

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	Case No. 123
)	
and)	
)	Award No. 123
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
NORFOLK & WESTERN RAILWAY COMPANY))	

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

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

1. The Carrier’s discipline (dismissal) of Mr. R. Waller, Jr., by letter dated October 16, 2020, in connection with his alleged failure to comply with the Carrier’s policy on Alcohol and Drugs and failure to comply and cooperate with his recommended treatment, when he allegedly tested positive for prohibited substances in a follow up drug screen conducted on May 26, 2020 and his alleged continued noncompliance and lack of required communication with his EAP representative was capricious, excessive, harsh and unwarranted (Carrier’s File MW-BLUE-20-106-LM-689 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Waller, Jr. shall now be reinstated and be cleared of the unsubstantial charges, with all rights and back pay.”

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 tested positive for a prohibited substance on a random drug test in October 2018. He was removed from service and subsequently enrolled in Carrier’s DARS program. He underwent an evaluation and entered treatment. After treatment, he was assigned an EAP therapist that he reported to weekly. Admitted to

the record was a September 2019 letter from the therapist to the claimant setting forth Claimant's rehabilitation plan. The EAP testified that Claimant thereafter had a relapse found through a random follow up test.

Claimant again tested positive for a prohibited substance on May 26, 2020. Treatment was again recommended, but Claimant refused because, the therapist testified, he said he was working another job. The Therapist testified that she explained that the only route back to work at Norfolk Southern was to complete the program and Claimant agreed to do so. Claimant needed to submit a Covid test to enter the treatment facility. He did not appear with Covid test results and the therapist testified that she never heard from Claimant again and that he never reported to the treatment center.

On July 13, 2020 Claimant was sent a letter from the Manager of the EAP stating in relevant part that because of Claimant's "positive follow up drug test on May 26, 2020, your lack of following instructions, continuing non-compliance and lack of required communication with your EAP Rep, we are dismissing you from the DARS program."

An investigation was held on September 30, 2020 to determine Claimant's responsibility, if any, with: "Failure to comply with the Carrier's Policy on Alcohol and Drugs and failure to comply and cooperate with your recommended treatment, when you tested positive for prohibited substances in a follow up drug screen conducted on May 26, 2020, and your continued noncompliance and lack of required communication with your EAP representative."

Claimant did not attend the Investigation, but he was represented by the Organization. Based on the evidence brought forth at the Investigation the Claimant was dismissed from service by letter dated November 27, 2020.

An appeal was progressed on the property in the customary manner without reaching accord and is now properly before this Board for final adjudication.

The Organization asserts that Claimant was denied his procedural due process rights under the Agreement because the Carrier failed to provide Claimant with a fair and impartial hearing by neglecting to properly communicate with the Claimant relative to his hearing.

The record evidence shows a receipt of proof of delivery of the notification of the time, date and location of the investigation and setting forth the charges that were to be investigated. Said notification was delivered to Claimant's address on file with the Carrier at 2:32 PM on August 2, 2020 and left with a person at that address.

The Board finds the Organization's procedural due process complaint to be without merit.

The Organization further asserts that the Carrier failed to meet its burden of proof. The Board finds that Carrier proved by substantial evidence that Claimant failed to comply with Carrier's policy to keep free from prohibited substances as evidenced by Claimant's drug test results of May 26, 2020, failed to comply with the EAP's recommended treatment and failure to comply with the required communication with Claimant's EAP representative as evidenced by the representative's testimony.

Lastly, the Organization argues that the discipline assessed in this matter was arbitrary and unwarranted and that Claimant should have been allowed the opportunity

to complete DARS so that Claimant could have demonstrated that he was a valuable employee. The Board points out that after Claimant's last relapse in May 2020, the EAP representative was bending over backwards to get Claimant back into a treatment center, but Claimant ceased communication with the EAP Representative. DARS had no choice but to sever him from the program given Claimant's failure to cooperate in trying to get treatment.

Given the evidence on this record, the Board can find no reason to disturb the discipline assessed on the property.

AWARD:

Claim Denied.



Richard K. Hanft, Chairman



Scott M. Goodspeed, Carrier Member



Zachary J. Wood, Employee Member

Dated at Chicago, Illinois, October 20, 2022