

BEFORE PUBLIC LAW BOARD NO. 6915

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

Case No. 30

STATEMENT OF CLAIM:

1. The dismissal of Welder David T. Vandenack for violation of USOR General Rules B and H and I in connection with reporting time on his timeroll on September 6, 2007, is unjust, unwarranted and in violation of the Agreement (Carrier's File WC-134-108-6).
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 January 9, 2008, 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 6, 2007. The investigation was conducted, as scheduled, on January 17, 2008. By letter dated February 5, 2008, 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 6, 2007, 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 him. The Carrier denied the claim.

The Carrier initially contends that the January 17 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 maintains that there is no foundation for the Organization's position that the Carrier failed to meet its burden of proof. The Carrier emphasizes that the record contains substantial probative evidence, including the Claimant's admission, that he violated Rule H. The Carrier submits that the record as a whole, as well as the Claimant's own testimony that he did make the call, and that he did attempt to cause himself to be paid vacation, without proper authority, at a time when he was actually out of service for disciplinary reasons resulting from a previous incident supports the discipline.

The Carrier argues that it simply is not believable that the Claimant was not aware that such actions would lead to an investigation and potential discipline. The Carrier suggests that it is more likely that the Claimant believed that he would not be caught. The Carrier contends that regardless of the Claimant's thoughts or perceptions of the results, he violated Rule H. The Carrier asserts that standing alone, violation of Rule H is justification for dismissal because, in this case, it involves an attempt to procure, by

fraudulent means, payment to which the Claimant was not entitled and for which he purposely failed to obtain approval from an authorized supervisor.

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's attempt to pass off his attempt to extract pay for which he had no authority and to which he was not entitled as "I had no idea it was so serious," obviously is deficient. The Carrier submits that this magnifies the Claimant's complete lack of credibility and his irresponsibility.

The Carrier then contends that the Organization's position that the Carrier did not properly apply the principles of progressive discipline is noticeably hollow in view of the Claimant's record. The Claimant has been coached, counseled, cautioned, and warned on numerous occasions. Moreover, the record shows that the Claimant has been reprimanded and disciplined on several occasions. The Carrier submits that all of this obviously had no effect on the Claimant's unacceptable behavior. The Carrier emphasizes that suspensions from service without pay of minimal and increased lengths of time did not serve to change the Claimant's unacceptable behavior.

The Carrier argues that it has the right to expect its employees to know, understand, and comply with its rules. The Carrier insists that it has the right and the

responsibility to take action to ensure compliance. The Carrier maintains that the Claimant had the benefit of various attempts through different means to impress upon him the importance of complying with the Carrier's rules, but these efforts have not been successful in correcting the Claimant's lackluster, irresponsible, and cavalier behavior. The Carrier emphasizes that the Claimant had been disciplined for the same act not only previously, but recently. The Carrier submits that dismissal is warranted in this case.

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 him or to support its decision to discharge the Claimant with any probative evidence that he violated either rule for which dismissal was imposed. The Organization asserts that the Carrier relied on brief excerpts from the transcript to assert that the Claimant had admitted guilt. The Organization argues that reviewing these statements in context does not support the Carrier's assertions. The Organization submits that the excerpts quoted out of context by the Carrier do not amount to an admission of guilt by the Claimant.

The Organization acknowledges that there is no dispute that the Claimant received vacation pay for September 6, 2007. The Organization maintains, however, that the record reveals that the claim for vacation pay for September 6 was nothing more than a miscommunication that occurred when the Claimant was attempting to obtain information about the September 5 incident involved in Case 29 before this Board. The Organization emphasizes the Claimant's testimony that he did not attempt to seek a vacation day for September 6 when he contacted the Carrier to confirm when he had reported September 5 as a vacation day.

The Organization argues that the error relating to September 6 was discovered too late for it to be corrected before the Claimant received payment. The Organization insists that this does not stand as proof that the Claimant failed to follow any instructions or that he was dishonest.

As for the Carrier's position that dismissal is appropriate and progressive in this matter, the Organization points out that the discipline imposed in connection with Cases 28, 29, and the instant matter all came about because of a single issue. The Organization asserts that three separate levels of discipline imposed in connection with a single incident cannot be viewed as progressive in nature.

The Organization maintains that even if the Board finds the discipline to be progressive, the Carrier failure to prove any of the charges in these three cases before this Board would require that the dismissal be set aside in favor of the lesser discipline imposed with the unproven charge.

The Organization emphasizes that there was no intent to defraud or deceive the

Carrier, and the Claimant merely was attempting to obtain payroll information for September 5, 2007, pertinent to the Carrier's investigation into that incident. The Organization argues that the Claimant inadvertently requested a vacation day for September 6, 2007. The Organization asserts that because the Claimant was not working and had no subsequent payroll entries, this error was not caught and corrected.

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 violating Carrier Rules B, H, and I when he improperly reported time on his timeroll for September 6, 2007. The Claimant admitted that he violated the rules and did make a claim for payment for a vacation day that he was not authorized to take. Consequently, the Claimant did make the call and attempted to cause himself to be paid for vacation without proper authority in violation of Carrier rules.

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 properly found guilty of a very serious rule violation. This is the second time that he attempted to put in for a vacation while he was

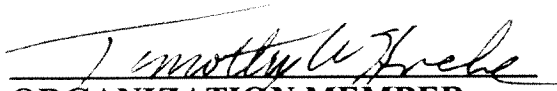
off on discipline. The Claimant's record includes several suspensions and letters of warning. Consequently, this Board cannot find that the Carrier's action in terminating the Claimant's employment for this latest violation was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.

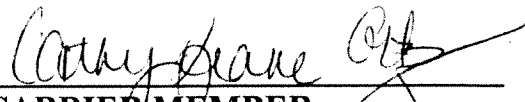


PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: June 16, 2010



CARRIER MEMBER

DATED: 6-16-10