

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
DIVISION - IBT RAIL CONFERENCE)	Case No. 44
and)	
)	Award No. 44
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
NORFOLK & WESTERN RAILWAY COMPANY))	
)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. L. Kerby, Carrier Member

Hearing Date: February 25, 2010

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

1. The discipline (dismissal) imposed by letter dated September 17, 2009 upon Mr. K. Swanigan for alleged violation of Company rules and policies in connection with charges of conduct unbecoming a Norfolk Southern employee and neglect of duties as a machine operator on August 12, 2009 at approximately 1:35 P. M. was arbitrary, unjust and based upon unproven charges in violation of the Agreement (Carrier's File MW-DEAR-09-72-LM-385).
2. As a consequence of the violation referred to in Part 1 above, Mr. K. Swanigan shall be immediately reinstated with all rights and benefits unimpaired and compensated for any and all straight time and/or overtime hours lost beginning August 12, 2009 until such time as the Claimant is fully reinstated."

Upon the whole record and all of 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 that this Board is duly constituted by agreement 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 a 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 August 12, 2009 Claimant was operating a front end loader as part of his normal work assignment. His initial assignment on that date was to go to Gary, IN and load a dumpster. The

Track Supervisor testified at the investigation that later that morning he learned that there was a problem having the dumpster delivered and he told another employee to send Claimant back to Van Loon. At approximately 10:45 the Track Supervisor met with Claimant at Van Loon and assigned him to clean up a rubble pile and to be ready to assist the smoothing gang at Van Loon when they obtained track time. The smoothing gang was not expected to obtain track time until after a geometry car passed through the Van Loon Area.. The Track Supervisor then related that he left Claimant and traveled to Hobart, IN where he boarded the geometry car along with the Division Engineer, Assistant Division Engineer and a Bridge Supervisor for its trip to the Van Loon area.

Two of Claimant's co-workers, the Smoothing Gang Foreman and Foreman Operator testified that they observed Claimant staying busy thereafter. The Smoothing Gang Foreman further testified that at 1:15 (all time noted refers to track time) Claimant had a conversation with him and said that he had not yet had lunch and then drove away in the loader.

The Assistant Division Engineer testified that as the geometry car approached Calvin Road east of Van Loon it was noted that the switch stands needed walkway stone filled in around the head blocks. The Track Supervisor related that at 1:28 P.M. he attempted to raise Claimant three times on the radio to attend to placing stone there, but that Claimant did not respond to the radio calls. The track supervisor further related that because he knew that the front end loader was assigned to be in that area and because he was unable to raise Claimant on the radio, he began looking for the front end loader as the geometry car slowed for a signal. The Track Supervisor testified that shortly thereafter he did see the front end loader and observed Claimant reclined in the loader in a slouched position with his chin resting on his chest, motionless, with dark glasses covering his eyes. The Track Supervisor testified that at that point he remarked to the others on the geometry car 'well, there is' Claimant 'no wonder he didn't answer' because he was in a slouched position. The Track Supervisor then recalled that everyone on the geometry car observed Claimant and that the Division Engineer then instructed the Assistant Division Engineer to stop the train and further that the Assistant Division Engineer and the Track Supervisor were to then disembark and take Claimant out of service.

The record reveals that the two men disembarked from the work train approximately 600 feet from where the front end loader was located and began to walk towards it. The Assistant Division Engineer recalled that when they were within approximately 150 feet of the loader, one of Claimant's co-workers approached the loader and aroused the Claimant who then started the loader and drove it in the direction that they were approaching from. The Assistant Division Engineer related that he signaled Claimant to shut the loader down and asked him why he was sitting there sleeping and that Claimant responded that he was not sleeping. The Assistant Division Engineer then removed Claimant from service. Subsequently, an investigation into the matter was held on September 2, 2009 and by letter dated September 17, 2009 Claimant was notified of his dismissal from service.

Normally, being caught sleeping on the job during working hours is cause for dismissal. Moreover, this Board is left with little choice but to find, based on the record before us, that the Claimant was culpable of the charged misconduct in that he was directly observed by the Division Engineer, the Assistant Division Engineer, a Bridge Supervisor and the Supervisor of the Track

Department lying motionless with his chin on his chest in a recumbent position with his eyes covered, albeit with Carrier- issued dark glasses, in his end loader with the engine off during working hours. And while Claimant tries to explain this away by contending he was on lunch break, it is clear from the record that his immediate supervisor had made clear to him that in the event that he was going to take his break outside the normal lunch hour, he was required to notify the Track Supervisor beforehand. Thus, we find that the Carrier proved the charge against Claimant by substantial evidence.

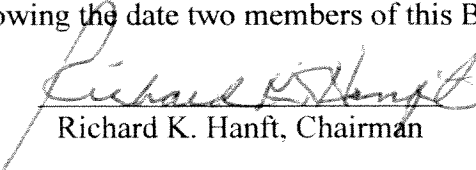
However, proof of culpability is but one of the standards of review examined by this Board in discipline cases. Also germane is whether the discipline imposed was arbitrary, capricious, or unreasonably harsh given the facts and circumstances of a particular violation of the rules and whether Claimant was afforded all of the elements of due process mandated in the collective bargaining agreement, including a full and fair investigation with due notice of charges, the Claimant's opportunity to defend and adequate representation. In that respect, the Board finds that in the instant case, Claimant was not.


The decision to take Claimant out of service before any explanation of his conduct could be offered, Carrier witnesses testified, was made by the Division Engineer who instructed the Assistant Division Engineer and Track Supervisor to disembark the train and go take Claimant out of service. Due process requires that Claimant at least be given the opportunity to defend or explain before any disciplinary decision be rendered.


Of even greater concern was the conduct of the hearing officer presiding over the formal investigation. The record makes clear that the hearing officer, rather than acting as an impartial, objective finder of fact instead conducted himself in an adversarial and prosecutorial manner with an obvious pre-conceived bias as to Claimant's guilt. As such, Claimant was denied a fair hearing and the discipline imposed cannot stand.

Hence, Carrier is directed to reinstate Claimant to service with seniority unimpaired but without compensation for time out of service.

Claim sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty days following the date two members of this Board affix their signatures thereto.


Richard K. Hanft, Chairman


D. L. Kerby
Carrier Member


T. W. Kreke
Employee Member

MAY 5, 2010

Dated at Chicago, Illinois, April 12, 2010