

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 213

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 service) of Mr. S. Asiola issued by letter dated March 19, 2010 in connection with alleged excessive absenteeism and failure to protect his assignment in that he had been absent sixty (60) work days since February 2, 2009, the latest being October 26, 2009, and many of those instances were without permission from the proper authority, was capricious, unjust and excessive (Carrier's File MW-BHAM-09-24-LM-512).
2. As a consequence of the violation referred to in Part 1 above, Mr. Asiola shall be made whole and restored to the service of the Carrier with pay for all lost time, seniority and vacation unimpaired.

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

The Claimant began employment with the Carrier on January 2, 2008. His regular assignment was Laborer on a track maintenance gang near New Orleans, Louisiana. He was charged with excessive absenteeism and failure to protect his assignment in a letter dated November 6, 2009. During the period from February 2, 2009 through October 16, 2009, according to the charge form by the Employer and through October 26, 2009 according to the union claim statement the Claimant had allegedly been absent sixty days and some of them were without permission. The hearing on this matter was postponed by mutual agreement several times and was finally held on March 2, 2010. In a letter dated March 19, 2010, the Carrier

indicated that there was evidence of the charges and that the Claimant was dismissed from service.

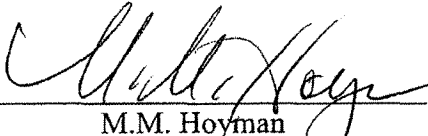
The Organization raised several procedural objections at the hearing: that the contract prohibits being disciplined for events that go back more than thirty days and that the charge letter was not specific enough in terms of what dates he had been absent, as opposed to the reference of "many instances". The Organization further argues that the Carrier condoned these absences by having accepted these absences, citing NRAB Second Division Award 8701. To quote from that decision - "We have often said that offenses of this nature, permanent dismissal, should be preceded (sic) by progressive suspension." The basis for the claim that the Carrier condoned the Claimant's behavior is the fact that the Carrier never disciplined the Claimant for these absences - only offered a letter of counseling. The record is clear that the Claimant was issued a letter of counseling which did not impose a discipline regarding the absences at the beginning of the time period, some nine months before the charges were finally brought against Claimant.

The record is clear that the Claimant requested a Leave of Absence after his dismissal and it was denied, although the exact timing is not clear. What the record does show is that request for the leave of absence came as a verbal request, and not as a formal written request. There is no dispute that he had been absent 60 times in the relevant period of time. He also had entered the DARS program in November of 2009 and testified that he is through the program now and ready to return to work. The Claimant attributes the substance abuse problem to the other problems he had. The Claimant had a number of calamities that beset him during this period: kidney problems, a house fire, trouble looking for a new home, problems with his girlfriend and his children, and problems with his mother. The evidence was clear that the Claimant's absence impeded the work progress, causing everyone to pick up the slack (Tr-73). What was less clear was whether the other men had complained about it.


The Organization argues that the employer condoned these absences and did not meet the contractual cutoff for discipline. The Carrier on the other argues that Claimant's attitude was cavalier and he should have been responsible for providing documentation for the many absences. Drawing from PLB 1760 Award 93, *BMWED v. NW* the employer quotes "his failure violates the implicit promise and the obligation contained in the employer and employee relationship." The Carrier also cites a decision on this property as well, which stated "The Board concludes that just cause for dismissal is established where, as here, the record demonstrates that the employee cannot be relied upon to meet an assigned work schedule or mark off in the manner prescribed, despite ample forbearance by his employer." PLB 5622, Award 69, *BRS v. NSR*. In addition, the Carrier cites a whole series of cases in which employees had valid excuses to miss, but the arbitrator ruled that employees should have nonetheless provided excuses to not notify or follow call-in procedures.

Given the high number of absences, the feedback from the supervision to change his habits and the fact that some absences were undocumented, the Board finds the Claimant to be guilty of excessive absenteeism.

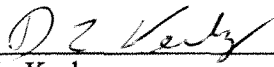
The claim is denied.



M.M. Hoyman
Chairperson and Neutral Member



T. Kreke
Employee Member



D.L. Kerby
Carrier Member

Award Date: June 30, 2011