

**SPECIAL BOARD OF ADJUSTMENT NO. 1048**

**AWARD NO. 208**

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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. R. Pertee, issued by letter dated February 17, 2012 in connection with his alleged excessive absenteeism and failure to protect his assignment in that he was absent from work on January 5, 2012 and then was absent from work on January 10, 2012 without notifying his supervisor that he would be absent and without any authorization or permission, all despite having been previously counseled regarding these matters, was arbitrary, capricious, unreasonable and in violation of the Agreement (Carrier's File MW-BLUE-12-01-SG-010).
2. As a consequence of the violation referred to in Part 1 above, Mr. R. Pertee 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 August 15, 2008 as a Trackman. He was working in that capacity as part of the Flash Butt Welding Gang No. 107 on the date of the events which led to this case. On January 5, 2012 the Claimant notified his supervisor via text message that he would be absent from work that day for unspecified reasons. The Claimant did not receive authorization to be absent on January 5, 2012. Upon his return to work on January 9, 2012 the Claimant was counseled by his supervisor

about the need to protect his position. The Claimant was again absent with no stated reason on January 10, 2012, and this time he did not notify his supervisor of his intention to be absent in advance. As a result of these absences the Claimant was removed from service on January 16, 2012 and charged with excessive absenteeism and failing to protect his job assignment. The Carrier conducted an investigation on this matter including a hearing on February 8, 2012. The Carrier concluded the Claimant was guilty of the charges and dismissed him from service via letter on February 17, 2012.

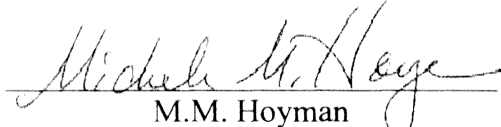
The Carrier's view is that the Claimant is clearly guilty of the charges because there is no dispute concerning the fact of his January 5 and 10, 2012 absences and no dispute that he did not have authorization to be absent (see Carrier Brief, page 4). The Carrier considers the absence of January 5, 2012 as particularly egregious because the Claimant knew in advance that he, as one of only two people on the Gang with a CDL license, would be needed on that day to move equipment. The Claimant's supervisor testified that the January 5, 2012 absence had a notably negative impact on the Gang's work (see Transcript, page 6). The Claimant has a history of being formally counseled (once verbally on August 18, 2009 and twice in writing on September 16, 2009 and March 17, 2010) about the need to be present on the job, the need to get authorization before being absent, and the importance of protecting his job assignment. The record indicates at least three other absences that were not authorized which occurred on May 30, 2011, July 25, 2011, and July 27, 2011 (see Transcript, page 13). For all these reasons, the Carrier argues dismissal was both appropriate and warranted.

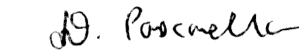
The Organization objects to dismissal based on a failure to follow procedure. It argues that the Claimant was not appropriately notified of the Carrier's investigation in a timely manner as required by Rule 30(a). The February 8, 2012 hearing occurred without the Claimant being present, which may only occur if the Claimant has not shown "good cause" for the failure to attend (see Organization Brief, page 14). The Organization notes the mail receipt for the hearing notice that was sent to the Claimant is signed by someone with a different first name than the Claimant (Danny Pertee). Under such circumstances, Claimant could not show good cause for his failure to attend, as it is plausible that he was completely unaware of the hearing date. Because of the hearing being held in absentia, the Organization argues it would be impossible for the Claimant to receive a truly fair and impartial hearing. For example, the Organization notes that the Claimant being absent means he could not ask relevant questions concerning the investigation, a key part of the process (see Organization Brief, page 14). For these reasons, the Organization argues dismissal is not warranted.

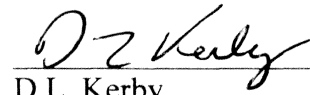
The Board finds no dispute in the case record that the Claimant was absent on January 5 and 10, 2012 without approval from a supervisor. This is an obvious violation of the Carrier's attendance policies. Concurrently, we find that the Claimant appears to be making a genuine effort to comply with Carrier attendance policies in part – for example, he did text a supervisor about his intention to be absent on January 5, 2012 even though he did not receive pre-approval for this absence. In reviewing the case record, the Board does note there appears to be a pattern of absenteeism, and for that reason the Board strongly urges the Claimant to make every effort to comply with all attendance policies in

the future. We find that dismissal was not warranted because it was too severe a penalty for the actual misconduct. The Claimant shall be reinstated, but without back pay.

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.