

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

**CASE NO. 157**

Parties to Dispute:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**NORFOLK SOUTHERN RAILWAY COMPANY**

**(Carrier File MW-GNVL-06-05-SG-053)**

Statement of Claim:

Claim on behalf of T. R. Pauley for reinstatement with seniority, vacation, and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on March 1, 2006, concerning failure to protect his job assignment and his excessive absenteeism in that he was absent every day from work commencing with Monday, January 23, 2006, and continuing.

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.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

**AWARD**

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

**BACKGROUND**

T. R. Pauley, the Claimant herein, entered the Carrier's service on January 24, 2005 as a Laborer. On January 22, 2006, the Claimant commenced work on a T&S Gang that had a Sunday through Wednesday work schedule. This matter concerns the propriety of the Claimant's failure to report for duty on January 23, 2006, his continued unauthorized absence from work each day thereafter

through February 15, 2006, and the Carrier's decision to dismiss him following his failure to protect his assignment and excessive absenteeism.

The record evidence established that the Claimant reported for duty and worked his full regular assignment on January 22, 2006. At the end of the workday the Claimant returned to the camp car site with other employees on his Gang. However, sometime following his return to the camp site, the Claimant left the area without advising anyone, including supervision or his co-workers, that he would not be present for work the next day. When the Claimant's Supervisor discovered his absence on January 23<sup>rd</sup>, the Supervisor telephoned the Claimant's home and spoke to the Claimant's mother who could not provide any information regarding the Claimant's whereabouts. The Claimant was no call, no show for the next three week period.

By letter dated February 15, 2006, the Claimant was cited to a formal investigation concerning his failure to protect his assignment and his excessive absenteeism beginning January 23, 2006 and continuing. The investigation was held on March 1, 2006, *in absentia*. The Claimant's interests were represented by the Organization who was present throughout the investigation. Following a review of the record evidence, by letter dated March 14, 2006 the Hearing Officer determined that the Claimant was guilty of the charges. The Claimant was thereupon dismissed from service. The Organization took exception to the Claimant's dismissal, and initiated an appeal on April 4, 2006.

### DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

As its initial finding, the Board concludes that at the hearing, held in absentia, the Carrier sustained its burden of proof by establishing, through substantive credible evidence, the allegations set forth in the notice of investigation. Accordingly, it was determined that the Claimant's failure to report for work for a period of approximately three weeks, without notification to the Carrier, resulted in his excessive absence and accordingly, his failure to protect his assignment.

Turning now to the discipline sought to be imposed, the Board finds unique circumstances that must be considered, particularly since the Claimant's loss of employment is at stake. The record establishes that prior to the Carrier's decision to dismiss the Claimant, the Hearing Officer as well as the Carrier's Medical Department were provided with additional facts of a medical nature. These facts were contained in a letter dated March 8, 2006 and authored by Dr. Jack Borders, the Claimant's personal physician. In his letter, Dr. Pauley, an affiliate with Regional Psychotherapy Services, Inc., stated:

I saw Mr. Pauley on 3/8/2006 at his request. He was able to return back to work only one week in January before his anxiety once again started creating havoc, making it impossible for him to function properly or work in close proximity to other people.

Since being off work, he has improved but still continues to have rather severe anxiety to the point that it is interfering with his functioning.

Today, I have increased his Klonopin from 2mg a day to 3mg a day and to continue the Cymbalta at 120 mg a day, at least for the next two weeks to see what happens with his anxiety.

In its May 3, 2006 letter to the Organization, the Carrier advised the Organization that it had not yet received the March 8, 2006 letter from Dr. Borders "or any other correspondence from this doctor in reference to the Claimant's continued absence." The Carrier advised that:

If the Claimant was, in fact, affected by a medical condition that he believes has made him unfit for duty, documentation of his medical treatment would have to be provided to the Medical Director for review before any consideration could be afforded the Claimant in connection with his excessive absenteeism and failure to advise supervision of his status.

The foregoing notice from the Carrier makes it clear that it recognizes the fact that employees sometimes get ill, and in order to consider the impact on the employee's job, it is necessary for the employee and/or his medical provider to communicate with the Carrier and/or the Carrier's Medical Director in a timely fashion. This the Claimant failed to do, thereby depriving the Carrier of relevant medical information that could have been used to protect the Claimant's assignment.

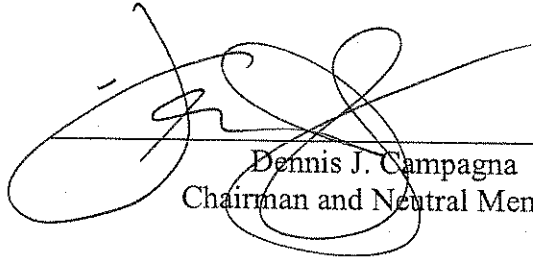
Upon review of the relevant facts of this case, with particular emphasis on the March 8, 2006 letter from Dr. Border, the Organization maintains that the penalty of dismissal represents excessive and undue punishment.

The concept of "just cause", which applies to instances of discipline and/or discharge, provides for the use of progressive discipline, except for those situations deemed to be egregious in nature. For actions of the later type, it is well established that the penalty of dismissal, while harsh, is appropriate, even for one instance. However, while the Claimant's inactions in this matter were unquestionably serious, the Board finds that they do not, in this one circumstance, warrant his termination. In this regard, there is nothing in the record challenging the integrity of Dr. Border's letter, and accordingly, it is more likely than not that the Claimant's medical condition was the root cause for his failure to inform his Supervisor that he would be unable to report for work.

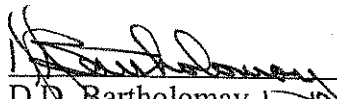
Given the foregoing unique facts and circumstances in this case, and without setting a precedent for future cases, the Board finds that a more fitting and appropriate way of dealing with this situation is to reinstate the Claimant, without back pay, contingent upon the Carrier's Medical Director's release of the Claimant to return to work. Accordingly, the Claimant shall be required to cooperate with the Medical Director's need to review all medical information relating to the diagnosis set forth in Dr. Border's March 8, 2006 letter. In this regard, the Claimant shall be required to sign any and all releases as required by the Medical Director for this purpose, including but not limited to a release as it may apply to review of records held by Dr. Border. Assuming the Claimant's return to work is ultimately approved by the Medical Director, the Claimant is well advised that his future employment with the Carrier is contingent upon his honest, timely and open communication with the Carrier over all matters affecting his ability to work. Failure to do so may well result in the Claimant's permanent termination from employment.

**CONCLUSION**

The claim is sustained consistent with the discussion set forth above.



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Dennis J. Campagna  
Chairman and Neutral Member



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D.D. Bartholomay 6-19-07  
Organization Member



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D.L. Kerby  
Carrier Member

**Dated May 31, 2007, Buffalo, New York**