

BEFORE PUBLIC LAW BOARD NO. 6043

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CANADIAN NATIONAL RAILWAY**

Case No. 39

STATEMENT OF CLAIM:

Claim of Machine Operator Wilson Gaines, Jr. that his "... personal record be cleared of the charge immediately and that he be made whole in accordance with Rule 33(i)" for his alleged violation of General Rule I of the U.S. Operating Rules 3rd Edition when he allegedly violated rules for excessive absenteeism and when he failed to report to his assignment on April 3rd and 4th 2006. Organization file number: SA 052206.0 CN-IC W. Gaines Jr. (Investigation). Carrier file number: IC 134 106 20.

FINDINGS:

By letter dated April 7, 2006, the Claimant was directed to attend a formal hearing and investigation on charges that the Claimant allegedly had violated Carrier rules on excessive absenteeism when he failed to report to his assignment on April 3 and 4, 2006, and failed to follow supervisory instructions to contact the Track Supervisor if he was not going to report for work. The investigation was conducted on April 20, 2006. By letter dated April 28, 2006, the Claimant was informed that as a result of the hearing, he had been found guilty of violating Carrier rules and policies, 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 Claimant's personal record was not used to determine guilt or innocence. Instead, the Claimant's record was reviewed only as information in the event discipline was found to be warranted and to assist in assessing

the amount of discipline appropriate. The Carrier points out, however, that the Claimant's work record includes numerous entries showing that his work practices, including his attendance record, to be less than acceptable.

The Carrier argues that there is no basis for the Organization's assertion that the Claimant was not allowed to testify and could not be properly defended during the investigation. The Carrier insists that the transcript demonstrates that the Claimant was given the opportunity to cross-examine each witness, as well as an opportunity to make a statement; the Claimant's representative made a closing statement on his behalf. The Carrier goes on to maintain that the notice of investigation properly informed the Claimant of the purpose of the investigation and the charges against him. The Carrier emphasizes that the transcript demonstrates that the Claimant was afforded a fair and impartial investigation.

The Carrier then addresses the Organization's position that the Claimant's dismissal was improper, arbitrary, and harsh. The Carrier points to a prior Award by this Board that also involved charges of absenteeism against this same Claimant. In this prior case, the Board found that the Claimant should be given one last lengthy suspension, and that the Claimant will face discharge if he thereafter failed to report for work. The Carrier argues that the Claimant has abused the last, lengthy suspension that this Board granted to him. The Carrier insists that there is no foundation for the Organization's position that it is improper, arbitrary, harsh, unwarranted, inappropriate, and non-progressive for the Carrier to discharge the Claimant.

The Carrier ultimately contends that the Agreement has not been violated, and the

instant claim should be denied in its entirety.

The Organization initially contends that the Claimant's due process rights were violated in that he was not afforded a fair and impartial hearing. The Organization asserts that that Claimant was not given the opportunity to take the witness stand in his own defense, the investigation was vague and imprecise, and the hearing officer fell short of a proper ending to the investigation.

The Organization then argues that it is well established within the railroad industry that the purpose of administering discipline is not to inflict punishment, but to rehabilitate, correct, and guide employees in the proper performance of their assigned duties. The Organization maintains that the Board consistently has held that the severity of the punishment must be reasonably related to the gravity of the offense. The Organization asserts that in this case, the penalty of dismissal is improper, arbitrary, and harsh in light of the Claimant's missing two days of work.

The Organization emphasizes that the totality of the circumstances surrounding the incident or occurrence must be considered. The Organization argues that the lack of facts must be considered here, in that the Claimant was not allowed to testify. The Organization insists that the record firmly establishes that the Carrier's decision to assess discipline in this case was unwarranted, inappropriate, and non-progressive in its application.

The Organization ultimately contends that the discipline imposed cannot be validly upheld, and 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 procedural arguments raised by the Organization, and we find them to be without merit. The record reveals that the Claimant was present at the hearing and that his request for a Union representative was granted. The record also indicates that the Claimant was given an opportunity to question the witnesses by the hearing officer. The Claimant did make statements in his own defense at that hearing as well.

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 report for his assignment as a Mobile Machine Operator on April 3 and 4, 2006. By doing so, the Claimant subjected himself to disciplinary action.

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 record reveals that this Claimant had previously been discharged by the Carrier and been reinstated to service by this Board in 2001. At that time, this Board stated the following:

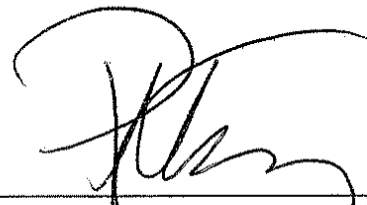
... the record also reveals that the Claimant has worked for the Carrier for approximately twenty-seven years. Given that lengthy seniority, this Board finds that the Carrier acted without just cause when it terminated the Claimant's employment. We find that the Carrier should have given the Claimant one last lengthy suspension to make it clear to him that if he does not show up for work, he will

face termination, even after three decades of service . . .

The Claimant in this case has already received that one last lengthy suspension and he has not changed his attendance behavior. This Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment in this current case. Therefore, the claim will be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: 7-13-07


CARRIER MEMBER

DATED: July 13, 2007