

SPECIAL BOARD OF ADJUSTMENT 1063

In the Matter of the Arbitration Between:  
NORFOLK SOUTHERN RAILWAY  
COMPANY

and

NMB Case No. 429  
Claim of D.E. Velat

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

STATEMENT OF CLAIM: Claim of Virginia Division Engineer D.E. Velat for reinstatement to service with all benefits restored and pay for all time lost in connection with the Carrier's charge that he failed to comply with instructions to maintain an acceptable work record.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant(s) employees within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on March 25, 2002 at Norfolk, Virginia. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Engineer's craft.

Claimant entered the Carrier's employ in train service on November 19, 1989, and was promoted to Locomotive Engineer in October of 1998. Claimant was regularly assigned to the Radford Division road extra board in that capacity until he was dismissed on September 24, 2001 for his alleged excessive absenteeism.

On August 28, 2001, Claimant was directed to attend a formal investigation in connection with his alleged "failure to comply with [the Carrier's] instructions to maintain an acceptable work record." The hearing was held on September 18, 2001, during which Carrier witness D. W. Woodlin entered into evidence extra board calling records indicating that Claimant had marked off for illness 15 times in the month of July, 2001 and 15 times in the month of August, 2001.<sup>1</sup> Woodlin also testified that Claimant had been repeatedly cautioned that his level of availability on the extra

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<sup>1</sup> The record established that the number of times Claimant marked off in each month equaled nearly one-half of his potential extra board time.

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board was unsatisfactory, and specifically noted occasions when he personally delivered verbal warnings to Claimant on April 20, July 8, and July 31, 2001. Woodlin did allow at page 23 of the transcript that Claimant was "a very personable type guy, very nice, and a very good engineer", and testified that he elected not to invoke more severe discipline on those occasions because he wanted Claimant to know "how much [he] cared about him". Woodlin asserted, however, that he did inform Claimant exactly what would be expected of him (in terms of his availability for service) in the future, and cited a letter of understanding signed by Claimant upon his promotion to engine service in November, 1989 which stated in pertinent part as follows:

I understand and agree that the duties of the position for which I am an applicant require that I use proper and constant care to avoid injury...

I further understand that the railway company operates SEVEN DAYS PER WEEK, TWENTY-FOUR HOURS PER DAY, and that I will work when needed. (Emphasis as originally presented)

In his testimony, Claimant offered no substantive excuse for his excessive absenteeism, but alluded to an "unreasonable expectation" on the part of the Carrier that he be available for service, upon rest, for extended periods of time without days off.

Claimant's "Abbreviated Employee Profile" was also made a matter of record, which contained the following pertinent entries:

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2-3-97	Fifteen days deferred suspension (waived hearing) - Failure to protect assignment
6-23-98	Letter of reprimand - Failure to comply with instructions of March 24, 1998, unacceptable work record.
11-11-98	Ten days deferred suspension (waived hearing) - Failure to comply with instructions, unacceptable work record.
3-16-99	Ten days deferred suspension (waived hearing, activated prior ten) - Failure to comply with instructions, unacceptable work record.
10-6-99	Fifteen days actual suspension - Failure to comply with instructions, unacceptable work record.

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By letter dated September 24, 2001, Claimant was dismissed, and in due course, a claim for his reinstatement was submitted. The Carrier denied the claim, and as resolution of the matter could not be reached on the property, it was submitted to the Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that Claimant was guilty of the charge, and further that dismissal, upon the whole of the record, was warranted. As to the merit of its charge against Claimant, the Carrier relies on essentially undisputed crew calling records indicating that Claimant was unavailable for nearly one-half of his potential road extra board starts in both July and August, 2001. The Carrier points out that Claimant received numerous (documented) warnings that his repeated unavailability for duty was unacceptable, yet he continued to lay off, particularly on weekends, due to alleged illness. The Carrier argues that Claimant offered no further explanation or proof of chronic illness, nor did he produce evidence that he was under the care of a physician.

The Carrier cites a number of prior arbitration awards supporting discipline and dismissal for excessive absenteeism, among which was Award 26 of PLB 5944 (UTU v N&W, Peterson, Neutral). That decision stated in pertinent part:

In the opinion of the Board, it does not necessarily follow that because a specific need exists for the establishment of an element of measurement for the application of rules such as those mentioned above that in the absence of a collectively bargained rule that the Carrier does not have the right to hold, as here, that an employee be available for work on a regular, full time basis, or to otherwise institute attendance policies and procedures for the efficient and economical operation of its services.

The Carrier argues here that, "50% availability is clearly not working on a regular, full time basis", and insists in accordance with the above Award that even in the absence of a bargained attendance standard, it was justified in holding Claimant accountable for his repeated unavailability for call from his assigned 24-hour extra board.

As to the degree of discipline, the Carrier maintains that dismissal was appropriate given Claimant's prior record. The Carrier argues that Claimant, as a full-time employee, was properly expected to be available for service to "fully meet the needs of the Carrier", and points out that he was frequently reminded of

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that expectation. The Carrier argues that Claimant was afforded ample opportunity to correct his problem behavior after numerous verbal warnings and more formal disciplinary action, yet he failed to do so. On that basis, the Carrier maintains that dismissal was its only remaining option, and urges the Board to deny the claim in its entirety.

The Organization argues that the Carrier acted harshly in dismissing Claimant, whom it describes as a "relatively long term employee" and "a very good engineer". The Organization points out the Claimant was last disciplined for poor attendance in 1999, and concludes that whatever events precipitated that particular action (and those preceding it) were addressed, rectified, and should now be barred from consideration in the instant matter.

The Organization also argues that the Carrier offered no evidence that Claimant was not, in fact, ill on all dates he marked off. On this point, the Organization acknowledges that the Carrier is justified in requiring its employees to maintain a "good" work record, but asserts that the Carrier, too, has an obligation "to ensure that all employees (including Claimant) are in good health and have a sense of well-being." In so arguing, the Organization concludes that the Carrier failed to satisfy its burden to prove Claimant negligent of his responsibility to be available for duty, and urges the Board to sustain the claim.

DISCUSSION AND ANALYSIS: On the basis of the entire record, the Board is convinced that while the Carrier had good reason to take some action against Claimant, the penalty of dismissal was unduly harsh.

As to the Organization's argument that the Carrier failed to prove Claimant was not ill as he alleged, the Board concludes that the Carrier was not bound, at least in this case, to so demonstrate in order to prevail. Claimant was not charged with falsifying claims that he was ill, but for his failure to satisfy his obligation as a full-time employee of the Carrier; an obligation he himself recognized when he signed his letter of understanding at the time of his promotion to engine service. On this point, the Board adopts the Peterson Board's analysis, and is indeed persuaded Claimant's lack of full-time availability during the months of July and August, 2001 justified remedial action by the Carrier. However, on the basis that he was an otherwise good employee with no recent formal discipline, the Board is convinced that the Carrier's escalation from a two year-old fifteen-day suspension to dismissal was excessive.

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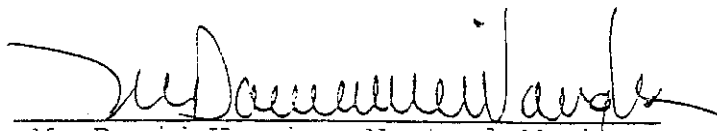
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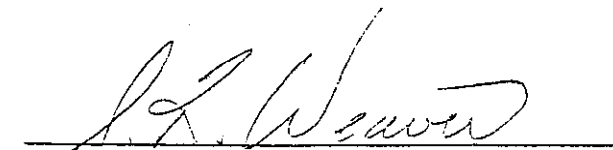
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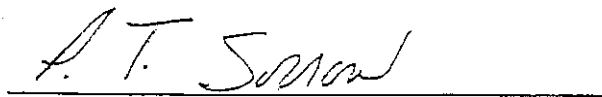
It is well settled that the purpose of discipline is corrective (or remedial) as opposed to being merely punitive; and the Board is persuaded that both Claimant and the Carrier would benefit from a restored employee/employer relationship. The Board assumes, by virtue of the instant claim, that Claimant seeks to regain his employment and intends to honor his commitment should he prevail. Carrier, on the other hand, is on record as appreciating Claimant's personable attitude and skill as an engineer. Therefore, as the following Award reflects, the Claimant's dismissal is hereby rescinded, with the additional admonition to Claimant that should any future action against him of this nature be brought to this Board, the Carrier's documented expectation that he be available for service as needed will be supported.

AWARD: The claim is sustained in part and denied in part. Claimant's availability was not acceptable and discipline was appropriate. Dismissal was, however, excessive. Claimant's dismissal shall be rescinded, and the period of claimant's absence corrected to a disciplinary suspension of 30 days and the remainder to leave without pay. Claimant shall be reinstated with all seniority rights unimpaired, but without pay or benefits for the period of his absence. Claimant's personal record shall be amended to so reflect.

Dated this 24<sup>th</sup> day of April, 2002.

  
M. David Vaughn, Neutral Member

  
S. R. Weaver, Carrier Member

  
P. T. Sorrow, Employee Member