

BEFORE PUBLIC LAW BOARD NO. 6915

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN – WISCONSIN CENTRAL RAILROAD**

Case No. 41

STATEMENT OF CLAIM:

1. The dismissal of Machine Operator Shane Johnson for violation of USOR General Rule C and On Track Safety Rules 1000 and 1004 in connection with a machine collision at Mile Post 99.5 at approximately 5:17 P.M. on August 6, 2008, is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File WC-BMWE-2008-00018).
2. As a consequence of the violation referred to in Part 1 above, Mr. Johnson is entitled to the complete remedy prescribed in Rule 31, Paragraph 1 of the Collective Bargaining Agreement as well as having his seniority restored, his accredited months of service and all benefits that were not received during time out of service.

FINDINGS:

By letter dated August 24, 2008, the Claimant was directed to attend a formal hearing and investigation to ascertain the facts and determine whether the Claimant had violated any Carrier rules, instructions, and/or policies in connection with an August 6, 2006, incident in which a machine that the Claimant was operating collided with another machine. The investigation was conducted, after a postponement, on September 19, 2008. By letter dated October 1, 2008, the Claimant was notified that as a result of the hearing, he had been found guilty of violating USOR General Rule C and On Track Safety Rules 1000 and 1004, 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 dismiss the Claimant. 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 and his representative were given proper and timely notice of the investigation, and they were present throughout the proceeding. The Carrier argues that the Claimant and his representative were afforded an opportunity to hear all testimony, to review all material and documents entered as exhibits, to question and cross-examine all witnesses, and to make statements on the Claimant's behalf. The Carrier submits that the Organization did not object to the conduct of the hearing during either the course of that hearing or the on-property handling of this claim, and no procedural flaws have been noted.

The Carrier maintains that the Organization's objection that the Carrier failed to provide it with the rules that were discussed and entered into the record as exhibits constitutes nothing but a thinly veiled ploy and attempt to cast some shadow on the propriety of the hearing. The Carrier points out that the Agreement does not specify that the Carrier is obligated to provide the Organization with specific rules prior to the hearing, and the Organization has all of the Carrier rules by virtue of the fact that each of its members, including the Claimant, are provided booklets and documents containing those rules. Moreover, all employees, including the Claimant, are required to know, understand, and comply with those rules.

The Carrier asserts that there is no dispute that the Claimant's machine was the only one of the two involved in the collision that was moving. There is no dispute that the Claimant failed to stop his machine before it collided with the other machine. There also is no dispute that the Claimant was looking in the direction opposite to the one in which

he was traveling shortly before the collision. Further, it is undisputed that the Claimant had operated this particular machine for about four months prior to the collision, and that he never reported or noted in the machine's log that there were any problems, defects, or deficiencies with the brakes. The Carrier contends that there is no evidence to support the Claimant's assertion that he had encountered problems with the brakes.

The Carrier argues that the Organization offered only excuses for the Claimant's failure to control his machine. The Carrier submits that none of these excuses are supported by any probative evidence. The Carrier insists that the evidence demonstrates that the Claimant did not comply with the cited safety rules in that he did not move at a speed that allowed him to stop within half the range of vision and that he did, in fact, hit the machine ahead of him.

The Carrier goes on to contend that despite the Claimant's testimony that he had been having "brake problems," there is no indication that the Claimant took any extra precaution to avoid running into the machine ahead. The Carrier points out that although the Claimant testified that he was traveling at about five miles per hour, his machine shoved the other machine ten to fifteen feet as a result of the collision. The Carrier also emphasizes the Claimant's testimony that when he did a forty-foot brake test, his machine stopped from full speed in only 40 feet. The Carrier emphasizes that in the face of this testimony, the Claimant suggests that the machine would not stop for 75-100 feet when he was going at about five to ten miles per hour. The Carrier insists that the Claimant's testimony simply is not credible.

The Carrier further maintains that the record establishes that the Claimant was not

alert and attentive, and he did not report defective equipment to the proper authority, in violation of Rule C of the Carrier's Operating Rules. There is no credible evidence in the record to support the Claimant's contention that the brakes were sticking or were otherwise operating improperly, and the Claimant never reported or noted any such problem. The Carrier submits that the evidence actually shows that the brakes were operating properly, with the re-enactment demonstrating that there were no defects or exceptions to the machine's brakes. The Carrier argues that the record strongly suggests that there were no problems with the brakes, and the Claimant's cries of defective equipment were a ruse designed to camouflage his dangerous and careless actions.

The Carrier emphasizes that only two years prior to the accident in question, the Claimant was involved in a frighteningly similar incident when a machine that he was operating collided with another piece of roadway equipment. The Carrier argues that the Claimant exhibits a propensity for careless and negligent performance, as well as a disregard for critically important safety rules. The Carrier submits that it has an obligation to provide a safe work place for its employees.

The Carrier insists that previous efforts to raise the Claimant's awareness and ensure his understanding that he is required to comply with the Carrier's safety and other rules were unsuccessful. The Carrier asserts that it cannot be required to retain an employee who twice had demonstrated such an obvious lack of regard for rules compliance. Pointing to prior Awards, the Carrier emphasizes that when the record demonstrates that the violations were proven, a Carrier's decision must be unaltered. The Carrier maintains that the discipline in this case unquestionably was warranted. The

discipline was commensurate with the Claimant's infraction, and it was not an abuse of the Carrier's discretion.

The Carrier then suggests that any award of back pay for time lost must be offset by outside earnings. The Carrier also points to the industry principle relating to an employee's responsibility to mitigate lost earnings.

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

The Organization initially contends that the Claimant clearly indicated that he was in compliance with all Carrier rules. The Organization asserts that the Claimant was alert, attentive, maintained a safe distance at all times, and had his machine under total control. The Organization argues that in this instance, the lever controlling the machine's movement stuck in the forward position and did not return to the brake position as it should have.

The Organization points out that as the Claimant prepared to stop, he knew that there was sufficient distance to stop short of the machine ahead, so he turned to be sure that the machine following him also was at a safe distance. The Organization suggests that this brief moment when the Claimant was checking the movement of the trailing machine and the brake failed to apply was sufficient to close the gap between his machine and the one in front, resulting in the Claimant's being unable to stop short of contact.

The Organization maintains that the fact that the Carrier was unable to reproduce this brake malfunction does not stand as proof that the Claimant was negligent or

contributed to the accident. The Organization suggests that there are a number of reasons why the Carrier's re-enactment failed to produce the same results that contributed to the accident, including the possibility that whatever caused the malfunction was dislodged by the Claimant's evasive attempts or by the impact of the two machines. The Organization insists that there is no evidence to support a finding that the Claimant was responsible for the accident.

The Organization submits that the Carrier's entire case is built on nothing more than speculation, assumption, and supposition that the Claimant was guilty of the charges. The Organization maintains that this and other Boards long have recognized that a carrier's decision to discipline an employee must rest on substantially more than speculation and conjecture.

The Organization suggests that the Carrier apparently assumed that because an accident occurred, the Claimant violated its rules. Pointing to a number of Awards, the Organization contends that this Board consistently has rejected that notion. The Organization asserts that when the principles enunciated in these Awards are applied to the instant dispute, there can be no doubt that the Carrier failed to prove the Claimant responsible for the collision in question.

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 guaranteed all of his due process rights throughout the entire hearing process.

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 Rule Nos. 1000 and 1004 when the machine that the Claimant was operating struck the machine ahead of him, causing significant damage. Although the Claimant contends that his machine was not operating properly, there is simply insufficient proof of that. The Claimant is also required by Rule C to be attentive to his work, and the record reveals that the Claimant was clearly not attentive when he crashed his machine into the other machine ahead of him.

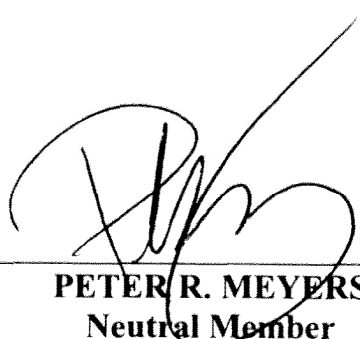
Once this Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. This Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary,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

The Claimant in this case had previously been involved in a serious accident involving a machine that he was operating colliding with another piece of equipment. That incident occurred nearly two years before, and the Claimant had been disciplined and counseled in an effort to improve his performance.

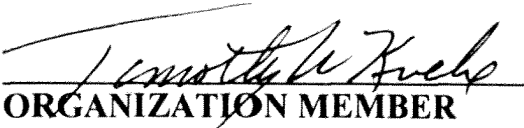
Given the previous background of this Claimant and the seriousness of the wrongdoing involved in this case, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated his employment. Therefore, the claim will be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER

DATED: Sept 17, 2010



CARRIER MEMBER

DATED: Sept 17, 2010