

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	Case No. 109
)	
and)	
)	Award No. 109
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
NORFOLK & WESTERN RAILWAY COMPANY))	

Richard K. Hanft, Chairman and Neutral Member
Scott M. Goodspeed, Carrier Member
Zachary J. Wood, Organization Member

STATEMENT OF THE CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. J. Jones, issued by letter dated June 13, 2018, in connection with his alleged excessive absenteeism and failure to protect his assignment, in that he had been continuously absent from his assignment without permission or authorization from proper authority and without notifying his supervisor of his need to be absent since April 23, 2018 was capricious, excessive, harsh and unwarranted (Carrier’s File MW-BLUE-18-54-BB-231 NWR).
2. As a consequence of the violation referred to in Part 1 above, the Carrier shall immediately reinstate the Claimant with all back pay, rights and privileges (once he is able to exhaust all time needed or allowed under the Family Medical Leave Act) and with seniority unimpaired.”

FINDINGS:

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 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 a precedent in any other case.

After thoroughly reviewing and considering the record and the parties’ presentations. The Board finds that the claim should be disposed of as follows:

It is undisputed that the Claimant in this matter was approved for intermittent Family Medical Leave Act (“FMLA”) leave for personal or family member illness granting Claimant two (2) instances of leave per month with each instance not to exceed five (5) days per occurrence.

The Charging Officer in this matter testified at a formal investigation held on May 29, 2018 that Claimant contacted the Supervisory Control and Date Acquisition office to mark off for FMLA leave on April 17, 2018 for Claimant’s second authorized leave for the month of April, 2018.

When, on April 24, 2018, Carrier's General Foreman contacted Claimant to advise him that his second instance of FMLA leave had exceeded its five-day limitation and that he was expected to return to service Claimant responded that he was aware that he was out of approved leave but needed to get additional paperwork from his doctor. Claimant was not heard from since April 24, 2018.

Thereafter, the Charging Officer related, several of Claimant's co-workers reported to management that Claimant was working at another job. Management contacted Virginia International Gateway's Human Resources Department and received confirmation that Claimant was in fact fully employed at the other company.

After an investigation to determine Claimant's responsibility, if any, for excessive absenteeism and failure to protect his assignment, Carrier advised Claimant by letter dated June 13, 2018 that as a result of being found guilty of the two rule violations he was dismissed from service.

The Organization filed a claim on Claimant's behalf and after being progressed on the property in the usual manner up to and including discussion in conference, this claim remains declined and is now properly before this Board for final adjudication.

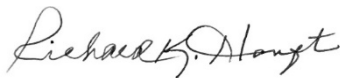
The Organization argues that the Carrier failed to provide a fair and impartial investigation and failed to meet its burden of proof in this matter. Further, the Organization avers that the discipline of dismissal assessed was arbitrary and unwarranted.

The Board has reviewed the record in this matter and find the Organization's arguments concerning procedural due process to be without merit.

Turning to the merits of the claim, there is ample evidence on this record that Claimant was working for Virginia International Gateway during the time he was away from work for the Carrier. Rule 22-Leave of Absence from the July 1, 1986 N & W/Wabash Agreement between Carrier and BMWED provides in relevant part that: "...Employees will not be allowed to enter into other business while on leave of absence, except in accordance with Rules and Regulations for the Government of the Operating Department. Should they enter other business without special permission, they will lose their former rights."

Inasmuch as Claimant violated this self-executing rule, the Board cannot say that Carrier failed to meet its burden of proof or that the penalty agreed to by the parties is excessive or arbitrary.

Award:
Claim denied.



Richard K. Hanft, Chairman



Scott M. Goodspeed, Carrier Member

Dated at Chicago, Illinois, October 20, 2022.



Zachary J. Wood, Employee Member