

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	Case No. 135
)	
and)	
)	Award No. 135
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. K. Akers, by letter dated September 27, 2021, in connection with his alleged conduct unbecoming an employe in that he made inappropriate and threatening comments towards a Carrier officer (District Claim Agent) during a phone call and through text messaging with him on August 10, 2021, was capricious, excessive, harsh and unwarranted (Carrier’s File MW-FTW-21-199-LM-665 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant K. Akers shall now be reinstated and be cleared of all charges, with all rights and back pay and vacation unimpaired.”

FINDINGS:

Upon the whole record and all of the evidence, after hearing, the Board finds that the parties herein are carrier and employe 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 had twenty-four (24) years’ service with the Carrier and an unblemished disciplinary record at the time he was dismissed from service.

It is undisputed that Claimant was injured at work in February, 2020 and was off work recovering until September 2020.

According to this record, Claimant entered into a settlement agreement with the Carrier around March 2021 relative to his injury. District Claims Agent Matt Buttgereit was the Claims Agent that handled Claimant’s case.

There was a statement from a witness, John Tucker, read into the record at the investigation stating that he overheard a telephone conversation between Claimant and the Claims Agent in March, 2021 and that the Claims Agent told Claimant that the settlement

agreement was for medical and that he would have to file a claim with his union for his lost wages from the date he went off work until he came back to work.

A statement was entered into the record from the Claims Agent, who was the complainant in this matter but did not attend the investigation, that said in part that he never told Claimant that the release involves the injury only and does not cover the lost wages in contrast to what Claimant and the above-named witness heard the Claims Agent say.

The full statement submitted by the Claims Agent and upon which the charges in this matter are based, is as follows:

“On March 8, 2021, I settled Mr. Akers’ claim for damages arising from his May 15, 2020 injury report. On July 21, 2021 Labor Relations Officer Sean McDowell inquired whether Akers’ settlement included a release of his time claims associated with the May 15, 2020 injury report. On August 6, 2021, I provided a redacted copy of the settlement release. The March 8, 2021 settlement release documented that the settlement included a release of all claims associated with his May 15, 2020 injury report.

Mr. Akers called me on August 10, 2021, however I missed the call. I called him back immediately and he answered. Mr. Akers started off the conversation by asking if his injury claim included his time off from work and I said it did. I explained further that the release he signed included his lost wages, injury, medical, pain and suffering, etc. He called me a “damn liar.” I told him I have never told a claimant that the release involves the injury only and does not cover the lost wages or time off from work. He again called me a liar. At that point, I realized this was not a conversation that I wanted to be involved in and tried to end the phone call. Mr. Akers then said, why don’t you come down here and talk about this in person? To the best of my recollection, I said come down where and why? He said so we can talk in person. Then he offered to meet me halfway. I then said are you threatening me/ He responded No, this is a promise. I told him there is nothing I can do for him, so I ended the phone call.

He then immediately texted me ‘U sir are a damn liar!!’

I feel this is completely inappropriate behavior in the workplace and no one should have to receive phone calls like this. When he requested that I meet at his location, or that we meet halfway, I felt his intentions included violence, my ‘flight’ instinct kicked in, so I hung up and blocked his contact from my phone.”

Another Statement was entered into this record from Josh Webb attesting to the fact that on August 10, 2021 he overheard a conversation that Claimant was having and at no point did Claimant say anything of a threatening nature to the person he was talking to.

Based on the above unsigned, undated statement by a complainant who did not appear at the investigation to be cross-examined by the Organization, the Hearing Officer in this matter determined that there was substantial evidence that Claimant exhibited conduct unbecoming an employee when he made inappropriate and threatening comments toward a Carrier Officer and dismissed the Claimant by letter dated September 27, 2021.

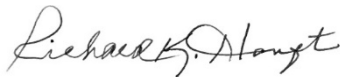
The Board has carefully reviewed and considered the record developed on the property. After careful consideration, the Board finds that the Carrier failed to meet its burden of proof in this matter. While the complaining District Claims Manager testified that he never told Claimant that his settlement was for the injury only, Claimant and an uninterested witness heard the Claims Agent say that it was for the injury only. The Charging Officer in this

proceeding even admitted that it is not inappropriate to call someone a liar if they're telling a lie, which Claimant believed was happening. In regard to Claimant inviting the Claims Agent to come to Kentucky and discuss the situation in person, that the Claims agent took as threatening violence and put him into 'flight' mode, it was explained at the investigation that that is where the Union office handling Claimant's claim is and no threat was intended. The evidence on this record does not support the finding of guilt on the charges here leveled. The Claim is sustained.

Claimant is to be returned to service within thirty (30) days from the issuance of this award and shall be made whole in accordance with Paragraph Two (2) of the Claim above.

Award:

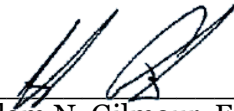
Claim sustained.



Richard K. Hanft, Chairman



Scott M. Goodspeed, Carrier Member



Adam N. Gilmour, Employee Member

Dated at Chicago, Illinois, February 1, 2024.