

BEFORE PUBLIC LAW BOARD NO. 6043

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
IBT RAIL CONFERENCE**

and

ILLINOIS CENTRAL RAILROAD COMPANY

Case No. 54

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

1. The five (5) day suspension imposed upon B&B Carpenter Eric D. Barnette for violation of General Rule B for failure to call his supervisor in advance of being absent from work on Wednesday, June 13, 2007 and fifteen (15) day suspension for violation of Rule H in connection with acting quarrelsome toward another CN Employee on Thursday, June 14, 2007 is based on unproven charges, unjust, unwarranted, excessive and in violation of the Agreement (System File S.A081007.1/134-107-21).
2. As a result of Part 1 above, Mr. Barnette shall be granted remedy in accordance with Rule 33(i) of the Agreement."

FINDINGS:

By notice dated June 18, 2007, the Claimant was directed to attend a formal investigation to ascertain the facts and/or determine the Claimant's responsibility, if any, for (1) allegedly failing to comply with supervisory instructions by not calling in advance of an absence from work on June 13, 2007, and for (2) allegedly being quarrelsome, vicious and/or entering into a dispute or disagreement with another employee on June 14, 2007. The hearing was conducted, as scheduled, on June 22, 2007. By letter dated June 28, 2007, the Claimant was notified that as a result of the hearing, he had been found guilty as charged and was being assessed suspensions totaling twenty working days in connection with these two violations. The Organization thereafter filed a claim on behalf of the Claimant, challenging the Carrier's decision to suspend him. 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 given timely and proper 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 the Claimant and his representative did not take exception to the conduct of the proceedings either during the investigation or during the on-property handling of this claim.

The Carrier maintains that there is nothing in the record that supports the Organization's assertion of a procedural flaw. The Carrier emphasizes that Operating Rules B and H were part of the notice of investigation.

The Carrier submits that the record establishes that the Claimant did violate General Rule B. The Carrier points out that exactly one year prior to the incidents at issue, the Claimant had signed a waiver agreement that required him to contact his supervisor in advance of any absence. The Carrier insists that on June 13, 2007, the Claimant violated this agreement, as well as direct instructions from his supervisor, when he failed to call and notify his supervisor of his absence prior to his shift.

The Carrier contends that when the Claimant improperly called his foreman on the date in question, the Claimant was instructed to contact one of his two acting supervisors to request the day off. The Carrier asserts that there is no dispute in the record that the Claimant failed to properly request to be absent from work, and the Claimant admitted

that he knew that he was required to contact his supervisor in advance of any absence.

The Carrier insists that on this record, it is evident that the Claimant was given clear instructions, but he failed to comply with those instructions, thereby violating Operating Rule B. The Claimant's blatant disregard for his supervisors' clear, distinct, and authorized instructions constitutes a violation that, by itself, is sufficient justification for the discipline imposed and for more severe discipline, including termination.

The Carrier argues that overwhelming evidence in the record proves that the Claimant commenced a quarrel, using abusive and highly inappropriate language. The Carrier points out that when the Claimant returned to work on June 14, 2007, his foreman asked for a doctor's excuse to explain the Claimant's absence on the previous day. The Carrier emphasizes that the Claimant became threatening and enraged, and the Claimant challenged his foreman's authority to ask for documentation.

Pointing to the testimony of Foreman Porter and two other eyewitnesses, the Carrier maintains that there is no support for the Organization's allegation that Porter somehow "provoked" the Claimant by allegedly jumping out of his truck as the Claimant was leaving. The Carrier argues that the Claimant's own testimony corroborated his guilt in that he admittedly raised his voice and used abusive and vulgar language toward Foreman Porter.

The Carrier contends that the evidence proves that the Claimant failed to contact his supervisor in advance of his June 13, 2007, absence, and he also was argumentative and quarrelsome with his foreman when he returned to work on June 14. The Carrier submits that there is substantial, probative evidence in the record proving the charges on

which the Carrier based its decision to discipline the Claimant.

The Carrier insists that once it has been determined that the charge(s) have been proven, it is prudent to consider the Claimant's past discipline history in determining an appropriate measure of discipline. The Carrier contends that based on the proven violation and the Claimant's lengthy discipline history, the discipline imposed was warranted and progressive. The Carrier argues that the Claimant, at this stage of his career, is fully aware of what is expected of him as an employee, and the Claimant has received numerous forms of progressive discipline to reinforce these expectations when his performance has fallen short.

The Carrier then asserts that the Organization is incorrect in alleging that there are "no captious entries" in the Claimant's record that are "of any significant countenance." The Carrier insists that there are, in fact, numerous entries in the Claimant's record of "significant countenance." The Carrier maintains that the Claimant's record shows that he has been progressively disciplined for what have essentially been the same issues – absenteeism and an inability to follow instructions. The Carrier submits that the Organization has failed to offer any probative evidence to support its allegation that the discipline imposed in this matter was unwarranted, inappropriate, and non-progressive.

The Carrier argues that the Claimant's discipline record reflects that despite coaching, counseling, warnings, and actual suspensions for progressively longer periods, the Claimant continues to demonstrate a cavalier disregard for rules and clear instructions issued by persons in positions of authority, as well as a propensity for aggressive and quarrelsome behavior.

The Carrier maintains that it has the obligation to impose discipline in cases where rules are violated and due process has been maintained. The penalty imposed was not arbitrary, capricious, or an abuse of the Company's discretion, and there are no mitigating circumstances that would justify a reduction in the discipline assessed. The Carrier argues that given the Claimant's already lengthy disciplinary record during his short time in service, the discipline was appropriate.

The Carrier emphasizes that numerous tribunals have held that when charges are proven by probative evidence, then a carrier's imposition of discipline must remain unaltered unless it is determined to have been unreasonable, arbitrary, or capricious. Arbitral authority also recognizes the Carrier's obligation to ensure a safe workplace for its employees. The Carrier insists that a safe workplace cannot exist without the consistent application of a zero-tolerance policy regarding aggressive and threatening behavior.

The Carrier asserts that if the Board is compelled to consider remedy, then any compensation due the Claimant must be subject to offset of all compensation earned by him in any other employment, in accordance with Rule 33(i) and the well established practice on this property.

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

The Organization initially contends that the Carrier has failed to prove the charges leveled against the Claimant, and that the instant discipline cannot stand. The Organization asserts that there is no doubt that the Claimant reported his June 13 absence

well in advance of his assigned starting time that day to his immediate supervisor, Foreman Porter. The Organization argues that although there was much discussion about to whom the Claimant was to report, there is no probative evidence that the Claimant's method of reporting his absence was contrary to any instruction from his supervisor.

The Organization maintains that when the Claimant telephoned his immediate supervisor, Foreman Porter told the Claimant to call either Supervisor Ellington or Supervisor Day. The Organization insists that there is no dispute that the Claimant did telephone supervisor Day on June 13, 2007. The Organization therefore asserts that it is clear that the Claimant did report to and comply with his supervisor's instruction. The Organization further emphasizes that if, as the Carrier asserted, the Claimant was to report any absence directly to Supervisor Day, there is no documentation to support such an instruction.

As for the alleged violation of Rule H, the Organization acknowledges that the Claimant was discourteous to Foreman Porter. The Organization contends, however, that the circumstances surrounding this incident clearly indicate that the Claimant had a justifiable reason to be upset with his foreman on June 14, 2007. The Organization points out that after the Claimant reported for duty following a single day of reported absence, Foreman Porter took it upon himself to require the Claimant to provide a doctor's excuse for that absence. The Organization emphasizes that although the Claimant informed Porter that he was not required to provide a doctor's release for a single day's absence, Porter told the Claimant that he would not be permitted to work without a doctor's excuse and instructed the Claimant to leave the property.

The Organization submits that the Claimant became more upset when it became apparent that his foreman was refusing to allow the Claimant to work, in violation of the Agreement. The Claimant admitted that, in pleading his case to Porter, he might have used language that would be inappropriate in certain environments, but nothing more than what could be considered shop talk in the Claimant's work environment.

The Organization goes on to contend that the incident would have ended when the Claimant turned away to walk to his truck and leave the property. The Organization insists, however, that at that point, Foreman Porter jumped out of his own vehicle and went after the Claimant as the Claimant was walking away. The Organization suggests that the Claimant was startled and threatened by Porter's actions. The Organization submits that the Claimant's actions clearly were mitigated by those of his foreman.

Pointing to prior Board Awards, the Organization argues that the Board is not precluded from considering mitigating circumstances such as these when assessing the quantum of discipline. The Organization maintains that the Carrier has failed to prove any violation of Rule B, and the record shows that mitigating circumstances surrounded the Claimant's violation of Rule H. The Organization submits that there can be no doubt that the discipline at issue is based on unproven charges, unjust, unwarranted, excessive, 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 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 General Rule B for failure to call his supervisor in advance of being absent from work and for violating General Rule H because he acted quarrelsome toward another Carrier employee. The record is clear that the Claimant knew the rules with which he was supposed to comply and he failed to comply with those instructions. Moreover, it is evident from the record that the Claimant used abusive language toward his fellow employees.

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.

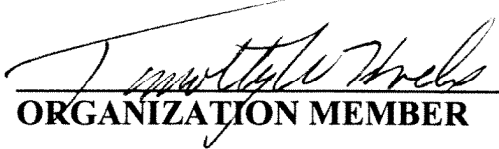
The Claimant in this case has compiled a very poor disciplinary record. That poor record, when coupled with his violation of two Carrier rules in this case is a sufficient basis for the Carrier to issue the twenty-day suspension to the Claimant. Finally, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it issued the lengthy suspension to this Claimant. Therefore, the claim must be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: May 10, 2010



CARRIER MEMBER

DATED: May 10, 2010