

BEFORE PUBLIC LAW BOARD NO. 6915

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
and
CN-WISCONSIN CENTRAL RAILROAD**

Case No. 11

STATEMENT OF CLAIM:

Appeal of the March 27, 2006, decision of Engineering Superintendent Holman to dismiss Trackman Bruce Davis from service following the March 7, 2006, investigation. The investigation was neither fair nor impartial, and the Carrier failed to meet its burden of proving the charges made against Mr. Davis.

FINDINGS:

By letter dated February 23, 2006, the Claimant was directed to attend a formal investigation and hearing "to ascertain the facts and determine whether or not you violated company rules, instructions or policies when you allegedly participated in the improper use of company property on Friday, February 3, 2006 at Schiller Park, Illinois." The investigation was conducted, as scheduled, on March 7, 2006. By letter dated March 27, 2006, the Claimant was notified that as a result of the investigation, he had been found guilty of violating General Rules H, I, and M, 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 the Claimant. The Carrier denied the claim.

The Carrier initially contends that the record, including the Claimant's own admissions, clearly shows that the Claimant violated the cited rules when he operated the Carrier's leased vehicle for non-Carrier business; participated in the loading and

unloading of non-Carrier items in a Carrier vehicle while on Carrier time; and withheld and failed to report and provide factual information relating to these matters when questioned by Carrier police. The Carrier argues that even if one accepts the Claimant's assertions that he was only following his foreman's order, or that he was unaware of and/or unable to report any misuse or misconduct, there can be no dispute that the Claimant was duty-bound to report and provide factual information and not withhold or provide misleading information. The Carrier maintains that its special agents were required to expend great effort to get information and the ultimate truth from the Claimant. Moreover, some of the information that the Claimant provided to the special agents proved not to be factual, as the Claimant's own testimony at the hearing confirmed.

The Carrier insists that the record proves that the Claimant had been dishonest about his assistance in loading the boxes and where the boxes were going to be taken. The Carrier argues that the Claimant actively participated in the use of a Carrier vehicle to conduct personal business while on Carrier time, and this conduct constitutes theft of time and property. The Carrier points to the Claimant's testimony that he was aware of the potential trouble for Foreman Green, and that he repeatedly advised Green to get a rental truck. The Carrier emphasizes that when the Claimant had an opportunity to tell all to both CP and CN police, he failed, for whatever reason, in his duty to be completely forthright and honest, and he did so at his own peril.

The Carrier contends that the Claimant's actions and inactions cast serious doubt upon his integrity and forthrightness. The Carrier insists that it must be able to remove

from its employment any dishonest individual who willfully withholds and/or falsifies information in a disciplinary or criminal investigation, in blatant violation of Carrier rules and policies. The Carrier asserts that it cannot be encumbered with dishonest employees, wondering whether these employees will commit further or more serious acts of theft and dishonesty. The Carrier maintains that the record proves that the Claimant was guilty as charged.

The Carrier goes on to argue that dismissal for such offenses is neither harsh nor excessive, when viewed in the context of the Claimant's relatively short tenure with the Carrier and the seriousness of the situation and the infractions. As the Organization itself acknowledged in its appeal, Foreman Green resigned and Trackman Manjarrez waived his appeal and accepted a fifteen-day suspension for operating a Carrier truck without a proper license and failing to report the rule violations. The Carrier maintains that it has the right to expect diligent, honest, faithful employees, and anything less very well may result in extreme consequences for the Carrier, its employees, and the public. The Carrier has the responsibility and the right to remove employees with whom it is unable to entrust its reputation and property.

The Carrier further asserts that its dismissal of the Claimant is supported by numerous Board Awards. Moreover, numerous Board Awards have emphasized that the Carrier retains the discretion to determine what disciplinary penalty should be imposed in response to proven violations. The Carrier argues that the Claimant's dismissal was not arbitrary, harsh, or excessive, but instead was justified by the Claimant's dishonesty, willful neglect of his duty to provide full and complete cooperation to CN police during

their investigation, and theft of Carrier time and property when the Claimant participated in the handling of personal property using Carrier equipment and on Carrier time.

The Carrier then addresses the Organization's assertion that the hearing was not fair and impartial. The Carrier argues that the Organization has failed to demonstrate or prove where in the record the Claimant was denied due process. The Carrier insists that the record shows that the Claimant was provided a fair and impartial investigation. The Carrier asserts that the Organization has not supported its self-serving objections and allegations of pre-judgment. Moreover, the Organization and the Claimant were allowed full and unrestricted opportunity to question and present witnesses and evidence.

The Carrier goes on to contend that contrary to the Organization's argument, the notice in this matter complied with Rule 31, Paragraph B. The Carrier points out that there is nothing in this Rule that requires the citation of rule numbers in the charges or statement of incident. The Carrier insists that it is clear that the Organization and the Claimant came prepared to defend against the offenses set forth in the statement of incident, and the notice was sufficient to fulfill the requirements of Rule 31. Both the Claimant and the Organization understood and vigorously defended against any offense cited in the February 23, 2006, notice. The Carrier asserts that there is no merit to the Organization's procedural objections.

The Carrier then argues that even if the Organization had established the merits of its claim, it has failed to meet its burden of supporting the monetary claim. The Carrier asserts that the remedy sought in the claim is excessive in that Rule 31 provides only for "regularly scheduled time lost, less any amount earned in other employment." The

Carrier maintains that it is beyond this Board's authority to grant a remedy not provided by the Agreement, or to expand beyond "regularly scheduled time lost" to provide other windfall money or benefits. The Carrier emphasizes that Rule 31 simply does not provide for "all other rights unimpaired," such as vacation, personal leave, or any other right or benefit. Moreover, Rule 31 authorizes the Carrier to deduct earnings from other employment.

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

The Organization initially contends that the Carrier violated Rule 31A when it withheld the Claimant from service prior to the investigation. The Organization argues that there were no "serious" actions taken by the Claimant that would justify withholding him from service prior to the investigation.

The Organization argues that the Carrier failed to present any evidence to support its allegation that the Claimant violated Operating Rules H, I, and M. In connection with Rule H, the Organization emphasizes that the Claimant was accused of not reporting the incident on February 3, 2006. The Organization points out that the Claimant was driving a rental truck that was not equipped with a Carrier radio. The Organization maintains that the employees were detained for questioning before leaving the scene of the incident, so the Claimant had no opportunity to report anything because he did not know until then that anything was wrong.

The Organization goes on to insist that there was no violation of Rule I. The Organization contends that Foreman Green ordered the Claimant to drive the rental truck

to a storage site. The Organization argues that it was not until Green indicated that the boxes removed from this facility were his personal property that the Claimant had any reason to believe that anything was wrong. Moreover, no one was certain what was in these boxes, as indicated by the differing identification of the boxes' contents by the two risk managers.

Turning to the alleged violation of Rule M, the Organization maintains that there is no evidence in the record that shows that the Claimant ever used Carrier property for personal use. The Organization insists that on the day of the incident, when the Claimant discovered what was going on, the Claimant refused to participate in the loading of Green's personal property. The Organization argues that the Carrier has failed to meet its burden of proving any of the charges leveled against the Claimant.

The Organization goes on to assert that even if it is assumed that the Claimant somehow acted in violation of the cited rules, it must be remembered that there were three individuals on the gang that day. Foreman Green resigned, while the other member of the gang was charged with the same rule violations as the Claimant, in addition to charges of operating a Carrier vehicle with an improper driver's license. The Organization emphasizes that this other gang member was assessed a fifteen-day suspension, while the Claimant was dismissed from service. The Organization argues that this obviously constitutes disparate discipline, and the Claimant's dismissal was arbitrary, capricious, and undue punishment.

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 violated several Carrier rules when he used a Carrier vehicle for non-Carrier business, helped his foreman load and secure items on Carrier time, and failed to report the facts to the Carrier in a timely fashion. The record is clear that the Claimant failed to be honest with the Carrier and give accurate statements of what had transpired during the incident in which his foreman required him to do things that were improper.

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 engaged in serious wrongdoing for which he deserved a severe penalty. The record reveals that his foreman resigned and the trackman who was involved in the incident and charged with violation of the same rules as the Claimant was only assessed a fifteen-day suspension. The record reveals that Claimant Davis engaged in more serious wrongdoing than did the trackman and was less than honest with the Carrier when he was questioned. However, this Board finds that there was simply an insufficient basis to terminate the Claimant's employment. Therefore, this Board finds that 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 for his

wrongdoing. The Claimant should recognize that he has a responsibility of being honest with his employer and the record before this Board indicates that he was extremely evasive, justifying the lengthy suspension.

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 for his wrongdoing.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: 5-24-07



CARRIER MEMBER

DATED: May 24, 2007