

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	Case No. 145
)	
and)	
)	Award No. 145
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. Mackling, by letter dated December 10, 2021, in connection with his alleged conduct unbecoming an employee in that he made multiple inappropriate, discourteous and unprofessional comments to Supervisor Track Inspection (STI) Z. Divers through several text messages between himself and STI Divers on September 30, 2021, was capricious, excessive, harsh and unwarranted (Carrier’s File MW-FTW-21-251-LM-820 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Mackling shall now be reinstated to service with all rights, privileges and back pay associated therewith.”

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 record developed on the property provides and it is undisputed that on the evening of September 30, 2021 the Supervisor of Track Inspection (“STI”) was advised of a track-related issue on the east-bound 7 track and began calling employees to assist him in resolving the problem. At approximately 8:00 p.m., the STI reached out to Claimant by telephone, but his call went unanswered. Claimant thereafter called the STI back, but the STI was on another call and could not take the Claimant’s call. The Claimant then texted the STI and stated that “if its about a call-out, I’m at my dad’s helping out.” Shortly thereafter the STI reached Claimant by telephone and Claimant explained that he could not come to work because he was caring for his ailing father. The STI assured Claimant that that was perfectly fine, but that he was calling in order to be in compliance with the parties’ Agreement.

Shortly thereafter, the STI began receiving text messages from Claimant that were objectively inappropriate, discourteous and unprofessional. The STI reported the interaction to the Engineer of Track, here the charging officer, and charges were brought alleging violation of Carrier's General Notice mandating courteous discharge of duties and violation of Carrier's rule 900 that requires employees to conduct themselves in a professional manner.

Before, however, the charges were brought and before the Claimant knew that charges were going to be brought, Claimant realized that he was having problems with alcohol and availed himself to the resources of Carrier's Drug and Alcohol Recovery Services ("DARS"), was admitted to the program and went through a thirty-five (35) day rehabilitation program.

Claimant was charged on October 4, 2021 and an investigation was postponed until Claimant had completed his rehabilitation program. A formal investigation into the charges was held on December 1, 2021.

At the investigation, the Claimant did not admit to sending the text messages but did explain that he could not remember anything that occurred that evening due to being blacked out from consumption of alcohol. After his testimony at the hearing, Claimant requested that the STI return to the hearing room and offered a sincere and heartfelt apology to the Carrier officer for anything he said or did during his blacked-out period.

The Organization contends that Carrier violated the procedural elements of Rule 30 because Claimant here was pre-judged and not provided with a fair and impartial investigation.

Moreover, the Organization avers, Carrier here failed to notify the General Chairman of the charges and investigation related to the Claimant and instead, sent notification to the Vice-Chairman of the Organization.

In that regard, the Board finds that the Organization was made aware of the charges and pending investigation, albeit through the wrong officer, but suffered no prejudice as a result of the Carrier's error in sending notification to the Organization, although to the wrong person, as the notification was routed by the recipient to the proper officer of the Organization.

After review of the transcript of the hearing, the Board finds that the Organization's contention that the Claimant was pre-judged is without merit.

With regard to proving the charges through substantial evidence, while the Claimant did not admit to sending the text messages to the STI, he could not deny that he did so because he was admittedly blacked out from alcohol abuse, and he did admit that fact. Claimant further at the investigation offered an explanation and sincere apology to the Carrier officer that he offended. Moreover, the Carrier did prove that the text messages were sent by the Claimant received by the STI and met its burden of proof.

The Board finds, however, that the penalty assessed in this matter was, given the particular circumstances here involved, excessive. The Claimant here admitted that as a result of his alcoholism he was blacked out on the night giving rise to this discipline while off property and off duty and cannot remember anything that happened that night. Claimant thereafter, and before being charged, availed himself to the resources of Carrier's DARS program, went through a rehabilitation program and remains in the DARS program and subject to testing for relapse.

While the Claimant's correspondence with his supervisor did "cross the line," given the particular circumstances and the Claimant's efforts at self-help, the Board finds that dismissal, in this instance and given the particular circumstances, was an excessive penalty. The Board therefore orders that Claimant shall be returned to his former position, without compensation for time out of service and subject to an evaluation by Carrier's DARS program. Claimant must, as a condition of reinstatement, abide by all conditions set forth by the DARS representative overseeing Claimant's recovery.

Award:

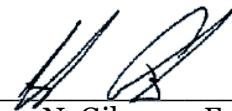
Claim sustained in accordance with the findings. The Carrier is directed to comply with the Award on or before thirty (30) days following the Award dated below.



Richard K. Hanft, Chairman



Scott M. Goodspeed, Carrier Member



Adam N. Gilmour, Employee Member

Dated at Chicago, Illinois, February 1, 2024.