

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 207

Parties to Dispute:

BROTHERHOOD OF MAINTENCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Claimant Charlie Williams for allegedly being insubordinate to supervisors, failure to follow instructions on March 25 and 26, 2009 and conduct unbecoming of an employee by being disrespectful, disruptive and using foul language towards supervisors and coworkers , was based on un-proven charges and was capricious, unjust, and excessive (Carrier's File MW-ATLA-09-07LM143),
2. The dismissal of Claimant Charlie Williams for the alleged violation of Safety and General Conduct Rule N alleging to have been injured on February 11, 2009 while working between Millen, GA and Waynesboro, GA, pouring concrete and with making false and conflicting statements in connection with this alleged injury, was based on un-proven charges and was capricious, unjust and excessive (Carrier's File MW-ATLA-09-25BB-413).
- 3, As a consequence of the unjust dismissal (s) described in Parts 1 and 2 above, Mr. Williams shall be made whole and restored to the service of the Carrier with pay for all lost time seniority and vacation 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:

In this case there are two primary sets of allegations against the Claimant. The first set of charges revolves around a series of events where the Carrier states the Claimant engaged in behaviors that were inappropriate and insubordinate to his

supervisors. The second set of charges regard a violation of Rule N and allegations that not only did the Claimant fail to report a workplace injury, but that veracity of the stated injury is questionable.

Overall, the Board finds conflicting evidence that does not conclusively support the first set of charges in their entirety. The evidence, which included much conflicting testimony, did not meet the preponderance of the evidence standard for some of the misconduct allegations (see for example Carrier Exhibit A, page 28). Given the nature of this evidence, the Board will not consider hearsay as providing sufficient proof of the misconduct allegations. Additionally, one witness provided by the Carrier states that the Claimant used offensive language but would not be specific with what the Claimant actually said due to religious concerns for saying cuss words (Carrier Exhibit A, page 37). Furthermore, the testimony shows the work unit in the instant case has a culture of working out disagreements verbally (Carrier Exhibit A, page 68-69). Some of the Claimant's conduct is not particularly egregious and does not appear to be insubordinate. For example, expressing disagreement in what is perceived as a "loud voice" may not be the best path to express disagreement but hardly qualifies as gross insubordination (Carrier Exhibit A, page 32). Complicating this case is that the allegations are all partially tied to use of inappropriate language, even though use of inappropriate language appears to be something that occurs occasionally in this work unit (Carrier Exhibit A, page 49) and as such it is unclear at what point use of such language is worthy of disciplinary action. It is an accepted standard in arbitration that disciplinary action must be uniform for all employees that engage in the offending behavior – if the Carrier classifies "conduct unbecoming an employee" to include use of inappropriate language the Rule be enforced for all employees.

While the Board discounts some of the testimony for these reasons, there are large portions of the testimony where the Claimant's misconduct were directly observed by witnesses (Carrier Exhibit A, pages 30-32; 40-41; 66-68, etc.). The Claimant's advocate did not provide sufficient evidence to refute these allegations. Much of the Claimant's alleged misconduct involves direct statements to supervisors about their inability to manage. These statements were not refuted and the record suggests they did occur. The Board finds sufficient evidence that the Claimant did engage in multiple statements that were insubordinate and inappropriate, even when discounting allegations about inappropriate language and hearsay statements.

The Claimant disputes the second set of charges regarding a possible violation of Rule N because he states that he told his supervisor directly about his workplace injury when it occurred. However, the Board notes that Rule N requires not only the notification of a direct supervisor but also that the employee fill out the correct form (see Carrier Brief, page 4), which the Claimant did not do. As the Claimant was not incapacitated after the injury, he should have filled out Form 22 at the time he reported it to his supervisor. There was conflicting testimony from the Claimant about what date the incident actually occurred on. The record suggests that the Claimant did initially report the injury, but at the time failed to fill out the appropriate form (Carrier Exhibit C, pages 37-38).

The instant case is challenging because the Claimant has been working for the Carrier since 1988, and beyond the events surrounding the case the Board finds no other stated incidents of previous discipline problems in the record. The case before the Board presents two sets of charges against the Claimant. Upon reviewing the record the Board finds that there is sufficient evidence to support charges of the Claimant making inappropriate and insubordinate statements which represent conduct unbecoming of an employee. However, the disciplinary action of dismissal for these charges in and of themselves is excessive. The Board also finds that there is sufficient evidence to support portions of the second set of charges. The Claimant committed a violation of Rule N by failing to fill out the appropriate form at the time his workplace injury occurred. Reporting injuries when they occur immediately and filling out the appropriate form is critical for workplace safety. On balance, the Board finds the violation of Rule N was egregious but that the disciplinary action of termination was again disproportional to the charges. The record shows that the Claimant did engage in inappropriate conduct and was insubordinate, and he failed to completely follow Rule N by not filling out Form 22.

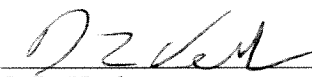
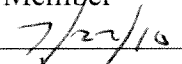
Given his seniority, the Claimant shall be reinstated but without back pay, and shall lose his seniority in the position of Helper on the Bridge and Building Gang, the position he was working under during the time the violations occurred.

The claim is sustained in accordance with the findings. The Carrier is directed to make this change effective within 30 days following the date on which the parties affix their signatures thereto.


M.M. Hoyman
Chairperson and Neutral Member


T. Kreke
Employee Member

Date Signed


D.L. Kerby
Carrier Member

Date Signed

Issued at Chicago, Illinois on June 19, 2010.