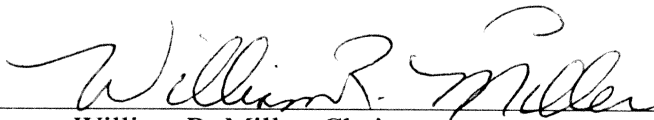
**A: Far as I know, he has."**

Supervisor Winfrey confirmed that the Claimant did not have a history of tardiness and that he was a good employee. Claimant's offense was of a serious nature and the Board does not excuse Claimant's behavior, however, it appears to have been an anomaly and a over-reaction were the Claimant did not think before he spoke. The Board finds and holds that the dismissal is

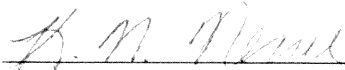
reduced to lengthy suspension that is corrective in nature and in accordance with the Carrier's UPGRADE Discipline Policy. Claimant is to be reinstated to service with seniority intact, all benefits unimpaired with no back-pay. Claimant is also forewarned that after reinstatement he needs to adhere to all Carrier Rules and Policies. Additionally, the Claimant is advised that if he has any complaints about instructions in the future he should obey and grieve later, unless those directives jeopardized his safety or others.

**AWARD**

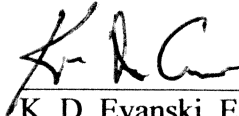
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: Aug 2, 2013