

BEFORE PUBLIC LAW BOARD NO. 6043

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
ILLINOIS CENTRAL RAILROAD COMPANY**

Case No. 34

STATEMENT OF CLAIM:

Appeal of the Carrier's decision to impose a five-day suspension, along with a ten-day deferred suspension, upon Claimant N. Armstrong, Jr., on charges that the Claimant allegedly violated the Carrier's U.S. Operating Rule 105.

FINDINGS:

By letter dated October 19, 2005, the Claimant was notified to attend a formal hearing and investigation to determine the Claimant's responsibility, if any, in connection with a delay to Amtrak 391 South on October 11, 2005, while the Claimant was providing flagging protection on the Chicago Sub-Division at Milepost 22.2. After a postponement, the investigation was conducted on November 4, 2005. By letter dated November 16, 2005, the Claimant was notified that as a result of the investigation, he had been found guilty as charged and was being assessed a five-day suspension, as well as an additional ten-day deferred suspension to be served only if additional discipline was issued to the Claimant prior to May 16, 2006. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to issue the suspension. The Carrier denied the claim.

The Carrier initially contends that the Claimant testified that on the date in question, he went to the washroom at about 4:30 or 4:45 p.m. The Claimant further testified that he knew to expect the Amtrak train to pass his work limits at 4:44 or 4:45

p.m. that day. The Carrier asserts that the record demonstrates that the Claimant knew that he should park in a position so as to have good range on his radio and so that he could hear fairly well, but he nonetheless decided to leave that position precisely when he knew that the Amtrak train would be passing his area.

The Carrier argues that the Claimant's own testimony clearly proved his guilt. The Carrier maintains that the discipline assessed was correct in light of the seriousness of the misconduct and the Claimant's personal record.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier has failed to meet its burden of proof in this matter. The Organization asserts that the Carrier has presented absolutely no evidence whatsoever to substantiate any specific charge of negligence or rule violations. The Organization argues that the transcript does not support the Carrier's conclusions in this case.

The Organization maintains that there is little testimony by any competent witness other than the Claimant himself and the Claimant's co-worker; the rest is merely a summary of discussions among those present at the hearing. The Organization emphasizes that the transcript contains no positive evidence whatsoever in support of the Carrier's finding of a rule violation. The Organization insists that the Carrier has failed to prove that the Claimant heard Amtrak 391 calling for him on the day in question.

The Organization points out that the transcript establishes that the Claimant and the co-flagman stated that the operating range on their radios varies from day to day due

to weather conditions and noise levels. The Organization asserts that it apparently is the Carrier's position that the Claimant must have violated some rule because it appears that the Claimant never heard Amtrak 391 calling for him, which resulted in a short delay. The Organization contends that this approach demonstrates the Carrier's attempt to construe guilt or responsibility in connection with any action taken by its employees. The Organization maintains that the Claimant's actions do not depict negligence, as the Carrier asserts, but rather customary and normal procedure.

The Organization goes on to argue that a close study of the record leads to the conclusion that substantial evidence was lacking in this case. The Organization points out that the Claimant and his co-worker both testified that the range of their radios changed on a daily basis. Moreover, the record does not show that the Claimant performed the work in other than the usual and customary manner; the Claimant did not admit to any wrongdoing, and the Carrier apparently relied on the fact that he did not respond to the radio quickly in determining that he violated its rule.

The Organization insists that because the transcript does not contain any probative evidence to support the Carrier's finding of guilt, the Carrier's decision to discipline the Claimant is not sustainable and should be vitiated.

The Organization then argues that the Board consistently has held that the severity of punishment must be reasonably related to the gravity of the offense. The Organization points out that minor rule infractions do not require exceedingly harsh penalties. The Organization asserts that the purpose of discipline primarily is corrective, and not punitive, and the Claimant would have been subject to the discipline prescribed if the

Carrier actually had proven some portion of the charges against him.

The Organization acknowledges the Carrier's concerns in this particular instance, but it maintains that the penalty imposed upon the Claimant is arbitrary, capricious, unwarranted, inappropriate, and, in light of the circumstances, a violation of the current working Agreement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of causing the delay to an Amtrak train because he violated Rule 105 and failed to properly attend to his radio. He did not set the radio to the correct channel so he could answer the calls and, as a result, missed a train and it was delayed.

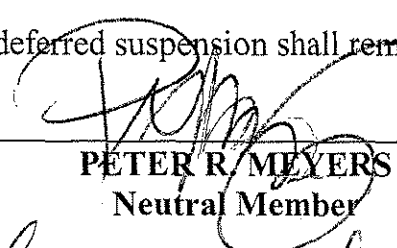
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its *actions to have been unreasonable, arbitrary, or capricious.*

The Claimant in this case has been an employee of the Carrier for over thirty-five years. He also had a clean disciplinary record. Given that excellent background, this Board finds that the Carrier acted unreasonably when it issued the Claimant a five-day actual suspension in addition to the ten-day deferred suspension. We hereby order that

the five-day actual suspension be removed from the Claimant's record and he be made whole. The ten-day deferred suspension shall remain on the Claimant's record.

AWARD:

The claim is sustained in part and denied in part. The five-day actual suspension of the Claimant shall be removed from the Claimant's file and he shall be made whole for the five days. The ten-day deferred suspension shall remain in the Claimant's record.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: July 9, 2008



CARRIER MEMBER

DATED: July 9, 2008