

BEFORE PUBLIC LAW BOARD NO. 6915

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

Case No. 29

STATEMENT OF CLAIM:

1. The sixty (60) day suspension imposed upon Welder David T. Vandenack for violation of USOR General Rules B, H and I and Rule 24, Paragraph I of the BMWED Agreement in connection with submitting a vacation day on his timeroll on September 5, 2007, is unjust, unwarranted and in violation of the Agreement (Carrier's File WC-134-107-39).
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 October 1, 2007, 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 when reporting time on his time roll for September 5, 2007. The investigation was conducted, after a postponement, on October 26, 2007. By letter dated November 13, 2007, the Claimant was informed that as a result of the investigation, he had been found guilty of violating Carrier rules by claiming vacation pay for September 5, 2007, and that he was being suspended for sixty 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 there is no foundation to the Organization's position that the Carrier failed to meet its burden of proof. The Carrier asserts that

substantial evidence shows that the Claimant did, in fact, report a vacation day on his time roll for September 5, 2007, without authority. The Carrier argues that at several points in his testimony, the Claimant confirmed that he reported the vacation day. The Claimant also admitted that he had not been given permission and was not authorized to take this vacation day.

The Carrier maintains that the Claimant's actions violated Operating Rule H, as well as Rule 24, Paragraph I of the BMWED basic agreement. The Carrier emphasizes that the Claimant was dishonest when he marked himself off on a vacation day without permission from a supervisor. The Carrier submits that this was a deliberate act, in that the Claimant improperly reported being off on vacation on September 5, 2007, a day that he left the property without authority.

The Carrier insists that the Claimant cannot hide behind the strained excuse that his supervisor took no exception to the requested vacation day. The Carrier contends that this excuse is disingenuous because the Claimant's supervisor was busy handling an emergency and did not have time to even consider the Claimant's request. The Claimant nevertheless marked himself down for a vacation day.

The Carrier emphasizes that the Claimant did not submit his request for a single vacation day with the required two-day advance notice. The Carrier argues that not only did the Claimant fail to give the required two-day notice, but he also failed to obtain his supervisor's approval.

The Carrier asserts that substantial evidence was developed to show that the Claimant was responsible as charged. The Carrier points out that a wealth of arbitral

awards have held that if substantial evidence is brought forth to support a finding of guilt, a board is without authority to substitute its judgment for that of the Carrier.

The Carrier additionally maintains that the investigation was fair and impartial. The Claimant was provided with 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 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 then submits that the Organization is incorrect in asserting that the Claimant was being investigated for a charge for which he already had been disciplined. The Carrier asserts that the Claimant previously had been given a forty-five-day suspension for failing to comply with instructions to attend a required training class and for leaving his job without authority. In the instant case, the Claimant was charged and disciplined for paying himself a vacation day when he was not authorized to do so. The Carrier insists that these are two separate incidents.

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 the Carrier's rules. The

Carrier asserts that the Claimant's disregard of the rules is blatant, and his actions could have resulted in much more severe discipline.

The Carrier maintains that by paying himself for a vacation day on September 5, 2007, the Claimant misrepresented that he had permission to be off on that date. The Carrier asserts that numerous awards have held that when charges are proven by probative evidence, the imposition of discipline cannot be altered unless it is determined that the discipline was unreasonable, arbitrary, or capricious.

The Carrier additionally argues that if the Board has any grounds to sustain the Organization's position in whole or in part, the Claimant would be entitled only to the difference between what he earned while out of service, including unemployment compensation, and what he would have earned had he not been suspended.

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

The Organization initially contends that until the Carrier's October 7, 2007, decision was rendered in Case 28 before this Board, the Claimant was under the impression that he had been authorized to take a vacation day on September 5, 2007. The Organization asserts that until that time, the Claimant had no way of knowing that he improperly claimed vacation pay for September 7, 2007. The Organization argues that once it was determined that the Claimant had not been granted a vacation day, all that was necessary was to inform the Claimant that his vacation request had been denied, that it had been determined that he left work without proper authority, and that he needed to correct his time roll entry for September 5, 2007.

The Organization maintains that the Claimant was issued and served a forty-five-day suspension in connection with the September 5, 2007, incident, and any further discipline in connection with that incident would be double jeopardy. The Organization submits that there was no intent to defraud or deceive the Carrier in this instance, and the Claimant merely reported his time showing vacation for the day that he requested. The Organization insists that the Carrier failed to prove the charges, and the discipline cannot stand.

The Organization ultimately contends that the instant claim should be denied 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 violating several Carrier rules when he submitted a claim for payment for a vacation day without permission. The record reveals that only two supervisors could have given the Claimant permission to take a vacation day on September 5, 2007, and neither of those supervisors gave the Claimant that permission. The Claimant admitted at the hearing that he had not been given permission to take a vacation day.

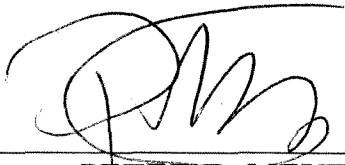
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary,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

The Claimant in this case was guilty of a very serious rule violation. His previous disciplinary record shows several written warnings and suspensions, including a recent sixty-day suspension. This Board finds that that recent sixty-day suspension, although it related to his behavior on the same day, is a separate discipline for separate violations. There was no double jeopardy here.


For all of the above reasons, 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