

**PUBLIC LAW BOARD NO. 6394**

**AWARD NO. 63**

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 discipline (dismissed from all service with Norfolk Southern Corporation) of Mr. J. Dean, issued by letter dated September 5, 2012 in connection with his alleged failure to protect his assignment and to follow instructions in that he was absent from his assignment without permission or authorization from proper authority on August 7, 2012, despite having been previously counseled and instructed previously concerning his attendance, was arbitrary, unreasonable, excessive and in violation of the Agreement (System File MW-DEAR-12-39-LM-293).
2. As a consequence of the violation referred to in Part 1 above, Mr. Dean shall receive the remedy prescribed under Rule 30(d) of the Agreement."

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 January 12, 2009 as a Trackman. Prior to the events which led to this case, the Claimant has received counseling multiple times for being tardy or absent. These counseling sessions stressed the need for prompt attendance for all scheduled shifts, the need to request supervisor permission to be absent, and warned that further problems in this area could lead to disciplinary action. On August 7, 2012 the Claimant had a shift which started at 7:00AM. The Claimant was not present for the start of his shift, but sent a text message to his supervisor at 7:02AM stating he would be absent that day. The Claimant did not secure approval for this absence from a

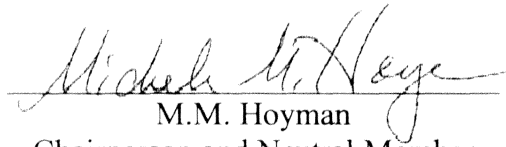
supervisor. Due to this event, the Claimant was charged with a failure to protect his job assignment and failure to follow supervisor instructions. The Carrier conducted an investigation including a hearing on August 29, 2012. The Carrier found the Claimant guilty and dismissed him from service via letter on September 5, 2012.

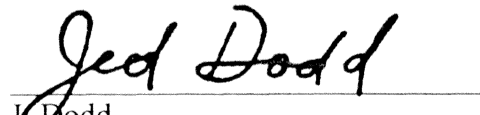
The Carrier argues that the Claimant is clearly guilty of violating General Rule GR-6, requiring that employees “not absent themselves from duty...without proper authority” (see Carrier Brief, page 6). The Carrier points out testimony from the Claimant’s supervisor that he was specifically counseled previously concerning the need to request approval to be absent before the start of a work shift. In admitting to being absent on August 7, 2012, the Claimant is therefore also admitting to failure to follow supervisor orders (see Carrier Brief, page 8). In coming to its decision, the Carrier notes that the Claimant has a history of absentee problems. The Claimant’s record reflects multiple letters of counsel for attendance problems on July 30, 2009, June 7, 2010, and October 1, 2010. The Claimant has also been previously subject to progressive discipline via two suspensions for attendance problems on October 7, 2010 and January 6, 2012 (see Carrier Brief, page 5). For all these reasons, the Carrier holds that dismissal in this case was appropriate and warranted.

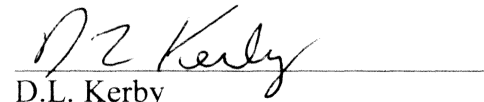
The Organization argues the Claimant was absent on August 7, 2012 due to transportation problems, and he notified the Carrier as soon as possible once he realized he would be unable to get to work. The Organization notes that even if the Claimant failed to notify a supervisor in advance of his shift, he was essentially only 2 minutes “late” in his notification by not sending a text until 7:02AM. The Organization’s characterization of the Claimant’s previous absentee issues is that the letters of counsel were just that – counseling – and should not be considered necessarily as evidence of discipline (see Organization Brief, page 8). It also argues that the Claimant was clearly trying to comply with Carrier policy as he called and notified his supervisor on August 6, 2012 that he might be late to work even though he ended up arriving on time. Additionally, the Organization argues that the Carrier violated the Claimant’s rights by withholding him from service pending the investigation for what it characterizes as a minor event of alleged misconduct. It contends that the Carrier’s allegations of failure to follow supervisor orders were effectively trumped up in order to substantiate the decision to remove the Claimant from service during the investigation. Finally, the Organization’s position is that even if some type of misconduct did occur, dismissal was not appropriate given the level of alleged misconduct.

The Board finds sufficient evidence in the record to support that the Claimant is guilty of violating General Rule GR-6. Although the Board acknowledges the Claimant should have sought permission to be absent on August 7, 2012 before his shift began at 7:00AM, we consider it a mitigating factor that the Claimant texted his supervisor concerning his absence at 7:02AM. Concurrently, we note that simply notifying a supervisor is not enough according to Carrier policy – absences should be preapproved. However, while the Claimant has clearly violated the Carrier’s policies on attendance, the misconduct in this case does not rise to a level which warrants dismissal. The claimant shall be reinstated, but without back pay.

The claim is partially sustained.

  
M.M. Hoyman  
Chairperson and Neutral Member

  
J. Dodd  
Employee Member

  
D.L. Kerby  
Carrier Member

Issued at Chapel Hill, North Carolina on June 20, 2013.