

PUBLIC LAW BOARD NO. 6394

AWARD NO. 49

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The discipline (withheld from service and dismissal) imposed upon Mr. P. Kolcan by letter dated May 12, 2010 for alleged violation of unidentified Carrier rules in connection with allegations that Claimant failed to comply with fall protection and allegedly fouled live track without protection on February 16, 2010 at Bridge B Mile Post 184.50 in Cleveland, Ohio was unjust, arbitrary, and unwarranted (Carrier's File MW-DEAR-10-04-BB-062).
2. As a consequence of the unjust removal from service and subsequent dismissal described in part 1 above, Mr. Kolcan shall '...be placed back in service immediately, compensated all straight time and overtime hours for which he has been deprived, which shall include February 16, 2010 and continuing until he is reinstated to service. Mr. Kolcan should also be granted all benefits & credits for days that the Carrier has held him out of service.' (Employees' Exhibit 'A-6', Sheet 3)."

Upon the whole record and all the evidence, after hearing, the Board finds the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This award is based on the facts and circumstances of this particular case and shall not serve as precedent in any other case.

AWARD

At the time of the events that lead to this claim, the Claimant was a mechanic for the Carrier with over 34 years of service and was assigned as a Bridge and Building Mechanic. On February 16, 2010, the Claimant was operating a boom truck at Bridge Mile Post 184.50. On that day, the Carrier states the Claimant failed to comply with fall protection rules and roadway worker rules during the course of his work. In response to these events, the Carrier held an investigation and dismissed the Claimant on the grounds that he not only violated the fall protection and roadway worker rules but did so knowing it was a rule violation.

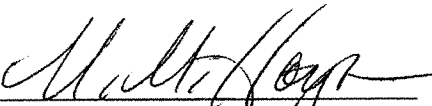
The Organization sets forth three main arguments against dismissal. (1) First, the Organization states the Carrier failed to provide a fair and impartial hearing to the Claimant by not listing specific rule violations in its hearing notices, and by refusing to send the Organization all documents and exhibits it would present at the hearing. As a result of this refusal the Organization maintains it had no way to examine the witnesses that provided written testimony but were not physically present at the hearing. (2) Second, the Organization claims the carrier did not meet its burden of proof. There was no direct observation of the Claimant's violation of the offenses, and the circumstantial evidence is disputed as to its accuracy. (3) Third and finally, the Carrier's choice of discipline – even if it was able to meet its burden of proof and even if it provided a fair hearing – was excessive for the offenses allegedly committed.

The Carrier argues that the collective bargaining agreement has no requirement to provide Claimants or the Organization documents related to its investigation until the day of the hearing. The Organization does not dispute that no such requirement exists in the agreement, but says that it is implied as part of due process. The Carrier also provided at the hearing written statements showing that the importance of fall protection was discussed at the morning safety meeting on the date the events occurred, so the Claimant had to know that failing to use fall protection was in violation of the rules. The Carrier does not dispute that no one directly witnessed the Claimant's alleged violations. However, the position of the boom truck and foot prints at the work site when the Claimant was questioned about his actions by ADE Lange prove that the violations occurred as there was no other way the Claimant could have reached his machine without failing to use fall protection and fouling a live track without protection.

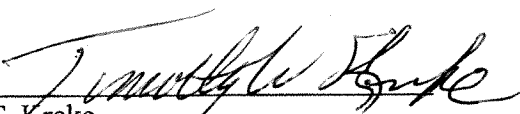
After carefully reviewing the procedural objections the Organization has made, the Board concludes that they are without merit. The Board finds that the language of the charge is specific, even though it may not specifically cite an Carrier rule number or other such technical specification. The Organization claims bias on the part of the Hearing Officer, but we do not find any merit for this in the transcript of the hearing. The collective bargaining agreement (Rule 30, as amended) does not include discovery provisions and there is no evidence in the case record that such discovery procedures have ever been previously used by the Organization and the Carrier. Even if the witnesses that provided the written testimony were not present at the hearing, the Organization had every opportunity to provide evidence to dispute the facts in the written testimony at the hearing itself. Although the Board finds no merit in the procedural objections, we do find some mitigating factors in this case. The Claimant has over 34 years of seniority with the Carrier. Given the case circumstances, the penalty of dismissal is disproportionate to the rule violations.

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows: The Claimant is to be reinstated with full seniority, but without back pay.

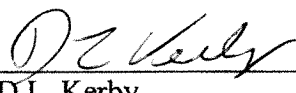
The claim is sustained in part.



M.M. Hoyman
Chairperson and Neutral Member



T. Kreke
Employee Member



D.L. Kerby
Carrier Member

Award Date: June 30, 2011