

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	Case No. 114
)	
and)	
)	Award No. 114
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. W. Kloboves, issued by letter dated February 18, 2020, in connection with his alleged failure to follow instructions and DOT regulation in that on multiple occasions the Claimant failed to properly maintain a driver’s log book beginning on January 2, 2019; alleged conduct unbecoming an employee in that the Claimant submitted payroll information for overtime service that he was unauthorized to perform on numerous occasions beginning on January 2, 2019; and alleged conduct unbecoming an employee in that the Claimant submitted payroll information for meal and mileage expenses that were unauthorized to claim on numerous occasions beginning on January 2, 2019 was capricious, excessive, harsh and unwarranted (Carrier’s File MW-PITT-20-03-LM-037 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant Kloboves shall now be returned to service and made whole for all hours lost including all credits and benefits due in his absence.”

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:

This matter involves a Claimant who established and maintains seniority in the Carrier’s Maintenance of Way and Structures Department in the Alliance, Ohio area. Claimant, at the time giving rise to this dispute was employed as a Commercial Vehicle Operator and has been in Carrier’s service for about ten years.

On January 10, 2020 the Division Engineer, Pittsburgh had reason to review Claimant's payroll and Hours of Service records for the prior year. After thorough review and research the Division Engineer charged Claimant with failure to follow instructions and DOT regulations on multiple occasions when he failed to maintain a driver's log book beginning on January 2, 2019; conduct unbecoming an employee in that he submitted payroll information for overtime service that he was unauthorized to perform on numerous occasions beginning on January 2, 2019; and, conduct unbecoming an employee in that he submitted payroll information for meal and mileage expenses that he was unauthorized to claim on numerous occasions beginning on January 2, 2019.

With regard to the first charge leveled concerning the Claimant's failure to maintain a driver's log, a thorough review of the record fails to show that Claimant did not follow instructions or was in violation of DOT regulations. The Claimant testified without rebuttal that the Electronic Logging Device ("ELD") on Carrier's truck worked intermittently at best, but that he used it as best as he could, that it was unreliable and for trips of less than 100 Air miles, according to DOT regulations, he was not required to keep a paper logbook and didn't if his trips were less than 100 miles. Claimant further testified that when he went over one hundred air miles that he maintained a paper logbook, that is in the truck, if the ELD was not properly functioning. The Carrier did not provide evidence to refute Claimant's testimony. Carrier, with regard to this charge, failed to meet its burden of proof.

Concerning the second charge, that Claimant engaged in conduct unbecoming an employee because he submitted payroll information for overtime service that he was unauthorized to perform on numerous occasions, the Board finds that the record evidence provides that the disputed overtime was indeed authorized and approved by the Track Supervisor for the Canton, Ohio subdivision and that charge cannot stand. The Carrier again failed to meet its burden of proof.

The final charge, that Claimant engaged in conduct unbecoming an employee in that he submitted payroll information for meal and mileage expenses that he was not authorized to claim on numerous occasions beginning on January 2, 2019 was clearly and convincingly proven. Claimant admitted to submitting false mileage and unearned meal reimbursement charges on this record.

Claimant, the record shows, was only eligible for mileage and meal reimbursement on days that he was unable to return to his headquarters and was staying in company provided lodging. Those conditions only happened on three (3) occasions in 2019. Nevertheless, Claimant submitted and was compensated for \$69.60 in mileage and \$42.06 in meals, totaling \$112.66 per day on 260 days in 2019. Here, the undisputed evidence proved the charge against the Claimant.

Turning now to the Organization's procedural due process complaints, the Organization submits that the Carrier violated Rule 30 of the Parties' agreement because the Carrier failed to hold the investigation within thirty (30) days of Carrier's first knowledge of the offense, because the Claimant was improperly withheld from service prior to the investigation and finally, that the Carrier failed to timely disallow the Organization's appeal within the explicit thirty (30) day time limit outlined in Rule 30 of the Agreement.

With regard to the first alleged Rule violation, the Board finds that the charges were filed within thirty days of the Division Engineer's first knowledge of the circumstances leading to the charges being filed. The Division Engineer, who was the Charging Officer in this matter testified that the information upon which the charges were based, did not come to his attention until January 10, 2020 after which he began combing through the records. The investigation was held on February 6, 2020 and that date is within the contractual time limit.

Concerning the Organization's complaint that Claimant was held out of service prior to the investigation, the Board finds that the allegations set forth in the charge letter constitutes a major violation and that it was within Carrier's discretion to take Claimant out of service pending an investigation.

Lastly, the Organization contends that the claim must be allowed as presented because the Carrier failed to comply with Rule 30(g) when it failed to disallow the Organization's appeal within thirty (30) days from the date the appeal was filed.

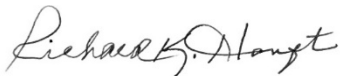
The Board finds that since Claimant acknowledged responsibility with respect to the third charged offense at the investigation and based on the facts and circumstances of this particular case, while there was a technical violation of Rule 30(g), no prejudice was found to the outcome of this case.

The Board finds that since only one of the three charges against the Claimant was proven, and where, as here, the quantum of discipline is bottomed on a finding of guilt on more than one of the charges, guilt on each of those charges must be proven because Carrier, it must be assumed, would not have found that level of discipline appropriate but for the guilt found on each charge.

Claimant shall be reinstated without compensation for time out of service.

Award:

Claim sustained in part and denied in part. The Carrier is directed to comply with this Award on or before thirty (30) days following the Award date below.



Richard K. Hanft, Chairman



Scott M. Goodspeed, Carrier Member



Zachary J. Wood, Employee Member

Dated at Chicago, Illinois, October 20, 2022