

PUBLIC LAW BOARD NO. 6394

AWARD NO. 60

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 (dismissed from all service with Norfolk Southern Corporation) of Mr. H. Hagwood, Jr., issued by letter dated December 22, 2011, in connection with his alleged failure to protect his assignment in that on December 5 and 6, 2011 he was absent without proper authority and without notifying his supervisor prior to the start of the work day (despite having been previously counseled concerning his attendance and his obligation to protect his assignment) was arbitrary, capricious, unreasonable, based on unproven charges and imposed in violation of Mr. H. Hagwood, Jr.'s due process rights under the Agreement (Carrier's File MW-DEAR-11-64-LM-459).
2. As a consequence of the violation referred to in Part 1 above, Mr. H. Hagwood, Jr. shall receive the remedy prescribed under Rule 30(d) of the Agreement."

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 November 1, 2004 as a Trackman and was working in that capacity during the events which led to this case. Before the events which led to his dismissal, the Claimant had received several counseling sessions with Carrier Supervisors over repeated tardiness and absence issues. The Claimant's work record indicates he received a letter of counsel for being absent without permission

on May 5, 2009 and was then discharged on July 3, 2009 for failure to protect his assignment (among other charges). The Claimant was then later reinstated by Public Law Board 6394 on July 22, 2010 and was later suspended for five days for being absent without permission again on August 8, 2011. The Claimant was again absent from work on December 5 and 6, 2011. He did not ask for permission to be absent. There is a disagreement in the record over whether the Claimant contacted a supervisor prior to these most recent absences. The Carrier's version of events alleges the Claimant had no contact with supervisors concerning his intention to miss work on December 5 and 6, 2011. The Organization's version of events states that the Claimant called his supervisor on December 6 and stated that he had taken medication that accidentally caused him to sleep through his work shift on December 5. In either case, the Claimant was removed from service on December 7, 2011 and the Carrier conducted a formal investigation including a hearing on December 19, 2011. The Carrier charges the Claimant with a failure to protect his assignment, a charge of which it found him guilty. He was informed of this via letter on December 22, 2011. The Claimant was dismissed from service.

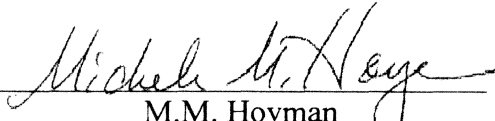
The Carrier's view is that the Claimant is clearly guilty of not protecting his assignment. There is no dispute the Claimant was absent on December 5 and 6, 2011 and that the Claimant failed to receive approval for those absences. The Claimant's supervisor testified to calling the Claimant to inquire about the absence on December 6, 2011. The Claimant at that point told the supervisor that he was sick and had forgotten to call as he had just woken up (see Carrier Brief, page 5). Given that the Claimant had received multiple counseling sessions previously about the importance of attendance, the Carrier believes he is clearly guilty of General Rule GR-9 ("Employees must report for duty...at the designated time and place...they must not absent themselves...without proper authority"). The Carrier's records indicate the Claimant received verbal counseling about these issues in March (2, 4, 30), April (18), July (13, 14), and August (5) of 2011. The Claimant also received written counseling about protecting his job assignment in May (4), June (3), and August (8) of 2011 (see Transcript, pages 4 and 17). The Carrier dismisses the Organization's argument that the Claimant is only required to notify a supervisor about an anticipated absence "as early as possible" (Rule 24). The Carrier notes there is no evidence that the Claimant failed to notify his supervisors of his absences before his shift began due to some "unavoidable cause" (see Carrier Brief, page 8). In response to the Organization's procedural objections, the Carrier argues that the offense in the instant case is clearly not "minor" in particular because the Claimant has a history of receiving counseling for repeated failures to adhere to the absence policies (see Carrier Brief page 10). As such, the Carrier's immediate removal of the Claimant from service pending the investigation was within management rights. It also disputes that it failed to provide a precise charge because the charge letter contained no specific reference to Carrier rules. The Carrier argues that the precise charge requirement does not require it reference specific carrier rule violations, and that its charge letter was in compliance by "identifying the nature of the alleged violation and referring to the specific dates on which the alleged violation occurred" (see Carrier Brief, page 11).

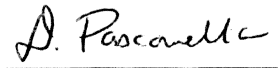
The Organization argues that, under Rule 24, an employee only has to notify a supervisor of the intention to be absent. Explicit approval is not required. It also notes

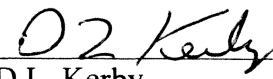
Rule 24 states an employee will notify a supervisor "as soon as possible." This is different than requiring employees to notify a supervisor before their scheduled shift begins, which is the interpretation supported by the Carrier (see Organization Brief, page 5). The Claimant complied with Rule 24 by notifying a supervisor when it was possible to do so on December 6, 2011 since he was under the effects of medication that caused him to sleep through his previous shift on December 5, 2011 (See Organization Brief, page 7). The Organization also alleges the Carrier has mischaracterized the Claimant's past absences because the Carrier admitted to incorrectly labeling some of them as unexcused when in fact they were excused. Finally, the Organization argues that the Claimant is being treated differently from other employees that have been disciplined for absences and argues that the instant case is a violation of just cause and proportional punishment principles. Particularly given that the Claimant has a good work record and 7 years of service, the Organization's position is that even if the Carrier's allegations are true the appropriate punishment would not be dismissal.

The Board finds there is significant evidence in the case record that the Claimant violated the Carrier's attendance policies in this case and has an extensive history of problems related to absenteeism. Concurrently, we do find evidence that the Claimant has made attempts to comply with the Carrier's policy. The absences in this case do not appear to be an intentional disregard for the Carrier's policies as the Claimant did notify a supervisor on December 6, 2011, although it is unclear whether that was before or after his shift began that day. Overall, we find that the penalty of dismissal for this case was not appropriate. The Claimant shall be reinstated, but without back pay for his violation of attendance policies. In coming to this decision, the Board takes note that the Claimant's history suggests this is a chronic problem and that the Claimant is strongly advised to stringently comply with Carrier attendance policies in the future.

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 June 20, 2013.