

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 201

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

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

1. The Carrier's discipline (dismissed from all services with Norfolk Southern Railway) of Mr. K. Morey, issued by letter dated December 22, 2011 in connection with his alleged failure to follow instructions and conduct unbecoming an employee in that on Wednesday, November 16, 2011 he was instructed by a supervisor to pull spikes and failed to do so and on Thursday, November 17, 2011 he became verbally aggressive toward a foreman, was harsh, excessive and an abuse of Carrier authority (Carrier's File MW-ROAN-11-44-SG-449).
2. As a consequence of the violation referred to in Part 1 above, Mr. Morey shall be reinstated and paid for all lost time, with his seniority and vacation rights unimpaired."

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

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

On November 16, 2011 the Claimant was working in a temporary capacity as a Track Broom Machine Operator assigned to the TS-20 Timber and Surface Gang. The purpose of this team was to complete large-scale tie replacement projects across the Carrier's properties. The Track Boom Machine Operator has two jobs (1) to sweep away debris off ties and mark the ones that need to be replaced and (2) to use a hydraulic spike puller to pull spikes out of switches and frogs, since conventional pullers are not made to work from these tight areas (see Transcript, page 13). On the morning of November 16,

Supervisor R. Ellett ordered the claimant to back up the machine and use the hydraulic spike pullers to remove spikes from two switches. The Claimant initially did as instructed and pulled some spikes from the first switch, but did not pull any out of the second area (see Transcript, page 14). Due to his failure to pull the switches using the hydraulic puller as instructed, the conventional pullers could not do their job properly and work was slowed down as workers had to pull the switches by hand (see Transcript, page 11). After this the gang stopped to have lunch, at which point Gang Foreman G. Lefew asked the Claimant to explain his actions. The Claimant did not give an answer and simply walked away (see Transcript, page 15). The next day, on November 17, 2011 the Claimant was assigned to feed spikes into the Spiker Machine. The nature of this job is such that, if the Spiker Machine runs out of spikes, the gang comes to a stop. On November 17, 2011, stoppages occurred and Gang Foreman Lefew approached the Claimant to show him how to properly feed spikes so that the machine would no longer keep running out of them. In response to this the Claimant became angry and used profanity towards Gang Foreman Lefew (see Transcript, page 32-33).

Due to the events of November 16 and 17, 2011 the Claimant was removed from service on November 17, 2011. The Carrier charged the Claimant with failure to follow instructions and conduct unbecoming an employee. The Carrier then conducted a formal investigation into these events, including a hearing on December 14, 2011. The Carrier found the Claimant was guilty and dismissed him via letter on December 22, 2011.

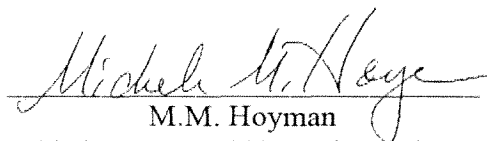
The Carrier argues the evidence clearly shows the Claimant is guilty of failing to follow the instructions of his Supervisors. Supervisor Ellett testified (see Transcript, page 14) that he had instructed the Claimant to use his machine to pull spikes from two switches. In addition, the Claimant himself revealed he was instructed to pull spikes from both switches but only completed one (because he believed other Track Broom Operators working in the gang would do the others) (see Transcript, page 56). The Carrier contends it is irrelevant whether other employees could have or were asked to perform the work because the Claimant was directly instructed to do it and not other employees (see Carrier Brief, pages 6-7). On the charge of conduct unbecoming an employee, the Carrier argues the testimony of Gang Foreman Lefew is corroborated by Machine Operator Price (see Transcript, page 52). The Claimant's use of profanity was directed specifically at Gang Foreman Lefew and therefore could not be considered simply "shop talk" in which profanity is commonplace. Finally, the Carrier argues dismissal was appropriate to the offense because the Claimant's conduct rises to a level that seriously damages the employment relationship and he has relatively little seniority (see Employer Brief, page 12).


The Organization argues the Employer has a higher than normal burden of proof to meet in the instant case due to the nature of the charges (see Organization Brief, page 6). Specifically, because the charges of harassment and insubordination involve such "moral turpitude" the evidence must be overwhelming and go beyond the normal "substantial evidence" standard. In support of this argument the Organization offers a series of cases including NRAB Third Division Awards 316 and 358, and PLB 4244 Award 4. In regards to the insubordination charge, the Organization argues the Claimant

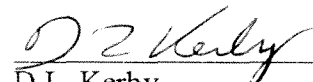
testified that he fully complied with orders to not slow down the work of the spike pullers. He did this by immediately moving forward when he saw the spike pullers come towards his area of the track (see Transcript, page 56-57). It is the Organization's view that the insubordination charge is not applicable because the incident was due to directly competing instructions. In regards to the harassment charge, the Organization contends that, while the Claimant admitted to cursing and yelling at his Foreman (see Organization Brief, page 19), this was done in response to the same behavior being directed at him earlier by the Foreman. In evidence of this the Organization points out that one Carrier witness could not recall who swore at the other first (see Organization Brief, page 11). The Organization notes that the Carrier's order of events hinge on the testimony of the Gang Service Foreman. He held the Claimant out of service initially and testified against him. Therefore, he cannot be considered reliable. Finally, the Organization raises procedural arguments and also a disparate treatment claim (see Organization Brief, page 24).

The case before the board is complex because of disagreements about the record and the nature of the charges. Although the record seems clear and there is no disagreement that the Claimant initially did as he was instructed and then moved on, it is not clear whether those actions constituted insubordination or a misunderstanding. It would appear that there was a personality conflict between the Claimant and the foreman, but not one between the supervisor and the Claimant. Supervisor Ellett, who testified to giving the instructions, also testified that he both told the Claimant to pull all the spikes and not stop the gang - instructions that were subject to a certain level of judgment (see Transcript, page 83). As such, the Claimant may be guilty of exercising bad judgment by failing to properly parse the instructions given – but that is not the same as insubordination. On the charge of harassment, there was also a large amount of testimony around whether or not the hostile relationship between the Claimant and the Gang Foreman was due (or not) to some sort of personality conflict. In reviewing the case record, we find that the Claimant did testify to desiring to bring the foreman “down a notch.” In coming to its decision the Board has weighed the case record, the Claimant's seniority and work history, and the testimony at the hearing. The Board finds that in this case that dismissal was not appropriate. The Claimant is to be reinstated, subject to the return to work exam and the dismissal is reduced to a suspension ending on May 17, 2012. The Claimant is also awarded back pay from May 17, 2012 until the date he is reinstated by the Carrier.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member

 10/15/12
D. Pascarella
Employee Member

 10/15/12
D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on September 14, 2012.