

PUBLIC LAW BOARD NO. 6394

AWARD NO. 32

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of T. G. Heiney for reinstatement with seniority, vacation and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on January 4, 2007, in connection with his conduct unbecoming an employee in setting fire to a private residence on June 27, 2005, and pleading guilty in court to first degree felony arson and five counts of misdemeanor cruelty to animals on November 13, 2006.

(Carrier File MW-HARR-06-14-LM-235)

Upon the whole record and all the evidence, after hearing, the Board finds that 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.

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 June 27, 2005, Claimant entered the house in which his estranged wife was living. He let his favorite dog out of the house and then set fire to the house, destroying it and killing the two dogs and three cats that remained. Claimant was arrested and incarcerated until April 10, 2006, when he posted bail. On June 15, 2006, Carrier notified Claimant to report for an investigation on July 13, 2006, concerning alleged conduct unbecoming an employee in that he set fire to a private residence on June 27, 2005. The Organization requested a postponement until after Claimant's criminal proceedings were resolved.

On November 13, 2007, Claimant pled guilty to one count of felony arson and endangerment and five counts of cruelty to animals and was sentenced to one to two years in prison with credit for time served. On December 5, 2006, Carrier noticed Claimant for an investigation on December 18, 2006, on a charge of conduct unbecoming an employee in connection with his guilty plea and conviction. The record reflects that Carrier learned of the guilty plea and sentence on November 20, 2006.

There is no question that Carrier proved the charge in the December 5 notice of investigation by substantial evidence. Claimant's conviction for such wanton and vicious conduct to which he admitted with his guilty plea rendered him unsuitable to be an employee and his prison sentence rendered him incapable of providing service. There is no question that the penalty of dismissal was appropriate. More problematic is the charge contained in the June 15, 2006 notice of investigation.

The System Discipline Rule provides, in relevant part, "The investigation shall be held within 30 days of

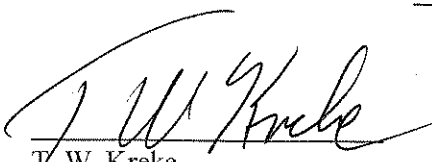
first knowledge of the offense." The offense with which Claimant was charged in the June 15, 2006, notice stemmed from an incident that took place on June 27, 2005. Carrier maintained that its first knowledge of the offense came in June 2006. The Division Office Manager testified that his first knowledge occurred in June 2006. Claimant's Representative then asked the Division Office Manager, "But the supervisor at Allentown, being the carrier official and responsible authority under whose jurisdiction Mr. Heiney worked was aware as to what and where Mr. Heiney was in June and July of 2005, would that not be correct?" The Division Office Manager responded, "That I can't answer to. I do not know when Mr. Winters was made aware of the situation or if he was aware of the situation."

Claimant's Representative then asked the Hearing Officer to produce the Allentown Track Supervisor for questioning concerning his first knowledge of the situation. The Hearing Officer denied the request on the grounds that the Track Supervisor was two and one-half hours away and would not have knowledge pertinent to the charges. The Hearing Officer was plainly wrong. Without the Allentown Track Supervisor's testimony, it is impossible to determine when Carrier had first knowledge of the offense. Under these circumstances, this Board has no choice but to rely on the date of the offense as stated in the notice and hold that the notice was not timely and violated the System Discipline Rule.

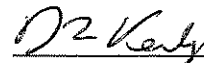
The remaining issue is the appropriate remedy. Claimant's dismissal based on the timely December 5, 2006, notice, as discussed above, clearly was proper. Thus, Claimant is not entitled to reinstatement to service. Claimant is entitled to pay for time lost as a result of the untimely June 15, 2006, notice of charges. However, as observed above, although the hearing was originally scheduled for July 13, 2006, it was postponed at the Organization's request to allow Claimant to resolve the criminal charges pending against him. Under these circumstances, we hold it would be inequitable to award Claimant pay for time lost beyond the original date set for the hearing. Accordingly, the claim will be sustained but only to the extent that Carrier shall pay Claimant for all time lost between June 15, 2006, and July 13, 2006. In all other respects, the claim is denied.



M. H. Malin
Chairman and Neutral Member



J. W. Kreke
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on February 5, 2008