

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 162

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of J. P. Fultz for pay for all time lost as a result of his 30-day actual suspension from service following a formal investigation on December 21, 2006, in connection with improper performance of duty, violation of Safety and General Conduct Rules GR-3 and Gr-6, failure to follow instructions and marking off under false pretenses.

(Carrier File MW-WHEL-07-01)

Upon the whole record and all 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.

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 record reflects that on December 2, 2006, Claimant and a coworker were sitting in their truck when the Assistant Terminal Manager instructed them to return to the field to dump coal. A short time thereafter, Claimant and the coworker entered the terminal office and placed their radios in the re-charger. The Assistant Terminal Manager asked them what they were doing. Claimant testified that he told the Assistant Terminal Manager that he was going home and that the Assistant Terminal Manager did not say anything to him but got into a discussion with the coworker. Claimant admitted that he did not tell the Assistant Terminal Manager why he was going home.

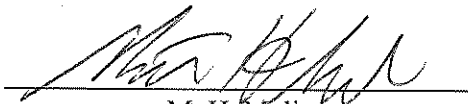
The Assistant Terminal Manager testified that Claimant did not say anything to him and that the coworker did the talking and reported that their truck had broken down. The Assistant Terminal Manager radioed for another employee to give them a ride to the field. The other employee responded and Claimant's coworker returned to the field with the other employee. Claimant however, did not. Shortly thereafter, the Assistant Terminal Manager heard water running in the shower, found Claimant preparing to take a shower and confronted Claimant. At that point, Claimant told the Assistant Terminal Manager that he was feeling sick but when asked whether he would be going to the doctor, Claimant replied, "Probably not."

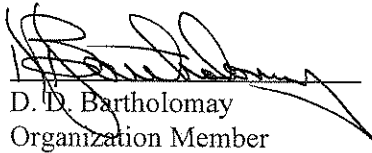
A few hours later that day, the Terminal Manager telephoned Claimant to ask about the incident. Claimant reported to the Terminal Manager that he had been feeling ill but was feeling better and that he did not plan to see a doctor. Nevertheless, after the Terminal Manager removed Claimant from service, Claimant went to a doctor.

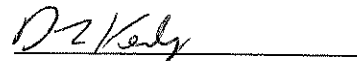
Claimant's version and the Assistant Terminal Manager's version of the events differ in some material respects. Claimant testified that the Assistant Terminal Manager's instructions to return to the field were aimed at Claimant's coworker and that when Claimant and his coworker returned to the office and placed their radios in the recharger, Claimant told the Assistant Terminal Manager that he was going home and the Assistant Terminal Manager did not object. The Assistant Terminal Manager maintained that Claimant did not say anything, that the discussion of the allegedly broken down truck occurred with the coworker and that the Assistant Terminal Manager's instructions were clearly directed to both employees.

As an appellate body that does not observe the witnesses testify, we are in a comparatively poor position to judge witness credibility and resolve conflicts in the testimony. Consequently, we defer to credibility determinations made on the property as long as they are reasonable. In the instant case, we note that Claimant's story and actions strain his credibility. Claimant and his coworker did not report the allegedly malfunctioning truck until after they were confronted by the Assistant Terminal Manager about their failure to comply with his instructions to return to the field and dump coal. Similarly, Claimant never reported his alleged illness until after being confronted in the shower. The conclusion that these were post hoc excuses rather than legitimate justifications is eminently reasonable. We conclude that Carrier proved the charges by substantial evidence.

The penalty imposed was not arbitrary, capricious or excessive. Accordingly, the claim must be denied.


M. H. Malin
Chairman and Neutral Member


D. D. Bartholomay
Organization Member


D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on January 28, 2008