

BEFORE PUBLIC LAW BOARD NO. 6043

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
IBT RAIL CONFERENCE
and
ILLINOIS CENTRAL RAILROAD COMPANY**

Case No. 58

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

1. The discipline in the form of a ten (10) day suspension without pay and being disqualified from holding any position that would ever hold the responsibilities of employee in charge for the alleged violation of CN On Track Safety Rules – Rule 400 and U.S.O.R. – General Rule A, is improper, arbitrary and harsh (System File S.A061908.0/IC-BMWED-2008-00006).
2. As a consequence of the violation outlined in Part (1) above, Mr. J. McClain is entitled to the full remedy detailed in Rule 33(i) of the Agreement effective July 1, 2007.”

FINDINGS:

By notice dated May 6, 2008, the Claimant was directed to attend a formal investigation to determine whether the Claimant had violated any rules or regulations in connection with his alleged failure to provide on-track safety protection while working on April 30, 2008. The hearing was conducted, as scheduled, on May 9, 2008. By letter dated May 19, 2008, the Claimant was notified that as a result of the hearing, he had been found guilty of violating CN On Track Safety Rules – Rule 400 and U.S.O.R. – General Rule A, and that he was being assessed a ten-day suspension. 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, and the Organization never alleged, during the on-property handling of this matter, that the proceeding was flawed in any way.

The Carrier maintains that the Organization is incorrect in asserting that the charges were not proven. The Carrier argues that the testimony in the record, including that of the Claimant, establishes that the Claimant acknowledged that he did not obtain an extension to the track protection that he needed until after his previous protection order had expired. Moreover, the next permit for track and time authority that the Claimant obtained did not afford protection to the men and machinery where they were located at the time.

The Carrier emphasizes that the Claimant contacted the dispatcher for yet another permit for track and time, but this third permit was not sufficient to provide the track protection that was needed. The Carrier points out that it is undisputed that the Claimant was without protection from 5:30 p.m. to 5:44 p.m., a train was setting south from the south switch at Neoga, and the Claimant's men and equipment were setting on the main track without protection from opposing movements.

The Carrier insists that Rule 400 of the On Track Safety Rules cannot be more clear. This Rule specifies that if an employee is on or in any way foul of the track, then

the employee must have protection or authority. Rule A provides that when doubt or uncertainty exists, the employee must take the safe course. The Carrier argues that the Claimant failed to get the men and equipment under his charge off of the track prior to the expiration of his protection authority, so the Claimant violated both of these rules. The Carrier then maintains that when the Claimant thereafter failed to get appropriate protection after the expiration of the previous authority, the Claimant violated these rules a second time.

The Carrier asserts that there has been no dispute that the Claimant was in violation of the cited rules. The Claimant's own testimony leaves no doubt of any kind, and the Organization has not challenged, in any way, the Claimant's responsibility and culpability. The Carrier submits that under any standard of proof, the probative, credible evidence in the record proves that the Claimant failed to comply with the cited rules, and the Carrier therefore has met its burden.

The Carrier additionally contends that the Organization failed to support its allegation that the discipline imposed was excessive. The Carrier insists that the Organization's attempt to characterize the discipline as a "death sentence" is a real stretch of the imagination. The Carrier emphasizes that leaving men and equipment unprotected on track, especially main track, is an extremely serious and potentially deadly matter. The Carrier asserts that people have died or been seriously injured as a result of not having and applying proper protection. The Carrier argues that the ten-day suspension imposed here is hardly a "death sentence" under any circumstances, but instead is amazingly lenient.

The Carrier insists that once it has been determined that the charge(s) have been proven, it is prudent to consider the gravity of the infraction and the Claimant's past discipline history in determining an appropriate measure of discipline. The violations in this case are sufficient, standing alone, to justify the ten-day suspension at issue. The Carrier points out, moreover, that this is not the Claimant's first incident involving a failure to provide protection or working without proper on-track protection. The Claimant's discipline history contains other events, including a previous dismissal for falsifying records to obtain free lodging, which constitutes theft. The Carrier submits that under the circumstances, the discipline imposed was not arbitrary, capricious, harsh, or excessive. The discipline at issue was in accordance with the principles of progressive discipline.

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. As for the Organization's allegation that the discipline imposed was in violation of the current agreement, the Carrier maintains that the Organization has not offered any evidence to support this position. The Carrier maintains that the complete absence of any supporting evidence demonstrates that this accusation is baseless, and the Board must deem it irrelevant.

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 there were a number of factors that played an active role in this matter and that resulted in the incident at issue. The Organization asserts that the record shows that the Claimant made numerous unsuccessful attempts, well before his track authority expired, to contact the dispatcher and procure the proper track protection authority. In addition, the dispatcher involved in this situation verified that it is not unusual for employees to have difficulty reaching the dispatcher or for the dispatcher to be unable to answer calls from an employee seeking track authority for extended lengths of time. In addition, the dispatcher testified that at the time involved in the incident, she was very busy and behind in answering her radio and telephone calls from various Carrier employees, including the Claimant.

The Organization submits that the record therefore establishes that the Claimant's efforts to obtain a proper authority prior to the expiration of his track authority were hindered by the dispatcher's inability to answer her radio and telephone calls because of the abundant activity within her designated territory. The Organization emphasizes that the record also demonstrates that the Claimant eventually did obtain a track authority to provide protection for the men and equipment working under his supervision, although that track authority was improper. The Organization points out, however, that the record shows that the Claimant properly attempted to obtain the proper track authority when he did successfully reach the dispatcher, and the Claimant clearly specified the required

track territory limits necessary to protect the employees working under his supervision at the time. The Organization maintains that the dispatcher granted different limits than what the Claimant requested and needed. The Organization therefore asserts that the stressors facing both the dispatcher and the Claimant played an active role in the instant situation.

The Organization submits that it is only reasonable to conclude that the incident in question was entirely accidental and involved multiple parties. The Claimant was not entirely responsible for the end results of this situation, and the discipline imposed upon him was improper, arbitrary, and harsh. The Organization accordingly argues that the discipline cannot stand.

The Organization asserts that even if the Claimant can be found solely at fault for the incident, the discipline in the form of a ten-day suspension and disqualification from any position that would ever hold the responsibilities of an employee-in-charge serves as nothing more than punishment. The Organization maintains that this Board long has held that the purpose of discipline is to rehabilitate, correct, and guide employees.

The Organization submits that the Claimant has an above-satisfactory work record and more than thirty-three years of service to the Carrier. The Carrier's disqualification of the Claimant from any position that would ever hold the responsibilities of employee-in-charge is nothing more than punishment and is not rehabilitative or corrective. The Organization contends that from this, it can only be concluded that the discipline imposed upon the Claimant is improper, arbitrary, harsh, and cannot stand.

The Organization argues that the Carrier failed to consider all of the factors that

were actively involved in this case. The Organization suggests that instead of rendering a decision based on the facts and circumstances, the Carrier instead chose to discipline the Claimant in order to place blame and responsibility upon anyone or anything other than itself.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

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 400 and USOR General Rule A when he failed to provide the appropriate on-track safety protection while working on April 30, 2008. The record is clear that the Claimant did not fulfill his responsibilities with respect to obtaining the appropriate protection authority for his men and the equipment. The Claimant definitely failed to get the appropriate protection after the expiration of the previous authority.

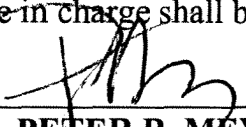
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary,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

The Claimant in this case has been employed by the Carrier for over thirty-three years. There is no question that he made a mistake in this situation and deserved the ten-day suspension. This Board, however, believes that the disqualification of the Claimant from holding any position that would ever hold the responsibilities of an employee in

charge was much too severe a penalty for this situation. Therefore, we find that the Claimant shall be given an opportunity to prove his competency and, once he does that, his employee-in-charge seniority shall be restored. However, the ten-day suspension was an appropriate disciplinary action in this case, and we find that that aspect of the claim will be denied.

AWARD:

The claim is sustained in part and denied in part. There was sufficient just cause for the issuance of the ten-day suspension to the Claimant. The Claimant shall be given an opportunity to prove his competency as an employee in charge; and once he has done that, his seniority as an employee in charge shall be restored.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: May 10, 2010



CARRIER MEMBER

DATED: May 10, 2010