

**BEFORE PUBLIC LAW BOARD NO. 1837**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**And**

**NORFOLK & WESTERN RAILWAY COMPANY**

**Case No. 127**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood that:

1. The dismissal of Trackman R. E. Phipps for allegedly failing to protect his assignment on February 1, 2, and 22, 1999, and excessive absenteeism in 1998 was without just and sufficient cause, based on unproven charges, in violation of the Agreement, and arbitrary (System File MW-FTW-99-01-LM-22).
2. Trackman R. E. Phipps shall now be reinstated to service with seniority and all other rights unimpaired and compensated for all wage loss suffered.

**FINDINGS:**

Claimant R. E. Phipps was employed by the Carrier as a trackman at the time of this claim.

On February 26, 1999, the Carrier notified the Claimant to appear for a formal investigation to determine his responsibility, if any, in connection with his failing to protect his job assignment on February 1, 2, and 22, 1999, and excessive absenteeism in that he was absent from work forty-two days between February 8, 1998, and December 30, 1998.

The hearing took place on March 5, 1999. On April 5, 1999, the Carrier notified the Claimant that he had been found guilty of all charges and was being assessed

discipline of dismissal from the service of the Carrier.

The Organization filed a claim on behalf of the Claimant, arguing that the Carrier's actions were arbitrary, unjust, and in violation of the parties' agreement. The Organization maintains that the Carrier's letter of charge was vague, non-specific, and failed to identify the alleged days the Claimant was absent between February 8, 1998, and December 30, 1998. The Organization argues that the letter of charge did not afford the Claimant nor the Organization sufficient information to address the allegations or prepare a reasonable defense. The Organization asserts that the Carrier even admitted that three of the days in question were for authorized bereavement leave and numerous other days in contention were clearly shown on the payroll as excused absences, which is clearly in conflict with the Carrier's allegations. The Organization also maintains that the Claimant has a history of physical problems and his wife is disabled requiring constant care, which are two situations that contributed to the Claimant's absences during 1998. Therefore, the Organization argues that the assessment of any discipline based on the allegations from February 8, 1998, to December 30, 1998, are unjust. The Organization claims that the Carrier merely cited as many days as possible without establishing whether or not the absences were authorized or not. The Organization also contends that the Claimant did not fail to protect his job assignment on February 1 and 2, 1999. The Organization maintains that the Claimant was on authorized sick leave on those dates and was not released to return to work by the Carrier's medical department until February 10, 1999. The Organization argues that the Claimant was not the incumbent of any position, nor was he eligible for compensation from the Carrier for February 1 and 2, 1999, and,

therefore, had no position to protect. The Organization also contends that the Claimant inadvertently was absent on February 22 because he believed that a holiday extended his vacation to include February 22, 1999. The Organization asserts that that was no more than an honest misunderstanding concerning vacation eligibility which sometimes occurs and generally does not result in disciplinary action being taken against an individual. The Organization argues that the assessment of dismissal upon the Claimant as a remedy for the alleged violations is excessive and clearly an abuse of the Carrier's discretion, in violation of Rules 22-(A) and (E).

The Carrier denied the claim. The Carrier argues that the Claimant was properly notified and afforded a fair and impartial investigation. The Carrier contends that the notice of charges set forth the sufficient information for the Claimant to defend himself and clearly set forth the matter under investigation. The Carrier maintains that the Claimant failed to report for his return-to-duty physical on February 1 and 2, 1999, after being instructed to do so; was absent without permission on February 22, 1999; and was excessively absent from his assignment from February to December 1998, which accounts for approximately 21 percent of the workdays in 1998. The Carrier maintains that the Claimant admitted that he was absent from *work* for "quite a many days." The Carrier argues that the Claimant has a history of not protecting his job assignment, which was supported by the evidence presented in the investigation. The Carrier argues that the Claimant displayed an unwillingness to become a productive employee. The Carrier asserts that the Claimant does not deny his excessive absenteeism but simply raises feeble excuses for his poor attendance record. The Carrier contends that the Claimant has

demonstrated a cavalier attitude towards the performance of his duties for the Carrier on a regular and consistent basis and the discipline assessed was warranted.

The parties being unable to resolve the issues, this matter comes before this Board.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit.

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 failing to protect his assignment on February 1, 2, and 22, 1999, and was excessively absent for forty-days between February 8, 1998, and December 30, 1998. Consequently, the Carrier has proven that the Claimant was guilty of excessive absenteeism and failing to protect his assignment. This Board rejects the Claimant's many excuses and finds that the Carrier has properly documented the wrongdoing on the part of the Claimant.

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 action to have been unreasonable, arbitrary, or capricious.

The record reveals that after many verbal and written warnings from supervisors, the Claimant has failed to correct his unsatisfactory attendance record. The Claimant was reinstated to service by a Public Law Board on January 27, 1998, after previously forfeiting his seniority for his failure to report to work. One would think that after that

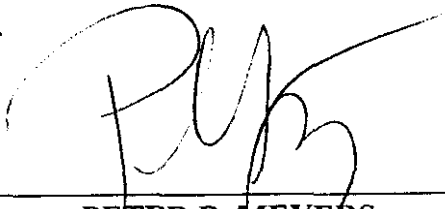
type of action on the part of the Carrier, the Claimant would improve his record.

However, the Claimant continued to exhibit poor attendance and was absent for the forty-two work days during the balance of 1998.

This Board finds that the Carrier has a right to expect better attendance on the part of its employees. This Claimant was clearly guilty of excessive absenteeism and failing to protect his assignment. Given his previous history, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated his employment. Therefore, the claim will be denied.

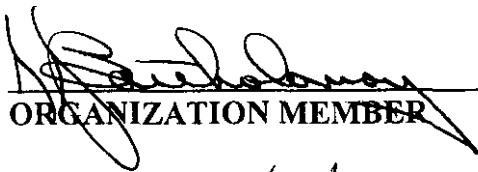
**AWARD:**

The claim is denied.

  
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**PETER R. MEYERS**  
Neutral Member

  
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CARRIER MEMBER

D A T E D : 5/18/01

  
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ORGANIZATION MEMBER

D A T E D : 5/18/01