

PUBLIC LAW BOARD NO. 6394

AWARD NO. 64

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline [suspension of forty-five (45) actual days and fifteen (15) days deferred suspension] of Mr. T. Wireman issued by letter dated November 5, 2012 in connection with his alleged conduct unbecoming, failure to follow instructions and violation of other Carrier Safety and General Conduct Rules on September 24, 27 and October 1, 2012 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh and excessive (Carrier's File MW-FTW-12-51-BB-388).
2. As a consequence of the violation referred to in Part 1 above, Claimant Wireman shall be immediately reinstated, exonerated of all charges and compensated for all lost wages, overtime and credits and benefits denied to him, commencing October 1, 2012 and continuing until this matter is resolved."

Upon the whole record and all the evidence, after hearing, the Board finds 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 precedent in any other case.

AWARD

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant entered service for the Carrier on June 6, 1973 as a Bridge and Building Helper and was working as a Bridge and Building Mechanic during the events which led to this case. The Claimant holds a commercial driver's license (CDL) and is required to keep the license current in his current position with the Carrier. The Claimant

was notified on July 20, 2012 via certified mail that his CDL would expire on September 20, 2012 and he would need to provide the Carrier with an updated copy of the renewed CDL by fax or email before the expiration date. The Claimant provided the requested document, and was later asked again to provide a separate copy of his renewed CDL by two supervisors on four different occasions – the morning and afternoon of September 24, September 27, and October 1, 2012. Each time, the Claimant declined the request from his supervisors (see Carrier Brief, page 4). Additionally, on October 1, 2012 the Claimant along with his entire work gang was asked by to provide current phone numbers on a list circulated by Supervisor Gilbert (see Carrier Brief, page 5). The Claimant did not provide his number when the list was passed to him, and instead passed it to the next employee. Due to these events the Carrier charged the Claimant with failure to follow instructions, conduct unbecoming an employee, and violating the Carrier's Safety and General Conduct Rules. The Carrier conducted an investigation including a hearing on October 22, 2012. The Carrier found the Claimant guilty of the charges and assessed a 45 day actual suspension and 15 day deferred suspension via letter on November 5, 2012.

The Carrier's view is that the Claimant is clearly guilty of the charges as he testified that he declined to provide a copy of his CDL and failed to provide his phone number to his supervisors when requested (see Transcript, pages 93-94, 96-97). The Carrier believes Supervisor Gilbert had a valid management reason in asking the Claimant for a current phone number, as he was seeking to ensure he had current contact information for the entire gang. Failing to provide a copy of his renewed CDL and phone number when requested constitutes a violation of Carrier rule GR-1(a), which specifies that all employees "must follow instructions from proper authority" (see Carrier Brief, page 8). The Carrier does not find any merit in the Claimant's explanation that he previously had sent a copy of his updated CDL to Administrative Services Supervisor Kemp as instructed in the July 20, 2012 certified mail letter. The Carrier notes that, even if he sent a copy of the CDL as requested in the original letter, the Claimant should have complied with supervisor requests on September 24, September 27, and October 1, 2012. At least one of the two supervisors that requested a copy of the CDL, Supervisor Gilbert, testified that he told the Claimant he needed a copy separate and apart from anything provided to Supervisor Kemp (see Transcript, page 102). Likewise, the Carrier argues that the Claimant's contention that his supervisor already had a current number so he did not need to provide it again is without merit for the same reasons.

The Carrier asserts that the Organizations' procedural objections are without merit. On the matter of removing the Claimant from service, the Carrier argues the number of alleged infractions means this case does not involve a "minor offense." Concerning (1) not providing the Claimant with written notice that he was being held out of service, (2) not listing specific violations in the letter of charge, and (3) denying the Organization's pre-hearing discovery request, the Carrier argues no rules require it act in the way described as required by the Organization. The Carrier also contends that rule 30(c) was not violated because there is no evidence the Claimant made an attempt to exercise his rights under this rule but was denied. Finally, the Carrier dismisses the Organization's claim of bias on the part of the Hearing Officer. The Carrier argues that a

failure to sustain the Organization's objections at the hearing does not prove the Officer was acting in a biased manner.

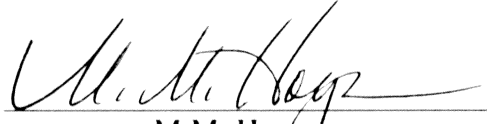
The Organization's position is that since this case involves allegations of "moral turpitude," the Carrier is under a heightened "clear and convincing" (and not "substantial evidence") standard. It is the Organization's position that the carrier has failed to meet this increased burden of proof. The Organization notes that the Claimant had already provided the Carrier's personnel department with a copy of his renewed CDL by the time he was asked about it by his supervisors. The Organization characterizes Supervisor Gilbert's explanation for why he had not checked with the personnel office to make a copy of the Claimant's CDL as a "personal quest...to make [the] Claimant submit to his [Supervisor Gilbert's] authority...." (see Organization Brief, page 7). The Organization also points out that Foreman Posadny, one of the supervisors who questioned the Claimant about his renewed CDL, did not find the Claimant to be insubordinate. Concerning the charge that the Claimant acted unprofessionally by yelling at a supervisor, the Organization argues the only evidence for this charge is Supervisor Gilbert's statement which is not corroborated by any other source. Finally, the Organization points out the testimony of Assistant Division Engineer Geary, who testified that he had the Claimant's phone number for years and had in the recent past used it to contact him. The Organization argues this shows that the Claimant had in fact provided his current contact information.

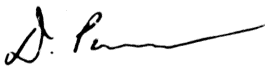
In addition to its substantive arguments, the Organization raises numerous procedural objections in this case. First, the Organization objects to the fact that the Claimant was removed from service before the investigation because the allegations were "minor offenses." Second, the Organization believes the Carrier violated the agreement by not providing the Claimant with written notice before removing him from service pending the investigation. Third, the Organization claims the Carrier erred in not listing the specific rule violations against the Claimant in the letter of charge. Fourth, the Organization asserts the Carrier failed to respond to its requests for information about this case before the hearing. Fifth, the Organization argues the Carrier acted improperly because the Claimant did not have access to an Organization representative with whom to discuss the incident as required by Rule 30(c). Sixth, the Organization alleges the Hearing Officer during the on property investigation was biased due to how he managed a series of objections.

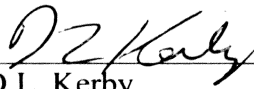
The Board finds there is substantial evidence in the record that the Claimant failed to comply with multiple supervisor requests to provide a copy of his renewed CDL and his contact information. While the Claimant may have responded to the Carrier's original request, he still has a responsibility to comply with additional requests made by supervisors. If the Claimant believed these additional requests were an undue burden or somehow inappropriate, he should have complied with them at the time and brought up the issue later using the dispute resolution channels available to him on property. This is the well-established law of the shop: to obey now, grieve later. We consider the Claimant's extensive 40 years of service record as a mitigating factor, but also note that such seniority means that the Claimant should have known to comply with supervisor

requests. Overall, the Board finds that the discipline in this case was too excessive. The 45 day actual suspension and 15 day deferred suspension shall be reduced to a 30 day actual suspension and 0 day deferred suspension.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member


D. Pascarella
Employee Member


D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on May 9, 2014.