

**SPECIAL BOARD OF ADJUSTMENT NO. 1048**

**AWARD NO. 203**

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) of Mr. C. Martin, issued by letter dated August 31, 2011 in connection with his alleged failure to follow instructions of proper authority in that he repeatedly failed to respond to requests for medical information was harsh and excessive (Carrier's File MW-ROAN-11-30-BB-268).
2. As a consequence of the violation referred to in Part 1 above, Mr. Martin shall be reinstated and paid for all lost time, with 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 April 26, 1996 in the position of Track Laborer. At the time of the events which led to this case, the Claimant was working as a Bridge and Building First Rate Carpenter. When the Claimant filled out form MED-15 on November 17, 2010 as part of his periodic exam to maintain a commercial driver's license (CDL), he indicated he had experienced several new conditions since his last exam (See Carrier Brief, Exhibit A, page 45). In response to these new conditions the Carrier's Medical Department evaluated the Claimant's fitness for work and determined he was not fit for service until his medical conditions could be properly controlled and until he completed the Carrier's drug rehabilitation program (DARS). On November 23,

2010 the Carrier advised the Claimant he was not medically fit for service and requested all documentation related to the new conditions he reported for further review.

The Claimant provided a letter from his Doctor which the Carrier determined only partially fulfilled their request (see Carrier Brief, Exhibit A, pages 49-50) and they further elaborated that they needed specific medical records related to his reported conditions from 2009 onwards. On January 27, 2011 the Carrier's Medical Service sent the Claimant a letter asking him to provide detailed medical records related to his conditions so the Carrier could determine his fitness for service (see Carrier Brief, Exhibit A, page 37). The Claimant did not respond to this letter. On May 5, 2011 the Carrier's Office of Administrative Personnel Manager S.H. Smith sent a letter ordering the Claimant to comply with the January 27, 2011 request and to do so within 10 days of receipt of Manager Smith's letter (see Carrier Brief, Exhibit A, page 41). The Claimant did not send in the requested records, and was again instructed to do so via yet a third letter on June 1, 2011 (see Carrier Brief, Exhibit A, page 42). The Carrier on July 22, 2011 determined the Claimant had failed to provide the requested documentation on multiple occasions even after being properly warned that doing so could (May 5, 2011 letter) and then would (June 1, 2011) result in disciplinary action. The Carrier held a formal investigation into these events, including a hearing on August 25, 2011. The Carrier determined the Claimant was guilty of failing to follow instructions and dismissed him from service via letter dated August 31, 2011.

The Carrier argues it was excessively generous in requesting upon three separate occasions that the Claimant send in additional medical information. The Claimant's actions, it argues, constitute an obvious violation of General Rule 1 which requires employees to follow instructions from proper authority (see Carrier Brief, page 6). There is no dispute that the Claimant received two of the three letters from a proper authority, the Office of Administrative Personnel. The Carrier argues that if the Claimant is truthful in his defense that the information on the MED-15 form as originally reported was inaccurate, the Claimant is responsible for deliberate misrepresentation since he self-reported the issues and signed a statement certifying the forms accuracy (see Carrier Brief, page 8). Additionally, the Carrier dismisses the Claimant's defenses by stating that he had the personal responsibility to send in the medical records regardless of his doctors availability and that the "clarifying" letter he presented about his medical conditions suggests that his doctor (see Carrier Brief, Exhibit A, page 48) was making statements without actually examining the Claimant (see Carrier Brief, page 11). In support of dismissal as appropriate, the Carrier also notes that while the Claimant's failure to follow instructions presented no clear and present danger, there were also no mitigating circumstances and the Claimant failed to provide any reasonable explanation for his behavior.

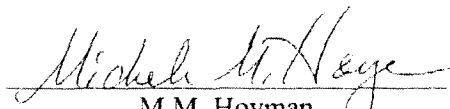
The Organization argues that the Claimant complied with the Carrier's request by contacting his doctors and requesting that they release his medical records to the Carrier (see Organization Brief, page 3). Since the Claimant doesn't actually possess the medical records, all he could do is request they be sent to the Carrier. The Claimant's intention to cooperate can be seen from his completion of the DARS evaluation (see Organization

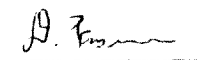
Brief, page 11). The Organization points out that the burden of proof rests on the Carrier to prove the Claimant failed to request his medical records be sent, and the Claimant's testimony in the record was not refuted. The Organization also argues (see Organization Brief, page 13) that the dismissal of the Claimant was not in accordance with progressive discipline as he is a very senior employee with no previous discipline record.

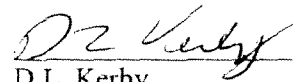
The Board finds there is no dispute in the record that, for whatever reason, the Claimant failed to produce the documents requested by the Carrier's medical department. Whether this failure was due to the Claimant not actually making the request (as the Carrier alleges) or whether he made the request and his doctors failed to follow through (as the Organization alleges) is unclear. There is also dispute about whether or not the Claimant completed the Carrier's DARS program. As the Claimant himself testified (see Transcript, page 19) that he went to a DARS evaluation counselor twice but declined to fill out the paperwork associated with it, we find that the Claimant did not complete the DARS program as requested.

In coming to its decision, the Board has carefully weighed the seniority of the Claimant, his work record, and the seriousness of the infractions. On balance, we find that the punishment of dismissal is not warranted. The claimant is to be reinstated, but without back pay. This reinstatement is contingent upon both (1) the Claimant's successful completion of the Carrier's DARS evaluation, including any paperwork that must be signed in order to satisfy the Carrier that the program has been completed and (2) the Claimant's successful completion of the return to work process, including the timely procurement of any and all requested medical records that the Carrier may request in response to any self-reported conditions.

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.