

BEFORE PUBLIC LAW BOARD NO. 6043

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

Case No. 57

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

1. The discipline in the form of a five (5) working day suspension imposed upon the Claimant for his alleged violation of L.I.F.E. Safety Rule E12-3 and U.S. Operating Rule C is based on no evidence whatsoever to substantiate the charges which warrants no discipline of any degree whatsoever (System File S.A010908.0/134-108-01).
2. As a consequence of the violation outlined in Part (1) above, Mr. K. Schultz is entitled to the full remedy detailed in Rule 33(i) of the Agreement, effective July 1, 2007."

FINDINGS:

By notice dated November 14, 2007, the Claimant was directed to attend a formal investigation to ascertain the facts and/or determine his responsibility, if any, in connection with an alleged personal injury that the Claimant suffered while working on November 8, 2007. The hearing was conducted, as scheduled, on December 13, 2007. By letter dated December 26, 2007, the Claimant was notified that as a result of the hearing, he had been found guilty of violating L.I.F.E. Safety Rule E12-3 and U.S. Operating Rule C, and that he was being assessed a five-day suspension. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to suspend him. 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 maintains that the Organization is incorrect in asserting that the charges were not proven. The Carrier argues that the testimony in the record, including that of the Claimant, establishes that the Claimant acknowledged that he should have put the nipping bar further underneath the tie. Moreover, the Claimant and the foreman both noted that the ties being used as replacements were "used ties," meaning that the bottoms often were rotten and in poor condition to hold the teeth of the nipping bar.

The Carrier emphasizes that despite knowing the poor condition of the ties, the Claimant nevertheless continued to use the nipping bar, rather than taking the initiative to change the method being used to nip the ties. The Carrier submits that the result of this was that the wood on the tie did not hold, the nipping bar's teeth slipped free, and this resulted in an injury when the Claimant fell and smashed his finger between the handle of the bar and a tie seated firmly on the ground. The Carrier maintains that the Claimant was in violation of Rule C by his failure to take proper care and caution to avoid an injury to himself.

The Carrier contends that the Claimant unquestionably failed to allow sufficient

clearance to avoid pinching and injuring his finger, and he also failed to have his weight evenly distributed or his feet properly positioned to guard against the very accident that occurred. Moreover, the Claimant testified that additional care in positioning his feet was necessary because the ground was uneven, but the Carrier submits that the Claimant did not take such additional care.

The Carrier argues that the record shows that instead of taking care to ensure proper balance and clearance, the Claimant simply stuck the fork under the tie and hoped that it was far enough underneath so that it would not slip. The Carrier asserts that rule compliance is critically important and cannot be left to hope. The Claimant failed to comply with the rules with which he was charged, and the Carrier's burden has been met.

The Carrier insists that once it has been determined that the charge(s) have been proven, it is prudent to consider the Claimant's past discipline history in determining an appropriate measure of discipline. The Claimant's record reveals a previous instance of non-compliance with Carrier Operating Rules, involving a collision between two pieces of track equipment.

The Carrier asserts that, standing alone, the violations in this case are sufficient to justify the five-day suspension at issue, particularly in that this is the second violation of the Carrier's rules within three years. The Carrier argues that the discipline imposed herein was not arbitrary, capricious, harsh, or excessive. Moreover, the instant discipline was consistent with the widely held principles of progressive discipline.

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 the Carrier's entire case against the Claimant was based on nothing more than speculation, assumption, and supposition that he was guilty of the charges leveled against him. The Organization asserts that this and other Boards have long recognized that a carrier's decision to discipline an employee must rest on substantially more than speculation and conjecture.

The Organization argues that Track Supervisor Jones' testimony reveals that he was not on the scene when the personal injury occurred, that any information he had about the matter was derived from his question of employees who were present when the injury occurred, and that Jones therefore had no direct knowledge of the situation. The Organization emphasizes that other than the Claimant, Foreman Correll was the only

witness who testified who was on the scene when the incident occurred. The Organization points out that Correll testified that he did not specifically see what happened. Moreover, Correll did not object or express any concern about how the Claimant was performing his duties, particularly nipping up the subject ties at the work location.

The Organization goes on to assert that the Carrier's witnesses confirmed that it was rather difficult to work with the tie nipper and that it can be difficult to verify if the nipping bar is fully inserted and secured into place. The Organization emphasizes that after the Claimant sustained his personal injury, the Carrier removed the subject nipping bar tool from the possession of Foreman Correll and directed Correll and other employees to thereafter use a lining bar when nipping and spiking ties. The Organization submits that these actions clearly indicate that the nipping bar played an active role in the incident at issue.

The Organization further contends that the testimony of the Claimant and Foreman Correll also demonstrated that the condition of the used ties being inserted at the work location played an active role in the incident, as well. The used ties were in poor condition, so it was difficult to work with them. The Organization additionally submits that the terrain of the work location was very uneven and rather hazardous. Both Correll and the Claimant testified that it was very difficult to get good, sound footing while performing the work involved here because of the ground conditions. The Organization insists that these factors actively contributed to the incident at issue.

The Organization maintains that despite all of the factors actively involved in this

matter, the Carrier immediately directed blame onto the Claimant. The Organization suggests that the Carrier assumed that because the Claimant sustained an injury, he must have violated a rule or rules. The Organization emphasizes that this Board consistently has rejected that notion, and there is no reason why the Board should not do so in this case.

The Organization submits that it is abundantly clear that the Carrier failed to consider all of the facts that were actively involved in this incident. The Organization insists that rather than making a decision based on the facts and circumstances, the Carrier chose to impose discipline upon the Claimant so as to place blame and responsibility on anyone or anything but itself.

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.

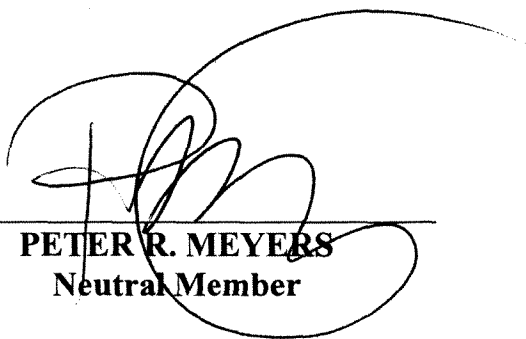
This Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant was guilty of violating any safety rules on November 8, 2007. There is no question that things did not occur as they should have that day and the Claimant's finger was badly injured. However, this Board has stated on numerous occasions that just because an accident or injury occurs does not necessarily mean that somebody violated the rules. The testimonial record in this case has no evidence from any Carrier witnesses that actually observed the incident. There has been no showing that the Claimant violated the rules or acted improperly. This

entire record is based on speculation and assumption. It is fundamental that this Board does not uphold discipline on the basis of speculation and assumption. There must be evidence to support a rule violation. In this case, there is no such evidence.

For all of the above reasons, this claim must be sustained.

AWARD:

The claim is sustained.

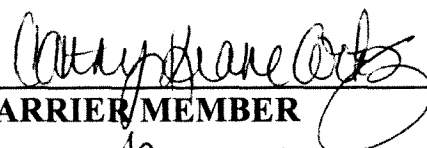


PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: May 10, 2010



CARRIER MEMBER

DATED: May 10, 2010