

BEFORE PUBLIC LAW BOARD NO. 6043

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

Case No. 51

STATEMENT OF CLAIM:

Claim on behalf of C.B. Alcoser that his "... personal record be cleared of the charge immediately and that he be made whole in accordance with Rule 33(i)" for his alleged violations in connection with an incident on November 16, 2006, during which he sustained an alleged personal injury, whereby he was assessed a fifteen-day actual suspension and a thirty-day deferred suspension.

FINDINGS:

The Claimant was directed to attend a formal hearing and investigation to determine the Claimant's responsibility, if any, in connection with an incident on November 16, 2006, during which he allegedly sustained a personal injury. After a postponement, the investigation was conducted on March 14, 2007. By letter dated March 26, 2007, the Claimant was informed that as a result of the hearing, he had been found guilty of violating Carrier Safety Rules, and that he was being assessed a fifteen-day actual suspension and a thirty-day deferred suspension. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to issue this discipline. The Carrier denied the claim.

The Carrier initially contends that the Organization is incorrect in asserting that there were "no captious entries" in the Claimant's personal work record. The Carrier argues that the Claimant has received discipline on several occasions for absenteeism.

The Carrier further asserts that there is no support for the Organization's

suggestion that the Claimant was subjected to disproportionate discipline because the two Mechanics working with him were not investigated. The Carrier points out that the investigation was for the purpose of determining the Claimant's responsibility, if any, for his personal injury. The Carrier insists that the Claimant was not disciplined for anything that the Mechanics did.

The Carrier then points out that the Organization acknowledged that a poor discipline record, length of service, or degree of culpability all may have bearing on the amount of discipline assessed. The Carrier emphasizes that the Claimant is an employee with only three years of service and with numerous instances of discipline already on his record.

The Carrier maintains that the Claimant was required to perform a daily inspection of his machine for any safety defects. The Carrier argues, however, that the record establishes that three of the four heater covers were missing from the Claimant's machine, and they had been missing for some time. The Claimant, as the machine's regular operator, was responsible for reporting this defect, which he clearly failed to do and which resulted in his injury. The Carrier additionally points out that the Claimant had to place his hand five inches within the heater vent in order to make contact with the fan blades.

The Carrier asserts that the Claimant was afforded a fair and impartial hearing, and the record certainly contains substantial evidence to support a finding of an infraction. The Claimant was represented by a duly accredited representative of the Organization, and he was given the opportunity to prepare his case, to present evidence on his own

behalf, and to confront and cross-examine witnesses. The Carrier argues that the penalty imposed was not arbitrary, capricious, or an abuse of Carrier discretion, and there are no mitigating circumstances that would justify a reduction in the discipline assessed.

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

The Organization initially contends that the crux of this case is the disproportionate discipline of the Claimant. The Organization asserts that offenders guilty of the same infraction should be punished in the same manner, absent some good reason for the difference in penalty. The Organization argues that the Carrier has failed to apply and enforce its rules with reasonable uniformity for all employees.

The Organization maintains that the Carrier has failed to adequately meet its burden of proof in this matter. The Organization insists that the Carrier presented absolutely no evidence whatsoever to substantiate any specific charge of negligence or rule violations. The Organization emphasizes that the transcript does not support the Carrier's conclusions, and it contains very little testimony by any competent witness, other than the Claimant. The Organization points out that the transcript is merely a summary of the discussion of those present at the hearing, and it contains no positive evidence whatsoever in support of the Carrier's findings of rules violations. The Organization further asserts that it is ridiculous for the Carrier to attempt to use the contents of the Claimant's daily log book when that could not be provided for the investigation.

The Organization argues that a thorough analysis of the transcript and the

supporting exhibits can lead only to the conclusion that substantial evidence is lacking in this case. The Carrier has failed to prove that the Claimant violated any of the Carrier Rules on the day in question. The Organization points out that it appears that because the Claimant sustained an injury, he must have violated or been negligent with regard to some Carrier Rules. The Organization contends that the Carrier is attempting to construe guilt or responsibility for any action taken by its employees. The Organization insists that the Claimant's actions do not depict negligence, but rather a customary and normal work procedure.

The Organization points out that innuendo and supposition are not substantial evidence. The Organization maintains that there absolutely was no probative evidence to support the Carrier's findings. The Carrier's decision to discipline the Claimant therefore should be vitiated.

The Organization goes on to argue that numerous Board Awards have held that the severity of the punishment must be reasonably related to the gravity of the offense. Moreover, the certainty of punishment is usually more of a deterrent than the severity of the penalty.

The Organization maintains that in determining whether the amount of discipline imposed was unreasonable, it is necessary to start from the premise that the purpose of discipline is not primarily punitive, but corrective. The Organization recognizes the Carrier's concern in the instant alleged infraction, but it contends that the penalty imposed is improper, arbitrary, and harsh in light of the nature of the incident.

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.

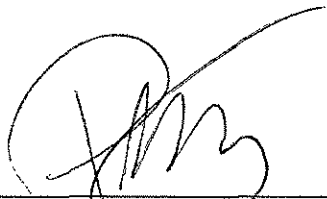
This Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating Carrier safety rules when he placed his left hand at least five inches into the heater vent to make contact with the fan blades. By doing so, the Claimant clearly violated Carrier rules and caused his own injury.

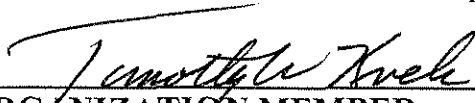
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary,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

The Claimant in this case was issued a fifteen-day suspension and a thirty-day deferred suspension. The record reveals that the Claimant had previously been suspended on several occasions for absenteeism, with the longest of those suspensions being a five-day suspension. Given the Claimant's wrongdoing in this case, plus his disciplinary record which he has accumulated over his short three-year career, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it issued the discipline to the Claimant. Therefore, the claim must be denied.

AWARD:

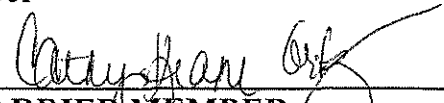
The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: 8-11-08-



CARRIER MEMBER

DATED: August 11, 2008