

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44740
Docket No. MW-46369
22-3-NRAB-00003-201043**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(The Kansas City Southern Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. F. Horton, by letter dated September 12, 2019, for alleged violation of General Code of Operating (GCOR) Rules 1. 6 - Conduct, GCOR Rule 1.6.4 - Notifications of Criminal Charges and The Kansas City Southern Railway Company’s Policy Prohibiting Workplace Threats and Violence Policy in connection with alleged conduct unbecoming of an employe and alleged failure to report the nature and severity of charges within forty-eight (48) hours of his arrest involving domestic violence on August 12, 2019 with Carrier’s first knowledge of incident on August 15, 2019 was excessive and without just and sufficient cause (System File KCS261KM19D/ 2019-0522 KCS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant F. Horton shall now ‘... be returned to work on his assigned position, and the claimant shall be made whole for all financial loses (sic) as a result of the violation, including compensation for the straight time for each regular workday lost and holiday pay for each holiday lost. This is to be paid at the rate of position assigned to the claimant at the time of removal of service. This amount is not to be reduced by earnings from alternate employment, obtained by the claimant while wrongfully**

removed from service. This should also include any general lump sum payment or retroactive general wage increase provided in any applicable agreement that becomes effective while claimant was out of service. Any overtime needs to be included for the lost overtime opportunities for any position the claimant could have held during the time he was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had he not been removed from service. Any health, dental and vision care insurance premiums, deductibles and copays that he would not have paid had he not been unjustly removed from service.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

After investigation held August 29, 2019 and by letter dated September 12, 2019, the Claimant – an employee in the Carrier’s service since January 2008 – was dismissed for failing to comply with the Carrier rules including conduct and requiring notification of criminal charges.

On August 12, 2019, the Claimant left a voicemail on the Carrier’s hotline reporting that he had been arrested. In a return call with the Carrier’s HR Manager, the Claimant explained that he had been arrested for domestic abuse the same morning around 2:00 a.m. which was related to an argument he had with his wife where his wife reported to the police that he pushed her and acted as though he wanted to choke her, but that he did not recall pushing his wife and he did not choke her. Tr. 13. Based on what the Claimant reported, the Carrier determined

that the Claimant would not be pulled from service. *Id.* However, the Carrier's HR Manager informed the Claimant that if the police report showed something more serious, he would be pulled from service. *Id.*

Subsequent review of the Natchitoches Parish Sheriff's Office Offense Report of the incident filed by the responding police officer showed that the Claimant was arrested for domestic abuse battery and his wife stated that the Claimant grabbed her in a choke hold and threatened to kill her, with the responding officer noting that the Claimant's wife had fingernail marks on the side of her neck that were consistent with being choked. Investigation Exhibit 5 at page 2 of the report. It was determined by the Carrier that the police report showed conduct more severe than Claimant's report to the Carrier. *Tr.* 17-18. According to the Carrier's HR Manager, in his report to the Carrier the Claimant left out that the police report contained assertions that he choked his wife and threatened to kill her. *Tr.* 18.

The Claimant's wife ultimately submitted a written request dated August 20, 2019 to drop the charges because "I would like to make my marriage work." Investigation Exhibit 8.

In pertinent part, Rule 1.6.4 requires that employees report certain criminal charges including "[a]ny crime involving violence" to the Carrier within 48 hours and further provides:

Notifications of Criminal Charges

... In regard to the criminal charges, the employee must report the crime(s) that s/he has been charged with committing, ...[and] the circumstances leading to the charge(s)

Rule 1.6 provides that employees are prohibited from "concealing facts concerning matters under investigation".

Although the Claimant reported his arrest, he was less than complete in advising the Carrier of the charges against him and the circumstances involved. Substantial evidence therefore shows that the Claimant did not comply with the above-quoted rules. Whether the Claimant actually engaged in the conduct contained in the police report is not the issue in this case. That alleged conduct was never adjudicated because the Claimant's wife dropped the charges. However, the

Carrier was entitled to know what the allegations against the Claimant were so it could decide its course of action and the Claimant did not provide the Carrier with complete information concerning those allegations. The Claimant was not pulled from service after his report of the arrest, but he was told that if the police report showed something more serious, he would be pulled from service. And that is what happened.

The purpose discipline is to correct misconduct and not punish. First Division Award 30771 and awards cited. Further, an employee's length of service is a factor to be considered. First Division Award 29448.

The Claimant has been employed since January 2008 – over 11 years prior to the incident. In this case, that length of employment weighs in the Claimant's favor. Under the circumstances of this case, we find dismissal of the Claimant was excessive and therefore arbitrary. The Claimant shall be reinstated to his former position subject to his passing regular return-to-duty testing and qualifications requirements. However, consistent with the concept that discipline is meant to correct misconduct and not to punish employees, to send the appropriate corrective message to the Claimant that he must in the future fully comply with the Carrier's rules – which he did not do in this case by failing to more fully disclose to the Carrier the reasons for his arrest – the Claimant shall not be entitled to backpay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of May 2022.