

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
DIVISION – IBT RAIL CONFERENCE	)	Case No. 137
	)	
and	)	
	)	Award No. 137
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. Thomas, by letter dated January 28, 2022, in connection with his alleged: (1) improper performance of duty in that he failed to address an unsafe condition resulting from non-compliance with Carrier rules that he witnessed at approximately 2:30 P.M. on November 4, 2021 while working at Mile Post 249 in Howard, Georgia; (2) failure to promptly and/or properly report the incident of non-compliance with Carrier rules, in connection with the above charge, in that he did not report the incident to the proper authority until approximately 4:30 P.M. on November 23, 2021; and (3) conduct unbecoming an employee in connection with the above charges in that he failed to report the accident on non-compliance to the proper authority until after he was notified of an unrelated disciplinary charge, by letter dated November 17, 2021, was capricious, excessive, harsh and unwarranted (Carrier’s File MW-ATLA-21-50-LM-984 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant K. Thomas 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:

The testimony and evidence developed at the investigation on the property provides that on November 4, 2021 a Track Supervisor was acting as the Roadway Worker in Charge ("RWIC"), piloting a Sperry verifier from Columbus Junction to Howard under Track Authority 9578, verifying track defects previously detected by the Sperry machine. A maintenance gang followed the Track Supervisor to remediate defects that were verified.

The Track Supervisor requested a second Track Authority upon reaching Howard from Howard to Newbie to continue testing. Track Authority 1280 was issued for Howard to Newbie and the track Supervisor and Sperry verifier continued testing.

Two of the Track Supervisor's employees, one being the Claimant, completed an FRA Track Patrol in the early afternoon and the Track Supervisor contacted the Claimant and assigned him and his co-worker to set on behind him and begin barring up verified track defects. Claimant testified that he and his co-worker drove the Carrier's truck to Fort Valley, loaded up some jump bars, drove the truck to Howard and had a telephonic briefing with the Track Supervisor. Claimant testified that he got joint occupancy on both of the Track Supervisor's Track Authorities, #'s 9578 and 1280 and got track time at 3:30 pm.

Claimant realized after receiving the joint occupancies to the two track authorities that although the track supervisor had gotten track authority to occupy track between Columbus Junction and Howard and from Howard to Newbie, that the track supervisor nor the Sperry Verifier he was piloting had track authority from Howard to Howard and occupied track between Howard and Howard without proper track protection.

Claimant testified that he informed the Track Supervisor of the failure to properly obtain track authority Howard to Howard and that the Track Supervisor told him that he had everything taken care of. The Track Supervisor vehemently denied Claimant bringing the error to his attention and testified that Claimant did not do so.

It is undisputed that the Track Supervisor thereafter brought Claimant up on charges for failure to protect his position for two consecutive days of "no-call-no show." The Track Supervisor issued the charge letter regarding the absences on November 17, 2021 and the USPS tracking number indicates that the letter was delivered to Claimant on November 23, 2021.

The Division Engineer testified that he received a telephone call from Claimant on November 23, 2001 at 4:30 p.m. for the purpose of reporting the track time violation to the District Engineer. The District Engineer testified that he questioned the Claimant why he had not reported the violation right away and Claimant responded that he was reporting it now because the Track Supervisor was trying to get him in trouble, referencing the charge letter.

Claimant was charged by the Division Engineer with:

1. Improper performance of duty, in that he failed to address an unsafe condition resulting from non-compliance with Carrier rules that you witnessed at approximately 2:30 pm on November 4, 2012, while working at milepost 249 in Howard, Georgia.
2. Failure to promptly and or properly report the incidence of non-compliance with Carrier rules in connection with the above charge in that you did not report the incident to the proper authority until approximately 4:30 pm on November 23, 2021.
3. Conduct unbecoming an employee in connection with the above charges in that you failed to report the accident of non-compliance to the proper authority until after you were notified of an unrelated disciplinary charge by letter dated November 17, 2021.

An investigation was held on the property pertaining to the charges and Claimant was found responsible for violation of Operating Rule "I" and the above-referenced charges and dismissed by letter dated January 28, 2022.

The Organization appealed the decision made on the property through the normal procedure and the appeal was managed in accord with the parties' Agreement, but the parties were unable to resolve the dispute on the property and the matter is now properly before this Board for final adjudication.

After careful review and consideration of the evidence on this record, the Board determines that the Claim must be denied.

There is no dispute that Claimant witnessed a track time violation on November 4, 2021 by the Track Supervisor that Claimant worked for. The Claimant asserts that he brought the failure to obtain track protection to his supervisor's attention and the Track Supervisor denies that he did. There is, therefore, an issue relative to the credibility of the Claimant and the Track Supervisor.

As an appellate body, the Board does not observe the witnesses and is in a poor position to assess credibility. Consequently, we defer to the credibility determinations made on the property.

Regardless, Claimant had an affirmative duty to try to stop a life-threatening rule violation and here, Claimant failed in that duty. Moreover, according to Operating Rule I, Reporting non-compliance, employees must assist in carrying out the rules, special instruction must promptly report any non-compliance to the proper authority.

Here, instead of promptly reporting his supervisor's life-threatening non-compliance, Claimant waited until nineteen days after the track time violation to report the situation to the Division Engineer after being served with a charge letter in an unrelated disciplinary matter. The Division Engineer testified without rebuttal that the Claimant stated to him during a phone call reporting the track time violation that he was only reporting it then because the Track Supervisor "was trying to get him in trouble."

The Board finds that the Carrier met its burden to prove that Claimant failed in his duty to promptly report the Track Supervisor's non-compliance with Carrier rules to proper authority by substantial evidence.

The Organization argues further that Claimant here was denied his contractual right to a fair and impartial hearing because the Carrier had a predetermination to dismiss the Claimant without an impartial weighing of the evidence and simply conducted the investigation as a formality.

After reviewing the transcript of the investigation held on the property, the Board finds the Organization's argument in that regard to be without merit.

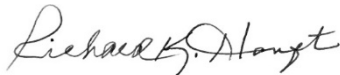
Finally, the Organization insists that the penalty of dismissal in this matter is unwarranted and excessive. The Organization points out that Claimant has an eleven-year tenure with Carrier, is a dedicated employee and that the violator of the rule, the Track Supervisor was not dismissed and thus, the Claimant was treated disparately.

Considering the gravity of Claimant's failure of duty as well as the potential consequences for such failure, as well as the timing of the Claimant's decision to report the track time violation to proper authority, the Board finds that dismissal in this particular matter was neither arbitrary, capricious. Moreover, upon review of the Claimant's disciplinary history, we find the penalty assessed is not excessive.

Accordingly, 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.