

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	Case No. 133
)	
and)	
)	Award No. 133
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
NORFOLK & WESTERN RAILWAY COMPANY))	

Richard K. Hanft, Chairman and Neutral Member
Scott M. Goodspeed, Carrier Member
Adam N. Gilmour, Organization Member

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

1. The Carrier’s discipline (dismissal) of Mr. H. Johnson, III, by letter dated June 3, 2021, in connection with his alleged failure to comply with the DARS program as most recently outlined in his DARS therapy letter dated March 20, 2020 and/or marking off under false pretenses when he allegedly remained off from work sick but failed to comply with the requirements of the DARS program was capricious, excessive, harsh and unwarranted (Carrier’s File MW-BLUE-21-09-SG-195 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant H. Johnson, III shall now be reinstated to service immediately, striking this offence from his record and be made whole for all losses incurred, 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:

There is no dispute that on January 28, 2020 Claimant tested positive for prohibited substances in his blood stream and thereafter enrolled in Carrier’s Drug and Alcohol Rehabilitation Services (“DARS”) program and was sent to an intensive outpatient treatment and issued a DARS letter upon completion of the Outpatient Treatment on March 20, 2020.

It is further undisputed that on September 16, 2020 Claimant provided an in-program collection that was positive for prohibited substances.

The record reveals that following Claimant's positive drug test on September 16, 2020, numerous attempts were made by Claimant's Employee Assistance Program ("EAP") counselor to contact him to no avail. A letter was sent to Claimant on October 20, 2020 instructing Claimant to contact his EAP Representative by November 4, 2020. Claimant failed to do so. Because of Claimant's failure to contact the EAP for five (5) months following his second failed drug screen, Claimant was removed from the DARS program on February 3, 2021.

On February 24, 2021, Carrier Supervision was notified of Claimant's removal from the DARS Program due to non-compliance with the program by the Manager of the EAP. By Letter dated March 9, 2021 Claimant was directed to report for a formal investigation concerning his responsibility, if any, in failure to comply with the DARS Program as outlined in his DARS therapy letter and/or marking off under false pretenses.

A formal Investigation was held on May 17, 2021 but the Claimant did not attend. The Organization objected at the Investigation that it was being held while Claimant was not present.

The Carrier argues that the system discipline rule provides: "If a charged employee fails to attend the duly scheduled investigation, without having provided evidence of good cause for such failure to attend, the Carrier may proceed with the investigation in absentia and such proceeding in absentia shall not constitute the basis for any claim with respect to such employee's right to contractual due process."

Thus, the Carrier contends, the Organization's due process objection based on the failure of Claimant to attend is without merit.

Moreover, the Organization asserts that the Carrier failed to meet its burden of proof because it relied on "second-hand knowledge" or hearsay evidence. Because the Claimant's DARS counselor had separated from service with the Carrier and did not testify at the investigation, the Organization contends that the representative of the DARS program that did testify at the investigation was merely testifying to the record compiled by DARS and had no first-hand knowledge other than the records kept by DARS.

The Carrier replies to the Organization's assertion by pointing to prior Awards on this property holding that "Hearsay and circumstantial evidence is properly admitted into disciplinary investigations, considered and weighed in determining whether the Carrier met its burden of proving its charges..." (See, PLB 6034, Award 7, IBEW vs. N & W[Yost]).

The Organization further avers that Carrier violated the time limit provisions of the System Discipline Rule by failing to hold the investigation within thirty (30) days of the Carrier's first knowledge of the violation, that, the Organization maintains, would have been February 3, 2021.

The Carrier submits that the Carrier officer with authority to administer discipline did not have first knowledge of the potential misconduct until February 24, 2021 when the Chief Engineer Program Maintenance received an e-mail from the Manager of the EAP informing him that Claimant had been removed from the program for non-compliance. The Carrier argues that the letter of charge was dated March 9, 2021 and the initial investigation was scheduled for March 25, 2021 that were both within the time limits set by the System Discipline Rule.

This Board has reviewed and carefully considered all of the Organization's objections and arguments concerning this matter. The Board finds that the Organization's arguments concerning procedural due process violations are without merit.

Further the Board finds that the Claimant's guilt of violating the conditions imposed by his participation in the DARS program to keep his system clear of prohibited substances after his first test showing a Rule G violation was proven by substantial evidence.

Here it was proven that Claimant has failed to comply with the Carrier's drug policy to keep his system clear of prohibited drugs. The discipline of dismissal assessed cannot be considered unreasonable because this is Claimant's second violation of the Carrier's drug policy and Claimant was well aware that non-compliance with his DARS therapy letter would result in dismissal.

For the above-stated reasons, the Board can find no reason to disturb the decision reached on the property and therefore, the claim is denied.

Award:

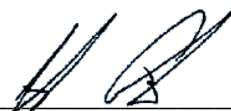
Claim denied.



Richard K. Hanft, Chairman



Scott M. Goodspeed, Carrier Member



Adam N. Gilmour, Employee Member

Dated at Chicago, Illinois, February 1, 2024.