

BEFORE PUBLIC LAW BOARD NO. 6915

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

Case No. 27

STATEMENT OF CLAIM:

Appeal of the Carrier's decision to assess Trackman Eric Dietscheweiler a sixty-day suspension, plus an additional sixty-day suspension to be held over head for twelve months, for alleged violation of USOR General Rule 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 a co-worker's personal injury 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.

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 a co-worker 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 assessed a sixty-day actual suspension, as well as a sixty-day suspension to be held over the Claimant's head for twelve months, with the Claimant having to serve this additional suspension in the event that he violated any Carrier rules or policies within that twelve-month period. The Organization thereafter

filed a claim on the Claimant's behalf, challenging the Carrier's decision to discipline the Claimant. The Carrier denied the claim.

The Carrier initially contends that the Claimant was provided a fair and impartial investigation. The Carrier maintains that the Claimant was represented by a duly accredited representative of the Organization, and he was given the opportunity to prepare his case, as well as to introduce evidence on his own behalf and to confront and cross-examine witnesses. The Carrier asserts that there is no merit to the Organization's appeal in this regard.

The Carrier argues that it is obligated to impose discipline in cases where rules are violated and due process has been maintained. The Carrier emphasizes that the record contains substantial evidence to support a finding of guilt. The Carrier insists that the penalty imposed was not arbitrary, capricious, or an abuse of the Carrier's discretion. Moreover, there are no mitigating circumstances that would justify a reduction in the discipline.

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

The Organization initially contends that one of the established elements of industrial due process is the privilege against self-incrimination. The Organization asserts that the hearing officer, over the strong objection of the Organization, required the charged employee to testify first. The Organization argues that because no evidence had been presented against the Claimant, the Claimant had nothing against which to defend himself. The Organization insists that this constituted pre-judgment on the hearing

officer's part, and it was not conducive to a fair and impartial investigation. The Organization emphasizes that the discipline should be overturned on this basis alone. The fact that the hearing officer did not rule on other objections raised by the Organization further establishes the Carrier's presumption of guilt in this case.

The Organization additionally points out that the charge letter did not list any of the numerous rules that the Claimant was found guilty of allegedly violating, so it appears that the investigation was nothing more than a fishing expedition. The Organization further asserts that the Carrier failed to meet its burden of proving the charges leveled against the Claimant.

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 a number of Carrier safety rules relating to an incident in which a co-worker sustained an injury after being struck in the mouth by a ballast rock.

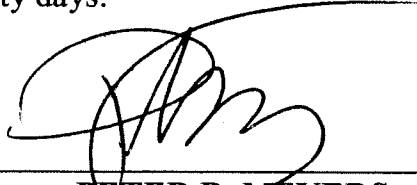
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its

actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was issued a sixty-day suspension plus a sixty-day overhead suspension. Although the Claimant was guilty of some serious wrongdoing in this case, this Board finds that the Carrier acted unreasonably in assessing the Claimant a sixty-day suspension. This Board hereby orders that the sixty-day suspension be reduced to a thirty-day suspension and that the Claimant be made whole for the additional thirty days.

AWARD:

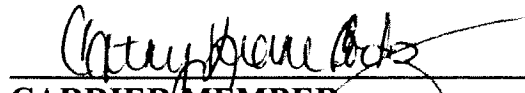
The claim is sustained in part and denied in part. The Claimant's sixty-day suspension is hereby reduced to a thirty-day suspension, and the Claimant shall be made whole for the additional thirty days.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: June 1, 2009


CARRIER MEMBER

DATED: 6/1/09