

BEFORE PUBLIC LAW BOARD NO. 6915

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

Case No. 28

STATEMENT OF CLAIM:

1. The forty-five (45) day suspension imposed upon Welder David T. Vandenack for violation of USOR General Rules B, H and I in connection with his failure to attend a required training class and leaving his job without proper authority on September 5, 2007, is unjust, unwarranted and in violation of the Agreement (Carrier's File WC-134-107-34).
2. As a result of Part 1 above, Mr. Vandenack shall be granted remedy in accordance with Rule 31(I) of the Agreement."

FINDINGS:

By notice dated September 13, 2007, and as subsequently amended, the Claimant was directed to attend a formal investigation to ascertain the facts and determine whether the Claimant violated any Carrier rules, instructions, or policies while performing the duties of a welder on September 5, 2007. The investigation was conducted, after a postponement, on September 28, 2007. By letter dated October 7, 2007, the Claimant was informed that as a result of the investigation, he had been found guilty of violating Carrier rules by failing to attend a required training class and leaving his job without proper authority, and that he was being suspended for forty-five days. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier initially contends that the September 28 investigation was fair and

impartial. The Carrier asserts that the Claimant was provided with proper and timely 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 neither the Claimant nor his representative took exception to the conduct of the proceeding either at the investigation or during the on-property handling of this matter. The Carrier emphasizes that at no time during the on-property handling of this claim did the Organization allege that the investigation was flawed in any way. The Carrier therefore maintains that any such argument raised before this Board would be untimely and improper.

The Carrier then submits that it met its burden of proof. The Carrier argues that the record contains substantial probative evidence, including the Claimant's admission, that he violated the rules as charged. The Carrier points to the Claimant's unequivocal testimony that he was directed to attend welding training, and that he did not do so.

Characterizing the Claimant's excuses for failing to attend the training as self-serving, the Carrier asserts that any such excuses are not credible and do not relieve the Claimant of his obligation to comply with instructions. The Carrier submits that the record clearly shows that the Claimant was given clear instructions, he understood those instructions, but he failed to comply with them and thereby violated USOR Rule B. The Carrier maintains that this blatant disregard of clear and distinct instructions is a violation that, standing alone, is sufficient justification for the discipline imposed and even more severe discipline, including discharge. The Carrier goes on to contend that there is no

dispute that the Claimant also was insubordinate, thereby violating Operating Rule H.

The Carrier emphasizes that the record additionally demonstrates that the Claimant absented himself from duty without proper authority, which constitutes desertion from duty. The Carrier points out that the Claimant's own testimony establishes that he left the property and that he had no authority to do so. The Carrier asserts that there is no dispute that the Claimant absented himself from duty without authority, and the Carrier points out that being upset does not relieve him of the responsibility to comply with the rules.

The Carrier points out that any of these violations – insubordination, desertion, being absent from duty without authority – standing alone would justify discipline far more serious than was assessed here. The Carrier insists that the record leaves no doubt that the Claimant violated the rules with which he was charged. The Carrier asserts that it has met its burden of proof.

The Carrier argues that once the charges have been proven, it is prudent to consider the Claimant's disciplinary history in determining an appropriate measure of discipline. The Carrier emphasizes that the Claimant's discipline record contains a number of letters of caution, instances of counseling, warnings, and suspensions. Moreover, the Claimant's record demonstrates that despite these disciplinary measures, the Claimant continues to demonstrate a cavalier disregard for rules and supervisory instructions. The Carrier asserts that the Claimant made a conscious decision to disregard clear supervisory instructions, and the Claimant's attempt to camouflage his failure to comply as being the fault of someone else demonstrates his lack of credibility.

The Carrier addresses the Claimant's assertion that he was without a means of

transportation, insisting that this is not true. The Carrier argues that there is nothing in the record to support the Claimant's contention that he could not have used his truck to get to the training location. Moreover, the Claimant made no attempt to make arrangements for other transportation prior to the date that he knew he had to attend the training session, as was his obligation. The Carrier submits that the Claimant violated the rules, and he demonstrated the same cavalier attitude toward rules and supervisory instructions that he had exhibited in connection with the past discipline on his record.

The Carrier points out that numerous tribunals have held that when the charges are proven by probative evidence, the imposition of discipline must remain unaltered unless it is shown to be unreasonable, arbitrary, or capricious.

The Carrier then asserts that if the Board is compelled to consider remedy, any compensation due the Claimant must be subject to offset of all compensation that he earned in any other employment.

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

The Organization initially contends that the Carrier failed to prove the charges leveled against the Claimant or support its decision to impose discipline in this matter. The Organization asserts that it failed to provide proper transportation for the employees traveling to Neenah, Wisconsin, for the training. The Organization argues that Carrier rules do not require any employee to use a personal vehicle for Carrier business.

The Organization points out that in similar circumstances, the Claimant and his helper always took the welding truck to such classes in order to have the welding

equipment tested and certified. In the instant situation, however, the vehicle assigned to the Claimant and his helper was in a repair facility and not available to them. The Organization insists that it remains undisputed that, as the Claimant testified, he would have been in violation of a Carrier safety rule if he had driven his personal vehicle on company time for Carrier use.

The Organization submits that there were no Carrier vehicles available to the Claimant, so he had no means of transportation to the training class. The Organization contends that under the circumstances, no discipline was warranted in connection with the Claimant's failure to report to Neenah, Wisconsin, on September 5, 2007.

Addressing the charge of leaving the property without permission, the Organization submits that it was his understanding that Assistant Supervisor Meyers acknowledged and acquiesced to the Claimant's request for a vacation day on September 5, 2007. The Organization argues that although Meyers testified that he did not grant the vacation day, the record makes it abundantly clear that Meyers did not refuse the Claimant's request. The Organization points out that instead of saying "no," Meyers told the Claimant, "I can't do this now." The Organization therefore argues that the Claimant's vacation request clearly was not denied.

The Organization maintains that the Claimant left the property believing that his vacation had been approved. The Organization therefore argues that any discipline imposed upon the Claimant based on his misinterpretation of the conversation with Meyers is unjust and unwarranted.

The Organization acknowledges that there is no doubt that the Claimant did not

attend the training class as instructed on September 5, 2007. The Organization further asserts that there can be no doubt that there was confusion surrounding his vacation in connection with this matter. The Organization asserts that under the unique circumstances of this matter, there should be no doubt that discipline was totally unwarranted.

The Organization goes on to argue that even if some discipline were warranted here, the forty-five-day suspension at issue is unjust, unwarranted, and excessive in light of the facts and mitigating circumstances surrounding this dispute.

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 Claimant was guilty of failing to follow instructions and attend a required training class and leaving his job without proper authority on September 5, 2007. The Claimant's actions clearly violated General Rule B that requires that employees report and comply with instructions from supervisors. The Claimant admitted that he was instructed to go to the class but, instead, left the property because he was upset and "physically disturbed."

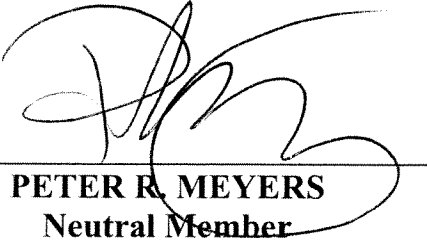
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its

actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case had previously received several counselings as well as letters of instruction and a two- and thirty-day suspension between April 1998 and June 2007. Given that previous disciplinary background, as well as the very serious violation of which the Claimant was properly found guilty, this Board cannot find that the forty-five day suspension issued to the Claimant was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.

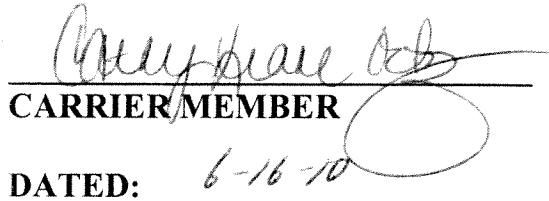


PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: June 16, 2010



CARRIER MEMBER

DATED: 6-16-10