

BEFORE PUBLIC LAW BOARD NO. 6915

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

Case No. 26

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

1. The Carrier’s decision to dismiss Trackman Cody Kizewski for violation of USOR General Rules A, B, C, D, H, P, Engineering Life Safety Book Core Safety ‘Rights and Responsibilities’ 1C, 1D, 1F, 1H and Engineering Safety Rule ‘Work Environment’ #13 in connection with the events surrounding the personal injury of employee Jeramiah Minton when he was allegedly struck in the mouth by a ballast rock near Mile Post 16.7 on the Iron Mountain Subdivision on Wednesday, August 22, 2007 at approximately 1345 hours is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier’s File WC-134-107-30).
2. As a consequence of the violation referred to in Part 1 above, Mr. Kizewski is entitled to the full remedy prescribed by Rule 31 I.”

FINDINGS:

By letter dated August 24, 2007, the Claimant was advised to attend a formal hearing and investigation on charges relating to an incident in which an employee sustained an injury after being struck in the mouth by a ballast rock. The investigation was conducted on September 6, 2007. By letter dated September 18, 2007, the Claimant was notified that as a result of the investigation and hearing, he had been found guilty of violating USOR General Rules A, B, C, D, H, P, Engineering Life Safety Book Core Safety ‘Rights and Responsibilities’ 1C, 1D, 1F, 1H and Engineering Safety Rule ‘Work Environment’ #13, and that he was being dismissed from the Carrier’s service. The Organization thereafter filed a claim on the Claimant’s behalf, challenging the Carrier’s

decision to discharge the Claimant. The Carrier denied the claim.

The Carrier initially contends that the Claimant and his representatives were present at the investigation, were able to hear all testimony, were given an opportunity to question and cross-examine all witnesses, and were given an opportunity to make statements. The Carrier asserts that the investigation was fair and impartial.

The Carrier argues that the only specific argument advanced by the Organization in support of its general contention that the Claimant had been denied a fair and impartial investigation was that the Claimant was questioned before other witnesses, meaning that the Claimant was pre-judged. The Carrier emphasizes that the order in which witnesses are questioned is not, in and of itself, indicative of prejudgment, and certainly not without some substantive proof that the Claimant's guilt would not otherwise have been determined. The Carrier additionally points out that the Organization objection during the hearing to the order in which witnesses were being questioned clearly was directed to the questioning of the employee who was injured.

The Carrier insists that it has the absolute and indisputable right to determine how one of its employees was injured while on duty. The Carrier asserts that it cannot make such determinations if the hearing officer cannot question witnesses about what occurred, or if the hearing officer is not permitted to question other witness, not involved in the incident, about what was told to them during investigatory interviews, because this is considered "hearsay" evidence. The Carrier argues that any argument that such a course of action denied the Claimant's right to due process is baseless and must be rejected.

The Carrier then asserts that the testimony at the investigation established, without

dispute, that the Claimant threw the rock that hit Minton in the mouth. The Carrier maintains that not only did the Claimant throw the rock that struck his fellow employee, causing a serious injury, but the Claimant also was dishonest, grossly careless, made false statements, and attempted to conceal facts concerning matters under investigation. The Carrier emphasizes that proven violations of any one of the infractions described in USOR Rule H is sufficient to justify dismissal from service, and the Claimant committed several such violations. Not only was the Claimant dishonest in denying that he threw the rock, but he also exhibited willful neglect and gross carelessness when he threw the rock in the direction of his fellow employees, whether or not he intended to hit any of them. The Carrier argues that either of these acts, standing alone, is sufficient to justify dismissal.

The Carrier insists that there is no dispute that the Claimant concealed facts concerning the matter under investigation. The Claimant made false statements during the initial inquiry, during subsequent interviews by managers, and during the investigation. The Carrier asserts that this is sufficient justification for the Claimant's dismissal.

The Carrier then contends that compliance with the rules in question is absolutely essential to ensure a safe work environment, the public's safety, and to reduce the negative effects of accidents and incidents to the Carrier. The Carrier insists that the cited rules are not permissive. The Carrier points out that the record demonstrates that the Claimant unquestionably understood these rules, but he simply failed to comply with them. Nothing in the record refutes the fact that the Claimant's action was the single

most significant, contributing cause of the injury to his fellow employee. The Carrier emphasizes that neither the Claimant nor the Organization offered any plausible arguments or information that could be considered to mitigate his culpability.

The Carrier further argues that the discipline imposed was not arbitrary or capricious in view of the entire record. The Carrier maintains that because there is no question that the Claimant violated the rules as charged, the only remaining issue to be considered is whether dismissal was an appropriate measure of discipline given the severity of the offense. The Carrier asserts that the Claimant's careless and negligent behavior resulted in an injury to a fellow employee that required medical attention and resulted in lost time by the employees. The Carrier contends that the Claimant's extreme carelessness and gross negligence simply must not be overlooked, nor should the Board condone the Claimant's dishonesty. The Carrier insists that it cannot afford to employee individuals who exhibit such blatant disregard for the rules and the safety of themselves and other employees.

Pointing to a number of Board Awards, the Carrier argues that where an egregious violation is proven, the Carrier's decision to dismiss must be upheld. Moreover, the Carrier maintains that no remedy due pursuant to the clear language of the governing Agreement. The Carrier asserts that if the Board nevertheless finds that a remedy is appropriate, the remedy sought by the Organization clearly is excessive. Any compensation awarded to the Claimant, in addition, must be offset by any interim earnings.

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

entirety.

The Organization initially contends that the Carrier's handling of this dispute makes a mockery of Rule 31 of the Agreement. The Organization asserts that the Claimant improperly was withheld from service pending the investigation in that no serious charge was leveled against him. The Organization argues that notice of investigation does not charge the Claimant with any offense. The Organization therefore emphasizes that any discipline imposed is improper because the Claimant's participation in the investigation was not to determine his guilt or innocence, but to determine, as stated in the notice, whether any Carrier rules, instructions, or policies were violated.

The Organization asserts that numerous Board Awards have held that an employee must be notified of the specific charge against him, and an employee cannot be found guilty of any violation other than that spelled out in the charge letter. In the instant case, the Claimant was notified to attend an investigation to determine if any Carrier rules were violated, and then he was dismissed because he allegedly violated no less than eleven rules. The Organization contends that any discipline imposed in such a manner is improper and in violation of the Agreement.

The Organization maintains that the investigation was neither fair nor impartial. The Organization argues that the Carrier failed to provide it with copies of witness statements at least twenty-four hours prior to the hearing, and the hearing officer refused to enter these statements into the record as exhibits, despite the Organization's repeated requests. The Organization insists that these failures stand as proof that the Claimant was not afforded a fair and impartial investigation in accordance with Rule 31 A. Moreover,

these failures demonstrate that the hearing officer was biased and pre-judged the Claimant. The Organization maintains that the hearing officer's conduct deprived the Claimant of his right to a fair and impartial investigation.

The Organization then points to the fact that the hearing officer did not render the decision in this case as further evidence of the Carrier's failure to grant a fair and impartial investigation. The deciding officer was not present during the investigation, so he was in no position to make credibility determinations. Moreover, having the officer who preferred the charges ultimately render the decision in this case clearly deprived the Claimant of his right to due process. The Organization argues that the Claimant was disciplined by the charging officer based on his pre-determined assumption of guilt. The Organization maintains that a number of Board Awards have cited the ills of having someone other than the hearing officer render a decision in discipline cases.

The Organization insists that each of the above-stated procedural violations, standing alone, requires that the instant claim be sustained as presented. When taken as a whole, these violations demonstrate that the case is so procedurally flawed as to preclude the necessity of considering the merits of this dispute. Notwithstanding this position, the Organization asserts that the merits of this dispute do no support the imposition of discipline.

The Organization contends that the Carrier miserably failed in its efforts to prove that the Claimant was in any way responsible for the injury sustained by Minton. Although the Carrier believes that the Claimant threw the rock that struck Minton, the Organization suggests that the most that can be said is that the Claimant was in the woods

away from the track in the direction from which the rock allegedly came. The Carrier argues that any attempt to implicate the Claimant in the incident is speculative, at best, and is not supported by the record. Moreover, the testimony of the Carrier's witnesses suggests that it was highly improbable that the Claimant could have thrown the rock. The Organization asserts that the decision to discipline the Claimant was based on speculation, not fact.

The Organization emphasizes that the principle that the burden of proof in discipline case rests with the Carrier was established to ensure that an employee would not be disciplined unless probative evidence was presented to support the charges specified against the employee. The Organization asserts that the Carrier may not rely on mere speculation, assumption, or conjecture as a basis upon which to impose discipline.

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 procedural arguments raised by the Organization, and we find them to be without merit.

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 several Carrier safety rules when he threw a ballast rock and struck a fellow employee in the mouth, causing significant injuries. The record is clear that the Claimant was guilty of this very serious offense and, therefore, subjected himself to

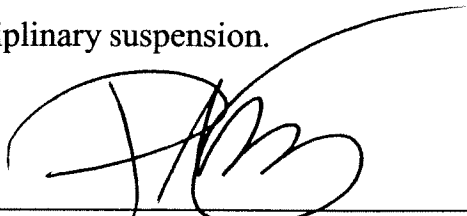
disciplinary action.

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 a relatively short-term employee who clearly engaged in dangerous and wrongful behavior. Nevertheless, this Board finds that the Carrier acted in an unreasonable manner when it terminated the Claimant's employment. Therefore, this Board orders that the Claimant shall be reinstated to service, but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.

AWARD:

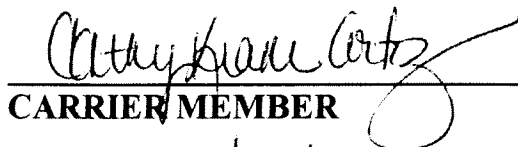
The claim is sustained in part and denied in part. The Claimant shall be reinstated to service, but without back pay. The period of time that the Claimant was off work shall be considered a lengthy disciplinary suspension.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: June 1, 2009


CARRIER MEMBER

DATED: 6/1/09