

BEFORE PUBLIC LAW BOARD NO. 6043

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

Case No. 40

STATEMENT OF CLAIM:

Claim of Carpenter John K. Dees that his "... personal record be cleared of the charges immediately and that he be made whole in accordance with Rule 33(I)" for his alleged violation of General Rule B and General Rule H of the U.S. Operating Rules when he allegedly failed to comply with instructions from his supervisor and falsified company time records on March 22, 2006. Organization file number: SA 051506.0 CN-IC J.K. Dees (Investigation). Carrier file number: IC 134 106 18.

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 failed to report and comply with supervisory instructions, and/or had falsified company records. After a postponement, the investigation was conducted on April 20, 2006. By letter dated April 26, 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, and it was reviewed only as information in the event discipline was found to be warranted. The Carrier points out that the Claimant's work record contained numerous entries that show that his work practices are less than

acceptable.

The Carrier argues that the record clearly establishes that the Claimant was instructed not to turn in his own time to payroll. The Claimant nevertheless accessed the computerized payroll system and put himself in for pay when he clearly was not at work. The Carrier insists that the record establishes that the Claimant was not to be calling in his time, and it is not relevant to this matter who was to call in the time.

The Carrier maintains that stealing from the Carrier, in this case eight hours work of pay and a per diem, is a serious offense that fully warrants dismissal. The Carrier points out that although the Organization alleges that the Claimant's dismissal violated the Agreement, the Organization did not cite a specific rule.

The Carrier asserts that the transcript proves that the Claimant was afforded a fair and impartial investigation. The Carrier emphasizes that the hearing officer neither prejudged the Claimant nor offered testimony about the incident. The Carrier points out that the Claimant was represented by a duly accredited representative of the Organization, was given the opportunity to prepare his case, to introduce his evidence on his own behalf, and to confront and cross-examine witnesses.

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

The Organization initially contends that the Carrier failed to adequately meet the burden of proof required to substantiate the charges against the Claimant. The Organization asserts that the Carrier has presented absolutely no evidence whatsoever to

substantiate any of the charges.

The Organization acknowledges that the Claimant did, in fact, try to get his time corrected before the end of the pay period. The Organization maintains that the transcript does not support the Carrier's conclusions, and it does not contain any positive evidence in support of the Carrier's findings of alleged rule violations. The Organization maintains that a review of the transcript demonstrates that substantial evidence was lacking in this case. The Carrier has failed to prove that the Claimant was not authorized to call in his own time. Moreover, no one seemed to know who was to call in the Claimant's time.

The Organization asserts that the only pertinent testimony came from the Claimant and Michael Hand, both of whom testified that the Claimant could have been marked up on March 17 and March 22 through an honest mistake. The Organization points out that when Foreman Hand forgot to call and change the Claimant's time for March 17, the Carrier did nothing; when the Claimant tried to change his time on March 22, the Carrier called for an investigation.

The Organization emphasizes that innuendo and supposition are not substantial evidence of wrongdoing. The Organization insists that there was no probative evidence to support the Carrier's decision. The Carrier's finding of guilt therefore is not sustainable, and the Carrier's decision to dismiss the Claimant should be vitiated.

The Organization emphasizes that it is well-established in the railroad industry that the purpose of administering discipline is not to inflict punishment, but rather to rehabilitate, correct, and guide employees in the proper performance of their duties. The

Organization points out that Board Awards consistently have held that the severity of the punishment must be reasonably related to the gravity of the offense. In this case, because there was no proven infraction, the penalty of dismissal is arbitrary, unwarranted, inappropriate, and in violation of the Agreement.

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 procedural arguments raised by the Organization, and we find them to be without merit. This Board finds that the Claimant was afforded a fair and impartial hearing.

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 failed to report and comply with instructions from his supervisors and falsified some Carrier records on March 17 and March 22, 2006. This Board finds that the wrongful behavior of the Claimant subjected him to disciplinary action.

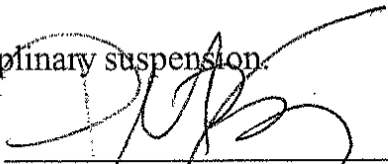
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary,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

The Claimant in this case was discharged for his actions. This Board finds that the

Carrier's action in discharging the Claimant was unreasonable, arbitrary, and capricious. Therefore, we find that the Claimant shall be reinstated to service, but without back pay. The time that the Claimant was off shall be considered a lengthy disciplinary suspension for his rule violations.

AWARD:

The claim is sustained in part and denied in part. The Claimant shall be reinstated to service, but without back pay. The period that the Claimant was off shall be considered a lengthy disciplinary suspension.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 7-13-07

DATED: July 13, 2007