

BEFORE PUBLIC LAW BOARD NO. 6915

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN/WISCONSIN CENTRAL RAILROAD**

Case No. 5

STATEMENT OF CLAIM:

Appeal of the fifteen-day suspension issued to Claimant S. Powell for alleged failure to perform warm-up and/or stretching exercises after a period of inactivity before performing physical activity, in violation of Carrier rules, policies, and/or instructions, and resulting in a personal injury to Claimant.

FINDINGS:

By letter dated September 26, 2005, the Claimant was notified to appear at a formal hearing and investigation to determine whether the Claimant violated any Carrier rules, policies, and/or instructions when he allegedly injured himself while installing track panels near the EJ&E Railroad Crossing, MP 37.9, Waukesha Subdivision in Mundelein, Illinois, on September 17, 2005. After a postponement, the investigation was conducted on October 4, 2005. By letter dated October 18, 2005, the Claimant was notified that as a result of the investigation, he had been found guilty of violating Carrier Operating Rules, General Rules, and Safety Rules by not performing stretching exercises prior to starting heavy work, and that he was being issued a fifteen-day disciplinary suspension. The Organization filed a claim on the Claimant's behalf, challenging the Carrier's decision to suspend the Claimant. The Carrier denied the claim.

The Carrier initially contends that the Claimant violated Carrier rules, policies, and/or instructions by failing to perform warm-up and/or stretching exercises after a

period of inactivity and before performing physical activity, resulting in a physical injury to himself. The Carrier maintains that the transcript, the Claimant's work record, and his discipline record support the fifteen-day suspension at issue.

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

The Organization initially contends that the Carrier failed to provide the Claimant with a fair and impartial investigation. The Organization argues that it was inappropriate for the hearing officer to have required the Claimant to testify before any evidence had been presented against him. The Organization insists that this demonstrated that the hearing officer realized that the Carrier had no evidence to support its charges and hoped that the Claimant would incriminate himself. The Organization maintains that such a tactic is contrary to due process. The Organization argues that because the Claimant did not receive a fair and impartial investigation, the instant claim should be sustained on that basis alone.

The Organization then asserts that a review of the transcript demonstrates that the Carrier failed to meet its burden of proving that the Claimant violated any of the multiple rules cited in the charges. The Organization emphasizes that the only Carrier witness simply read into the record numerous rules that the Claimant allegedly violated. The Carrier's witness acknowledged that he did not know what caused the Claimant's injury, and this witness also was unable to establish how the Claimant violated the cited rules. The Organization insists that the Claimant was disciplined because of an injury, and not

because he violated any rules. The Organization asserts that the Carrier did not meet its burden of proof, so the instant claim should be allowed as presented.

The Organization goes on to argue that the Claimant had no prior discipline in his record. The Organization maintains that if the Claimant somehow could be found guilty of violating one of the numerous rules cited by the Carrier, a fifteen-day suspension is excessive and undue punishment.

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 several Carrier rules by failing to perform warm-up and/or stretching exercises on September 17, 2005. It is fundamental in these types of cases that the Carrier bears the burden of proof of showing a violation of the rules by the Claimant. In this case, there has been no such showing.

This Board has stated on numerous occasions in the past that simply because an accident occurs does not necessarily mean that the Claimant acted in violation of Carrier safety rules. The Carrier is required to present sufficient proof to support discipline that it issues. In this case, the Carrier has failed to meet that burden.

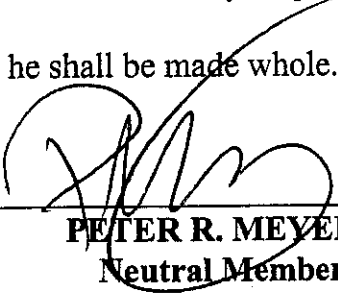
For all of the above reasons, the claim must be sustained. The fifteen-day

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suspension shall be removed from the Claimant's record and he shall be made whole.

AWARD:

The claim is sustained. The fifteen-day suspension of the Claimant shall be removed from his record and he shall be made whole.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 8-22-06



CARRIER MEMBER

DATED: 8-22-06