

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	Case No. 119
)	
and)	
)	Award No. 119
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. B. Hunter, issued by letter dated September 18, 2020, in connection with his alleged conduct unbecoming a Norfolk Southern employee and for alleged improper performance of duty on August 3, 2020 was capricious, excessive, harsh and unwarranted (Carrier’s File MW-BLUE 20-109-LM-700 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant B. Hunter shall now be immediately reinstated with all back pay, rights and privileges and that all charges be expunged from his record. Additionally, all days that the Claimant continues to be withheld from service shall count toward his qualification time for vacation, holiday and retirement purposes.”

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:

Claimant in this matter entered service with the Carrier on December 19, 2011 and was promoted to the position of Machine Operator in 2012. On July 2, 2014 Claimant agreed to a Waiver that states in relevant part that B. E. Hunter, waived his right to a formal investigation in connection with improper performance of duty in that he failed to correctly control the ballast regulator he was operating and in consideration of accepting his responsibility agreed to be permanently disqualified as a ballast regulator operator. That Waiver, however, also provided that “This discipline will not become a permanent part of my Career Service record.”

In July, 2020 Claimant was employed as a Trackman and was displaced by a more senior employee. Claimant contacted the Atlanta Personnel Office and he was sent an e-mail listing the displacement positions that were available to him. One such displacement that was available to him was running the ballast regulator at Buena Vista, Virginia and since that was close to Claimant's home, that was the displacement Claimant chose to accept despite the permanent disqualification set forth in the July 2, 2014 waiver.

According to Charging Officer's testimony, Claimant contacted him on Thursday July 30, 2020 and advised the supervisor that he was going to be displacing the gang's current ballast regulator operator on Monday August 3, 2020.

Claimant reported for duty on Monday, August 3, 2020 at 7:00 AM. He testified that he and the Charging Officer did a walk-around inspection of the machine and then Claimant got up on the machine. Claimant testified that he looked at everything and tried to familiarize himself with the controls and then started the machine up. The Claimant's supervisor testified that the Claimant then went to move the machine, but the plow was down so the supervisor signaled the Claimant to stop. The machine, the supervisor recalled, was moving backwards and when he signaled the Claimant to stop, Claimant put the machine into forward and collided with the Mark III Tamper. Claimant recounted that he got off the machine and sat to the side. He testified that the supervisor gave him a piece of paper and he wrote out a statement and he and the supervisor went to the office where he gave a urine sample and was taken out of service.

On August 7, 2020 Claimant was summoned to an investigation to determine his responsibility, if any, for conduct unbecoming an employee for exercising displacement rights to and operating a ballast regulator despite having been permanently disqualified on ballast regulators; and improper performance of duty for failing to maintain proper control of the machine in order to stop within half the range of vision.

An investigation was convened on September 2, 2020 and by letter dated September 28, 2020 Claimant was dismissed from service. The Carrier appealed the Carrier's decision to dismiss the Claimant and the Claim for relief was progressed on the property in the customary manner without reaching accord and is now properly before this Board for final adjudication.

The Organization first maintains that the Hearing Officer and Carrier failed in its obligation to provide the Claimant his contractual due process rights to a fair and impartial hearing.

The Organization points to a disagreement between the Hearing Officer and Claimant's representative when the Hearing Officer stated that the investigation would be conducted in an orderly and impartial manner. The Organization contends that the Agreement sets forth that an investigation shall be conducted in a "fair and impartial" manner and that the words fair and orderly are not synonymous.

Our review of the transcript of the Investigation finds that the disagreement was not whether fair and orderly are synonyms but whether impartial and fair mean the same thing. Upon further review of that transcript, the Board cannot find that the Carrier did not provide Claimant and the Organization a fair and impartial investigation.

The Organization further asserts that Carrier failed to meet its burden of proof that Claimant was guilty of conduct unbecoming an employee by exercising his displacement rights onto a ballast regulator, when it improperly relied on the July 2, 2014 waiver wherein Claimant acknowledged his permanent disqualification as a ballast regulator operator, but in the very next sentence states that the discipline will not become a part of Claimant's Career Service record.

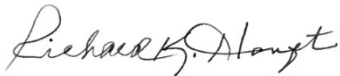
The Board has reviewed all of the evidence submitted in this dispute and has given particular attention to the waiver Claimant agreed to in 2014. The waiver clearly states in unequivocal language that Claimant is permanently disqualified as a ballast regulator operator. The Board finds that while an employee exercising his right to displacement rights does not

constitute conduct unbecoming an employee that here the Claimant knew that he agreed in his waiver of July, 2014 that he was permanently disqualified as a ballast regulator operator. As such, his displacement into that position was barred by his previous agreement with the Carrier and was therefore in breach of his agreement with the Carrier.

The Board, after thorough review of the record, determines that Claimant shall be reinstated to service without back pay for time out of service and with forfeiture of all of his machinery operator's seniority. Going forward, if Claimant wishes to requalify as a machine operator, he must requalify on equipment consistent with his prior agreement not to operate a ballast regulator.

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