

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

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| BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES |) | |
| DIVISION – IBT RAIL CONFERENCE |) | Case No. 136 |
| |) | |
| and |) | |
| |) | Award No. 136 |
| 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. J. Turner, by letter dated February 9, 2022, in connection with his alleged: (1) failure to protect his assignment and excessive absenteeism in that he failed to protect his assignment on multiple dates between January 6 through December 29, 2021, including but not limited to: January 6, 18, 20 and 27, February 11 and 12, March 12, 15 through 19, 24 and 30, April 19 and 27, May 14 and 18, June 21, 22 and 30, July 1, 2, 9, 15, 16, 19, 28 and 29, August 11, 23 and 24, September 1, 3, 16 and 23, October 1 and 20, November 16 through 19, December 7, 15, 23 and 27 through 29, 2021, when he was absent from and unable to protect his assignment; (2) conduct unbecoming an employee in that on December 29, 2021 supervision discovered that he falsely reported payroll for time that he did not work on December 7, 2021; and (3) conduct unbecoming an employee in that on January 13, 2022 supervision discovered that he falsely reported payroll for time that he did not work on March 24, April 27, May 14, September 1 and 3 and December 15, 2021, was capricious, excessive, harsh and unwarranted (Carrier’s File MW-ATLA-22-01-LM-019 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Turner shall now have his dismissal set aside with all notations thereof removed from all Carrier records and he shall also be restored to the Carrier’s service with all seniority and restored to all financial and benefit losses, such as vacation and health insurance benefits occasioned as a result of the violation, including: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully dismissed); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been removed from service; and (4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly dismissed.”

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:

On January 5, 2022, Claimant received a letter from the Carrier instructing him to report for a formal investigation concerning failure to protect his assignment and excessive absenteeism on 42 days between January 6, 2021 and December 29, 2021; Conduct unbecoming an employee because on December 29, 2021 supervision discovered that Claimant falsely reported payroll for time that he did not work on December 7, 2021; and, conduct unbecoming an employee when, on January 13, 2022 supervision discovered that Claimant had falsely reported payroll for time that he did not work on March 24, April 27, May 14, September 1 and 3 and December 15, 2021.

A formal investigation was held on January 27, 2022 and as a result of that investigation, Claimant was found responsible for the charged rule violations and dismissed from service by letter dated February 9, 2022.

The Organization contends that in this matter the Carrier violated Rule 30 (a) of the System Discipline Rule when it failed to charge Claimant within thirty (30) days of management's first knowledge of the alleged offense. Here, the Organization asserts that Claimant's supervisors had first knowledge of Claimant's absences whenever they acknowledged his text messages reporting off and that this occurred over a time period well before December 29, 2021 when Claimant dropped the straw that broke the camel's back by reporting off that day for the third time in a workweek.

The Carrier responds that it is well settled that the Carrier may consider dates of absences beyond whatever time limit is applicable in disciplinary cases involving excessive absenteeism, as in this instance, provided the "trigger date" is within the time limits of the negotiated agreement. In this case it was undisputed that the "trigger date" was December 29, 2021 when the Claimant notified his supervisor that he would not be able to protect his assignment for the third time in a week and for the 42nd time in the calendar year. Thereafter, after reviewing Claimant's attendance record, a charge letter was sent to the Claimant on January 5, 2022 and a revised charge letter was mailed January 14, 2022, both of which were within the time limit specified in the System Discipline Rule.

The Board also takes into consideration the fact that Claimant had formally been counselled on May 14, 2021 and October 18, 2021 in regard to his attendance, but to no avail.

The attendance issues were not the only rule violations discovered when reviewing the Claimant's attendance records concerning his excessive absenteeism. Upon review of the Claimant's attendance records the Carrier also discovered on December 29, 2021 that Claimant had falsely reported payroll for time that he did not work on December 7, 2021 and also discovered on January 13, 2022 that Claimant falsely reported payroll for time that he did not work on March 24, April 27, May 14, September 1 and 3 and December 15, 2021.

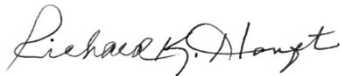
The Board specifically notes that the false reporting of payroll for December 7, 2021 discovered on December 29, 2021 and the false reporting of payroll for December 15, 2021 discovered on January 13, 2022 was within the thirty (30) day time limit imposed by the System Disciplinary Rule.

The Board, after carefully considering the record developed on the property finds that the Carrier produced substantial evidence of the Claimant's responsibility for excessive absenteeism and further that Claimant engaged in falsifying payroll and accepting pay for time he was not entitled to claim.

The Board, while considering the severity of the discipline assessed on the property in this matter takes into account the Claimant's prior service record for excessive absenteeism that includes a 5-day suspension, a 15-day suspension, a dismissal, and Claimant's return to service on two (2) years' probation. We find in this matter, the discipline of dismissal was neither arbitrary, excessive, nor capricious and therefore the claim is denied.

Award:

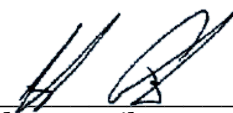
Claim denied.



Richard K. Hanft, Chairman



Scott M. Goodspeed, Carrier Member



Adam N. Gilmour, Employee Member

Dated at Chicago, Illinois, February 1, 2024.