

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 222

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 Carrier's decision to dismiss Laborer R. H. Dalton for failure to report for a return to duty physical as instructed by letter dated January 5, 2010 is based on unproven charges, unjust, unwarranted and in violation of Rule 38 of the Agreement (Carrier's File MW-CN-10-03-LM-078).
2. As a consequence of violation referred to in Part I above, Mr. Dalton shall have his seniority reinstated, sent proper notice to report for duty and paid for all time lost beginning January 25, 2010."

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:

The Claimant entered service for the Carrier on November 10, 2008 in the position of Laborer/Trackman and subsequently achieved seniority in those positions. On April 28, 2009 the Claimant was working on the TS-1 Timber and Surfacing Gang when he was displaced by a more senior employee. Under Rule 14(b), when an employee is displaced or their job is abolished, the employee has ten days from the date of the event to either displace a more junior employee or to fill a vacancy. If an employee fails to exhaust these options, they forfeit all seniority. The Claimant properly exhausted his options to displace an employee or fill a vacancy under 14(b), so he was furloughed but retained seniority.

The next year, positions became available and the Claimant was recalled to work via letter dated January 5, 2010. This letter specified (1) that the Claimant was to report to work on the R-1 Rail Gang in South Dayton, Tennessee on January 11, 2010, (2) that the Claimant was to complete a return to work physical, and (3) that a failure to report within ten days of receipt of the letter would result in a forfeiture of all seniority (Rule 38). The Claimant did not report to the assigned work site on January 11, 2010 but did contact the Carrier's Manager Administrative Services. The Manager Administrative Services department instructed the Claimant to report to a Railway Yard near his home to pick up the paperwork for the return to work physical. The Claimant was asked to report to the Railway Yard before 7:00AM but reported at 8:00AM on January 14 and received the appropriate paperwork and instructions on where to go to complete the physical. The Claimant never reported to the assigned medical facility to complete the physical. On January 20, 2010 the Carrier notified the Claimant via letter that because of his actions he had forfeited seniority.

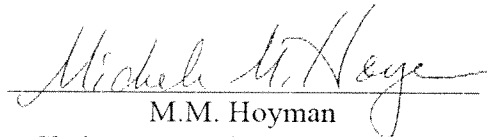
The Carrier argues that as a minor dispute the Organization has the burden of proof to establish substantial evidence that the Claimant did not violate Rule 38 (see Carrier Brief, page 6). It is the Carrier's position that there is no "good and sufficient reason" (as required by Rule 38) for the Claimant to have failed to have reported to work within 10 days of receiving his letter. All evidence cited by the Organization is mere assertion and does not rise to the level of substantial evidence (see Carrier Brief, page 7). The Carrier also argues that it gave Claimant an additional five days to complete these tasks when the Claimant contacted the Manager Administrative Services department (see Carrier Brief, page 10). Additionally, the medical facility's records refute the Claimant's statement that the Carrier had made an appointment for him which he was unaware of until he missed it due to having to pickup his paperwork (see Carrier Brief, page 12).

The Organization argues that the Carrier has mischaracterized the Claimant's justifications and that he was proactive about returning to work and would have done so within 10 days in accordance with Rule 38 except for delays caused by the Carrier (see Organization Brief, page 6). The Organization further contends that Rule 38 states that an employee has 10 days to return to service and imposes no additional requirements (such as the return to work physical). Additionally, Rule 38 provides that an employee may take longer than 10 days for "good and sufficient cause" and the Organization argues the Carrier's required physical fits this clause, especially when the Claimant's appointment was delayed to a time outside the 10 day window (see Organization Brief, page 11).

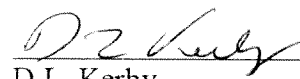
The Board finds the Carrier was correct in determining that the Claimant had forfeited his seniority in accordance with Rule 38. Rule 38 is clear that after receiving notice to return to work the Claimant had ten days to report to the assigned work site or he would forfeit his seniority rights. Given that the Claimant was obviously aware of this, he had some level of personal responsibility to inquire with the Carrier or the medical facility conducting the physical, when his appointment was delayed to a date outside the ten day period. If he had done so, he would have learned that no appointment or paperwork was needed and he could have completed the required physical at any time. Concurrently, the Board finds there are some mitigating factors in this case. First, the

January 5 letter, in violation of Rule 38, only gave the Claimant 6 days to report to work on January 11 (see Carrier Brief, Exhibit A, page 16). Due to this, the Carrier itself acknowledged the possibility of logistical issues (see Carrier Brief, page 10) and in fact argues that due to those issues it gave the Claimant an additional five days to return to work. Second, as the Organization's order of events shows (we do not find a refutation of them in the record), the Claimant did make a good faith effort to keep the Carrier informed of his status (see Organization Brief, page 5). As such, on balance we find the forfeiture of all seniority is unwarranted. The Claimant is reinstated, but shall not be awarded back pay.

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.