

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 202

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 Railway Company) of Mr. R. Law, issued by letter dated September 23, 2011 in connection with alleged conduct unbecoming an employee and improper performance of duties, in that he made false statements to a Carrier officer concerning his license status, failed to advise the Carrier that had been convicted of driving under the influence and had his CDL certification revoked while assigned to a position requiring the same, operated a vehicle requiring a CDL without possessing a valid CDL and failed to protect his assignment in being absent one (1) day without permission was arbitrary, capricious, without just cause and in violation of the Agreement (Carrier's File MW-BLUE-11-09-LM-318).
2. As a consequence of the violation referred to in Part 1 above, Mr. Law shall be reinstated and paid for all lost time, with his seniority and vacation rights 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

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 May 3, 1982 in the position of Track Laborer. The Claimant was arrested in West Virginia on July 7, 2006 and charged with driving under the influence. After being convicted of the charge on April 11, 2007, the Claimant appealed the revocation of his regular state driver's license through the West Virginia Department of Motor Vehicles (DMV). During the duration of the appeal to the DMV, the suspension of the license was stayed so the Claimant was legally able to drive with his state license. While the appeal was being considered - a process which took 3 years to complete - the Claimant was notified by the DMV on February 4, 2010

that because of the DUI he could not hold a commercial driver's license (CDL) for a one year period and would need to pay a \$50 restoration fee after that period to have the CDL reinstated. The Claimant did not pay the fee, so the CDL was never reinstated. Upon appeal, the Claimant's regular state license was restored.

The Claimant was convicted of a DUI a second time after being arrested on January 16, 2010 while his original 2007 suspension was still under appeal. The state DMV notified the Claimant on February 5, 2010 that as a result of the events of January 16, 2010 his CDL would be suspended for life, effective March 12, 2010, and his state driver's license would be revoked for a period of one year beginning on March 12, 2010. The Claimant this time appealed the suspension of both his regular and CDL licenses. This again caused a temporary stay enabling the Claimant to use his state driver's license (and would have enabled the use of the CDL – had the claimant ever paid to reinstate it) until both appeals were denied on May 11, 2011. The final appeal decision from the state DMV was that the Claimant's state license was suspended until May 11, 2012 and his CDL license was suspended permanently.

On June 10, 2011, the Claimant exercised his seniority with the Carrier to a Tie Handler Machine Operator position. This position requires both a valid state driver's license and a valid commercial driver's license. The Claimant began working this position on June 20, 2011. On August 15, 2011, during a routine annual review of the Claimant, the Carrier became aware of the permanent CDL suspension and one-year regular license suspension which had occurred on May 11, 2011. Upon being informed of this, Assistant Division Engineer B.A. Emerson drove to the Claimant's work site and personally questioned him about this information. At that time the Claimant stated there were no issues with his regular license or CDL. ADE Emerson notified the Claimant that he could no longer drive any Carrier vehicles. The next day, August 16, the Claimant did not report to work as scheduled and did not receive permission to be absent from his supervisors.

In response to all these events, the Carrier removed the Claimant from service on August 19, 2011 and held a formal investigation, including a hearing on September 8, 2011. The Carrier concluded that the Claimant was guilty of (1) driving a company vehicle without a valid CDL, (2) failing to advise the Carrier that his CDL had been revoked, (3) making false statements in connection with his driving credentials on August 15, 2011, and (4) failing to protect his assignment by being absent without permission on August 16, 2011. The Carrier dismissed the Claimant by letter dated September 23, 2011.

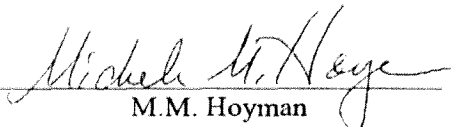
The Carrier argues that the Claimant clearly knew about the status of his driver's licenses but continued to work in a position that required a valid CDL from June 20 to August 16, 2011 (see Transcript, page 4), an action which is in violation of both the Carrier's rules and federal laws (see Carrier Brief, page 9). The Carrier also argues that the Claimant's statements that there were no problems with his licenses on August 15, 2011 were clearly misleading. In support of this, the Carrier notes there are certified receipts of the state DMV's letters addressed to the Claimant which informed him of the permanent CDL revocation and 1 year suspension of his regular license (See Carrier

Brief, Exhibit A, pages 36-42). In terms of his unauthorized August 16 absence, the Carrier dismisses the Claimant's argument that he left a voice mail for ADE Emerson requesting a personal day (see Transcript, page 15). In order to have an authorized day off, the Claimant would have needed to actually receive confirmation that his request was approved – leaving a voicemail was not enough. Finally, the Carrier notes many previous awards that characterize dishonesty as a serious offense, on the same level as theft and, as such, dismissal for the Claimant's actions is appropriate (see Carrier Brief, page 15).

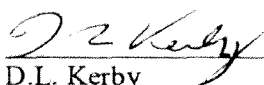
The Organization argues that the Carrier has a heightened burden of proof in this case, due to the nature of the charges, which it did not meet. The Organization argues that the Claimant testified that he genuinely was not aware of his license status as being anything other than normal until August 22, 2011 (see Organization Brief, page 10). Additionally, the Organization notes the testimony of the Carrier's witness, ADE Emerson, who stated that there is no formal procedure concerning whom to notify to request day off, except that an unspecified "local supervisor" should be contacted (see Organization Brief, page 11). Finally, the Organization argues that given the Claimant's lengthy period of service and his testimony that he was not aware of his license status, the punishment of dismissal in this case was not appropriate.

The West Virginia DMV issued several letters to the Claimant which notified him about the changing status of his licenses. Although it is possible that the Claimant received but did not read the letters, the Claimant has a certain level of personal responsibility to keep abreast of the status of his driving privileges. The Claimant's responsibility to be aware of his driving status is especially important in the instant case because having a valid personal and CDL license was a requirement for his job position. We consider these findings as aggravating factors in the case. Concurrently, we also consider the Claimant's lengthy service history as a mitigating factor. Overall, the Board finds dismissal in this case is, on balance, inappropriate. The Claimant is reinstated with no back pay. His return to work is conditional on (1) his successful completion of the Carrier's drug and alcohol rehabilitation program, (2) his passing the Carrier's standard return to work exam procedures, and (3) the proviso that Claimant shall not be allowed to drive a company vehicle in any capacity for Norfolk Southern.

The claim is partially sustained.


M.M. Hoyman
Chairperson and Neutral Member

 10/15/12
D. Pascarella
Employee Member

 10/15/12
D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on September 14, 2012.