

BEFORE PUBLIC LAW BOARD NO. 6043

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
IBT RAIL CONFERENCE
and
ILLINOIS CENTRAL RAILROAD COMPANY**

Case No. 55

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

1. The five (5) working day suspension imposed upon Track Foreman Dan Schmidt and Truck Driver A.E. Stevens for violation of USOR General Rules A and C in connection with an incident involving a personal injury to Truck Driver Stevens on May 14, 2007 is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement (System File S.A072807.0/134-107-19).
2. As a result of Part 1 above, Mr. Schmidt and Mr. Stevens shall be granted remedy in accordance with Rule 33(i) of the Agreement.”

FINDINGS:

By notices dated May 16, 2007, the Claimants were directed to attend a formal investigation to ascertain the facts and/or determine their responsibility, if any, in connection with an incident that resulted in a personal injury to Claimant Stevens on May 14, 2007. The hearing was conducted, as scheduled, on May 24, 2007. By letters dated June 11, 2007, the Claimants were notified that as a result of the hearing, they had been found guilty of violating USOR General Rules A and C, and that they each were being assessed a five-day suspension. The Organization thereafter filed a claim on behalf of the Claimants, challenging the Carrier’s decision to suspend them. The Carrier denied the claim.

The Carrier initially contends that the investigation in this matter was fair and impartial. The Carrier asserts that the Claimant was given timely and proper notice of the

investigation, the Claimant and his representative were present throughout the investigation, they were permitted to hear and question all witnesses, and they were permitted to make any and all statements they deemed necessary. The Carrier argues that the Claimant and his representative did not take exception to the conduct of the proceedings, and the Organization never alleged, during the on-property handling of this matter, that the proceeding was flawed in any way. The Carrier submits that any Organization argument to the contrary before this Board would be a new argument, and therefore untimely, improper, and not ripe for consideration.

The Carrier maintains that it has met its burden of proof in this matter. The Carrier emphasizes that the record establishes that the Claimants made a conscious decision to perform the re-coupling of the rail buggy to the truck by pushing it by hand to where the truck was positioned, rather than backing the truck to the rail buggy. The Carrier points out that the Claimants' own testimony demonstrates that they did not give any thought to how they were going to stop the rail buggy, which was loaded with ten lengths of rail that weighed about 1,500 pounds each. The Carrier submits that when the buggy hit the truck, Claimant Stevens' hand happened to be at the collision point.

The Carrier contends that this injury occurred because of the Claimants' inability to control or stop the buggy before it pinched Claimant Stevens' legs, which caused him to lose his balance and put his hand between the hitch and the step on the back of the truck, where it was smashed. The Carrier insists that the Claimants both were seasoned employees, and they both acknowledged that the better and safer way to accomplish the coupling would have been to back the truck to the stationary buggy.

The Carrier then argues that the record makes it abundantly clear that the Claimants did not take the safe course when, without any particular plan, they elected to push a buggy loaded with several tons of rail, by hand, to the truck, instead of simply backing the truck to the buggy. The Carrier emphasizes that it spends millions of dollars to provide equipment for employees to perform their work safely and more efficiently. In this case, the Claimants did not use that equipment to accomplish their tasks safely.

The Carrier emphasizes that the Claimants admittedly did not conduct a job briefing to ensure that they both understood the task to be performed and to give consideration as to whether the manner in which they performed the task was the “safest course.” The Carrier maintains that the Claimants’ actions were irresponsible and resulted in an injury. Moreover, it was only by a stroke of good fortune that this injury was not more serious or even catastrophic. The Carrier therefore argues that there is substantial evidence in the record, including the Claimants’ own testimony, proving that the Claimants did violate Rules A and C.

The Carrier insists that once it has been determined that the charge(s) have been proven, it is prudent to consider the Claimants’ past discipline histories in determining an appropriate measure of discipline. Disputing the Organization’s allegation that the Claimants had “no captious entries” in their personal work record of “any significant countenance,” the Carrier maintains that based on the Claimants’ disciplinary history, the discipline imposed in this matter was not arbitrary, capricious, harsh, or excessive. The Carrier submits that when considering the entire record, the discipline at issue is, by any reasonable measure, lenient. The Carrier points out that these same Claimants were

involved in another display of simple carelessness in a previous incident. The Carrier contends that it is laughable for the Organization to suggest that the discipline at issue is excessive.

The Carrier emphasizes that numerous tribunals have held that when charges are proven by probative evidence, then a carrier's imposition of discipline must remain unaltered unless it is determined to have been unreasonable, arbitrary, or capricious. As for the Organization's allegation that the discipline imposed was in violation of the current agreement, the Carrier maintains that the Organization has not offered any evidence to support this position. The Carrier maintains that the complete absence of any supporting evidence demonstrates that this accusation is baseless, and the Board must deem it irrelevant.

The Carrier asserts that if the Board is compelled to consider remedy, then any compensation due the Claimant must be subject to offset of all compensation earned by him in any other employment, in accordance with Rule 33(i) and the well established practice on this property.

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

The Organization initially contends that with regard to the alleged violation of Rule A, the Claimants' testimony demonstrates that they did give thought and consideration to the task at hand, and the Claimants chose the safest possible course. The Organization asserts that based on this testimony, there can be no doubt that the Claimants discussed and carefully considered their options before deciding on a course of

action. The Organization argues that there was no proven violation of USOR General Rule A.

As for the alleged violation of USOR General Rule C, the Organization maintains that there is not a single shred of evidence to support this asserted violation. The Organization submits that on this record, the five-day suspensions imposed upon the Claimants cannot stand.

The Organization argues that the Carrier's entire case against the Claimants was based on nothing more than speculation, assumption, and supposition that they were guilty of the charges leveled against them. Pointing to prior Board Awards, the Organization asserts that a carrier's decision to discipline an employee must rest on substantially more than speculation and conjecture.

The Organization suggests that the Carrier assumed that because Claimant Stevens sustained an injury, then he and Claimant Schmidt violated one or more rules. The Organization points out that this Board consistently has rejected that notion, and there is no reason why this Board should not do so now. The Organization emphasizes that there can be no doubt that the Carrier failed to prove the Claimants responsible for the injury.

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 Claimants were

guilty of violating USOR General Rules A and C when they did not take the safest course of action to make a coupling on May 14, 2007.

Rule A states:

. . . in case of doubt or uncertainty, take the safe course.

Rule C states:

Employees must take care to prevent injury to themselves or others.
They must be alert and attentive when performing their duties,
observing the condition of equipment and tools they use . . .

The Claimants in this case decided to push a buggy loaded with several tons of rail by hand rather than simply backing up the truck to the buggy. According to the transcript, they did not discuss what to do if something might happen and they did not discuss how to stop it.

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.

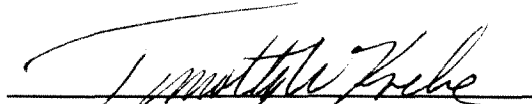
The Claimants in this case received minimal discipline of a five-day suspension. Given the seriousness of the wrongdoing as well as their previous disciplinary records, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it issued the five-day suspension to the two Claimants. Therefore, the claim must be denied.

AWARD:

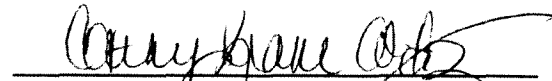
The claim is denied.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: May 10, 2010


CARRIER MEMBER

DATED: May 10, 2010