

BEFORE PUBLIC LAW BOARD NO. 7078

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

Case No. 3

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The discipline of a five (5) working day suspension imposed upon Machine Operator Jeffery L. Seibert 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.A040907.0/134-107-04).
2. As a consequence of the violation referred to in Part 1 above, Mr. Seibert'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, and that a five-working-day suspension was being imposed upon him. 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 the record establishes that the Claimant was given clear instructions by the employee in charge (EIC) to remove the anchors before dragging the rail. The Carrier contend that the Claimant's own testimony conclusively demonstrates that the Claimant failed to observe the track either before or during the dragging of the rail, while the rails was being damage. The Carrier argues that this constitutes a violation of USOR Rule C.

The Carrier then points out that once the gang began dragging the rail and the EIC felt the rail "catch," the EIC gave specific instructions to each crewmember to inspect a

portion of the track and knock off any remaining anchors. The Carrier emphasizes that the Claimant was instructed to inspect the track eastward from his machine. It was the Claimant's responsibility, and only his, to knock off anchors east of his machine while observing the condition of the track as it was being pulled westward. The Carrier submits 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 he had been found in violation of the same USOR Rule C less than two years earlier, a violation for which the Claimant was issued a three-day deferred suspension. 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 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 with regard to the damage that occurred during the incident at issue, the Claimant followed his foreman's instructions. The Claimant inspected the rail and removed all visible rail anchors prior to coordinating his actions with the other two operators. The Organization asserts that when moving the rail, the Claimant focused his attention in the direction of the move and was unaware that he had failed to observe or remove five rail anchors near the end of the rail. After the foreman observed the erratic movement of the rails, the anchors were discovered. The Organization argues that the Claimant immediately stopped his machine as instructed until the anchors were removed.

The Organization submits that the record shows that the Claimant took the safest course possible, and there was no violation of USOR Rule A. The Organization points out that the Claimant inspected the rail and removed all visible anchors, and it asserts that the Claimant was following his foreman's instructions when moving the rail. The Organization maintains that there is no evidence that the Claimant failed to follow instructions, so there was no violation of USOR Rule B. The Organization further asserts that the Claimant was alert and attentive in coordinating his movements with the other two machine operators and in immediately complying with the foreman's instructions. The Organization therefore contends that there is no proof of any violation of USOR Rule C. The Organization argues that the Claimant cannot be found to be in violation of USOR Rule M because the Claimant did not observe any damage to Carrier property that was not immediately reported by his foreman. The Organization therefore insists that

there is no evidence to prove a violation of any of the cited rules or to support the imposition of any discipline in this matter.

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 track damage occurred in the vicinity of the Claimant, 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 violating Carrier Rules A, B, C, and M when he failed to properly knock off the anchors and observe the condition of the track as it was being pulled westward. The Claimant's action led to significant amount of damage to Carrier property.

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 a three-working-day deferred suspension for violating Operating Rule C less than two years before this incident. Given that previous disciplinary action, this Board cannot find that the Carrier's action in issuing this Claimant a five-day suspension was unreasonable, arbitrary, or capricious. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: Sept 17, 2010



CARRIER MEMBER

DATED: Sept. 17, 2010