

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 7874

---

BROTHERHOOD OF MAINTENANCE OF WAY DIVISION -	)	
IBT RAIL CONFERENCE	)	
	)	Case No. 5
and	)	
	)	Award No. 5
FLORIDA EAST COAST RAILWAY COMPANY	)	

---

Richard K. Hanft, Chairman and Neutral Member  
Robert Bullock, Carrier Member  
Ross Glorioso, Employee Member

STATEMENT OF THE CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. W. Virgo., by letter dated December 16, 2021, for unauthorized absence, job abandonment and falsification of time/payroll on October 20 and 27, 2021 when he left early without permission while on duty as a welder, was on the basis of unproven charges, arbitrary and in violation of the Agreement (System File FEC 305521 FEC).
2. As a consequence of the violation referred to in Part 1 above:  
  
"\*\*\* the Carrier must clear all mention of the matter from Mr. Virgo personal record and immediately return Mr. Virgo to service with rights and benefits unimpaired and compensate him for all losses suffered. The losses include, but are not limited to, any straight time, overtime, double-time, or other Carrier provided compensation lost as a consequence of the discipline. It also includes healthcare, credit rating, investment, banking, mortgage/rent or other financial loss suffered because of the discipline.' (Employees' Exhibit 'A-3')."

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.

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 entered service as a Trackman on May 1, 2017. He qualified as a Welder Helper on August 28, 2017, as a Welder on September 14, 2018 and as a High-Speed Equipment Operator on August 3, 2019.

At the time of the events giving rise to this discipline, October 20 and 27, 2021, Claimant was assigned as Welder on the Line of Road near Dania, FL and scheduled to work 4-10's, Sunday through Wednesday from 0700 to 1730.

It is undisputed that Claimant attended a welding class at the Carrier's Dania, FL office on Wednesday, October 20, 2021.

The Roadmaster for the south end of the line entered into the record at the Investigation on the property a statement that he authored on October 21, 2021. That statement provides that the Roadmaster arrived at the Dania office at 1400 and noticed that the welding class being held there had ended and participants of the class were packing up their trucks. The Roadmaster's statement further provides that he texted the Claimant to see where he was since the Claimant was scheduled to work until 1730 and that Claimant responded that he had gone home after the class.

The Roadmaster additionally testified at the Investigation on the property that Claimant claimed ten (10) hours pay for October 20, 2021.

The Roadmaster further testified that he again visited the Dania office on October 27, 2021 at around 1500 and noticed that Claimant's work truck was there but that the Claimant was not and had left early again without permission.

The Production Roadmaster who the Claimant directly reported to testified later at the Investigation that he called Claimant on October 27, 2021 after receiving a call from his supervisor (The Roadmaster) and the Claimant informed him that he had left early.

Claimant, upon direct examination at the Investigation admitted that on October 20, 2021 that he was scheduled to work until 1700 and left duty between 1430 and 1500 without receiving permission to do so, and also claimed ten (10) hours pay for that day. Claimant further testified that on October 27, 2021 he left work without permission between 3:30 and 4:00 when his shift was scheduled to end at 1730.

The Investigation on the property concluded and the Claimant was advised by letter dated December 16, 2021 that he had been found guilty of the charges and was dismissed from service immediately. By letter dated December 20, 2021 the Organization appealed the Carrier's decision and the appeal progressed in the ordinary fashion through the on-property appeals process without resolution and is now properly before this Board for resolution.

The Organization contends that the Carrier failed to comply with Rule 12(f) by not supplying the Organization with the specific rules the Claimant was charged with and while Rules GR-11, GR-15 and GR-34 were referenced in the Carrier's November 4, 2021 hearing notice, the specific portions of the rules that were claimed to have been violated were not identified.

The Carrier submits that there is a long-standing practice on this property of reading the rules that may be involved onto the record when entering the charge letter as an exhibit and that further Claimant was issued a rule book as part of his employment and is tested annually on his understanding of the rules.

The Board takes note that the Claimant testified that he understood the rules that he was charged with violating and we find no obstruction to the Organization's ability to prepare a defense on behalf of the Claimant.

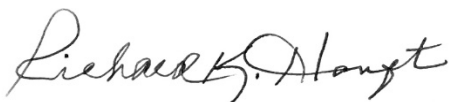
The Organization further asserts that the Carrier failed to meet its burden of proof because, while Claimant admitted to leaving his assignment early without permission on October 20 and 27, 2021, the Organization avers that Carrier has a long-standing practice of allowing employees to leave work early following the conclusion of training classes.

The problem for the Organization with that argument is that the Claimant admitted on the record that he did not receive permission on either day to leave early.

Finally, the Organization insists that the Carrier's discipline of Claimant constitutes an arbitrary and unwarranted treatment. Claimant here admitted to violation of GR-15 B (4) in that he falsely and dishonestly claimed pay for time he was not entitled to on October 20, 2021 and violated GR-15 B (5) by willfully neglecting his duty. Both offenses subject the Claimant to dismissal. Moreover, Claimant admitted to violation of GR-34 by leaving his assignment that can also support a cause for dismissal. And, while the Board does not consider a Claimant's past record in determining whether or not the Carrier has proven a rule violation by substantial evidence or whether the Claimant was afforded all of the procedural due process rights guaranteed under the parties' agreement, when considering the quantum of discipline dispensed, and its propriety, a Claimant's service record can be influential. Here, Claimant is a relatively short tenured employee with four (4) years' service. Over those four (4) years' time, Claimant has previously been dismissed on three (3) occasions but brought back on a leniency return to work. As the Carrier asserts, leniency has its limits. The Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. The Claim must therefore be denied.

AWARD: The Claim is denied.

ORDER: This Board, after consideration of the dispute described above, hereby orders that an Award not favorable to the Claimant be made.



---

Richard K. Hanft, Chairman



---

Robert Bullock, Carrier Member



---

Ross Glorioso, Employee Member

Dated: At Chicago, Illinois, October 5, 2023