

**BEFORE PUBLIC LAW BOARD NO. 7078**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
and  
CHICAGO, CENTRAL AND PACIFIC RAILROAD**

**Case No. 2**

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

1. The discipline of a five (5) working day suspension and permanent disqualification imposed upon Track Foreman Wade Anthony Miller for violation of USOR General Rules A, B, C, and M in connection with an incident causing track damage to approximately 1,400 feet of track on January 4, 2007 near Farley, Iowa (Mile Post 206.5) is unjust, unwarranted, excessive and in violation of the Agreement (System File S.A041007.0/134-107-05).
2. As a consequence of the violation referred to in Part 1 above, Mr. Miller’s personal record shall be cleared of the charge immediately and that he be made whole in accordance with Rule 33(i).”

**FINDINGS:**

By letter dated January 8, 2007, the Claimant was advised to attend a formal hearing and investigation to ascertain the facts and determine the Claimant’s responsibility, if any, in connection with a January 4, 2007, incident that resulted in the damaging of about 1,400 feet of track near Farley, Iowa. The investigation was conducted, after a postponement, on February 7, 2007. By letter dated February 23, 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, and M, that a five-working-day suspension was being imposed upon him, and that he was being permanently disqualified as a foreman. 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 investigation in this matter was fair and impartial. The Carrier asserts that the Claimant was provided with timely and proper notice of the investigation. Moreover, the Claimant and his representatives were present throughout the investigation, were permitted to hear all of the testimony, were allowed to question all witnesses, and were given the opportunity to make any statements they deemed necessary. The Carrier argues that neither the Claimant nor his representatives took exception to the conduct of the proceeding either during the hearing or in the course of the on-property handling of this claim.

The Carrier maintains that it has met its burden of proof in this matter. The Carrier emphasizes that the record establishes that the Claimant was given clear instructions, he understood those instructions, but he failed to comply with them. This constitutes a clear violation of USOR Rules A and B. The Carrier points out that this violation, standing alone, is sufficient justification for the discipline imposed and for more severe discipline, including termination.

The Carrier argues that there is no truth to the Organization's position that the Claimant did follow instructions issued by Production Supervisor Kruckenberg. The Carrier contends that the Claimant's failure to ensure that all anchors were removed prior to giving instructions to start dragging the rail, and also not realizing the damage that was being done until it was too late, constitutes a violation of USOR Rule C. The Carrier submits that the Claimant was the "employee in charge" at the time of the incident in question, and he was responsible for overseeing the rail gang's work and making sure

that the rail was safely moved without damage to Carrier property. Contrary to the Organization's suggestion that the Claimant denied any wrongdoing, the Carrier points out that the Claimant admitted that he did not properly perform his duties as foreman on the date in question. The Carrier therefore asserts that the Claimant violated USOR Rule M.

The Carrier asserts that the damage to the rail and track as a result of this incident was estimated at a total cost of about \$7,454.85, including the wages of seven employees who were needed to repair the track. The Carrier maintains that this incident also resulted in train delays. The Carrier submits that had the Claimant exercised due diligence, been safe and alert, and complied with instructions, then the incident at issue would have been prevented.

The Carrier goes on to contend that the Claimant's discipline record reflects that the most recent entry was a ten-day suspension for violating the same USOR Rule C. The Carrier insists that it is obvious that despite coaching and previous discipline, the Claimant continued to demonstrate a cavalier disregard for the Carrier's rules.

Citing prior Board Awards, the Carrier asserts that when charges are proven by probative evidence, a carrier's imposition of discipline must remain unaltered unless it is determined to have been unreasonable, arbitrary, or capricious. The Carrier insists that there is no merit to the Organization's position that the discipline was disproportionate because another foreman was not disciplined or investigated. The Carrier emphasizes that the other foreman was not working anywhere near the area during the incident and was not responsible for the safe moving of the rail. The Carrier argues that because the

violation was proven and the discipline was neither harsh nor excessive, no remedy consideration is warranted.

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

The Organization initially contends that during the course of the incident at issue, the Claimant gave clear instructions to the three machine operators he was supervising to make sure that all anchors were removed. The Organization asserts that when the Claimant noted difficulty in moving the rail, he stopped all movement and again gave instructions to check for any anchors that might have been missed. The Organization argues that when the Claimant noted that the tail end of the rail section was not sliding smoothly, he again stopped all movement and removed the rail anchors that had been missed on the previous two inspections.

The Organization maintains that the Claimant took the safest possible course, and there was no violation of Rule A. The Organization points out that there is no evidence that the Claimant failed to follow any instruction, so there was no violation of Rule B. The Organization emphasizes that stopping the movement twice when things did not appear right stands as proof that the Claimant was alert and attentive, and this establishes that there was no violation of Rule C. The Organization also submits that once the damage was done, the Claimant took care to report the damage and protect the Carrier's property from further damage, so the Claimant cannot be found in violation of Rule M. The Organization insists that there simply is no evidence to prove any of the alleged violations of Carrier rules or to support the imposition of any discipline in this matter.

The Organization goes on to contend that even if the Claimant could be found in violation of any or all of the cited rules, the five-day suspension and permanent disqualification as foreman can only be viewed as disproportionate or disparate in this case. The Organization submits that the record demonstrates that the Claimant was disciplined solely because he was the employee in charge of the work when the damage occurred, and not because the Claimant violated any of the cited rules. The Organization asserts that the Claimant was in charge of a support gang following a rail production gang. The Organization maintains that the rail production gang foreman was responsible for ensuring that all rail anchors were removed from the old rail that the Claimant had been instructed to remove and stockpile. The Organization insists that the rail production gang foreman failed to ensure that all anchors were removed by the employees under his supervision, but this foreman was not charged and received no discipline in connection with his failure to do so.

The Organization submits that the Claimant was disciplined solely because of the damage caused, not because he was culpable. The Organization insists that any discipline imposed under these circumstances can only be viewed as unjust, unwarranted, excessive, and in violation of the Agreement.

Citing numerous Board Awards, the Organization emphasizes that the Carrier bears the burden of proof in discipline cases, and that the Carrier may not rely on mere speculation, assumption, or conjecture as a basis upon which to impose discipline. The Organization suggests that in the instant case, the Carrier simply assumed that because the Claimant was in charge of the task, he somehow was responsible for the damage. The

Organization argues that there is no basis in fact for that assumption, and the Claimant is entitled to the full remedy requested.

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 comply with General Rules A and B when he failed to ensure that all anchors were removed prior to giving instructions to start digging the rail. In addition, the record makes it clear that the Claimant was also guilty of a Rule C violation for failing to remain alert and attentive and “observing the condition of employment and tools [that he] used.” The Claimant even admitted during his testimony that he did not perform his duties properly by stating “obviously not, because the track got tore up.”

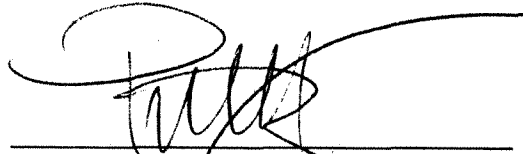
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier’s imposition of discipline unless we find its actions to have been unreasonable, arbitrary,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


The Claimant in this case was issued a five-day suspension and, in addition, he was disqualified from his track foreman and employee-in-charge position. Although this Board finds that there was a sufficient basis for the issuance of a five-day suspension for the Claimant’s violation of the rules, this Board finds that the Carrier had no just cause to

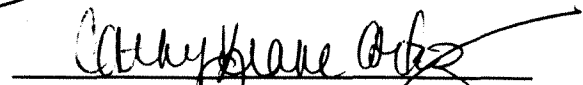
permanently disqualify the Claimant from his track foreman and employee-in-charge position. Consequently, we find here that the Claimant shall be allowed to bid back and return to his Track Foreman position. He will be entitled to no back pay for the time that he did not hold that position.

**AWARD:**

The claim is sustained in part and denied in part. The Carrier had just cause for the issuance of a five-day suspension and a temporary disqualification of the Claimant from his position of track foreman and employee-in-charge. The permanent disqualification of the Claimant from that foreman position shall be removed and the Claimant shall be allowed to bid back and return to that position.

  
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**PETER R. MEYERS**  
Neutral Member

  
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**ORGANIZATION MEMBER**  
DATED: Sept 17, 2010

  
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**CARRIER MEMBER**  
DATED: Sept. 17, 2010