

**SPECIAL BOARD OF ADJUSTMENT NO. 1048**

**AWARD NO. 191**

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 Trackman J. Dingess in connection with his failure to follow Instructions of Foreman Tucker and the use of abusive and unprofessional language toward Foreman Tucker and a Carrier officer on December 10, 2009 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File MW-FTW-09-61-SG-554).
2. As a consequence of the violation referred to in Part 1 above, we request that Mr. Dingess be reinstated to service with seniority and vacation unimpaired and paid for all lost time."

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**

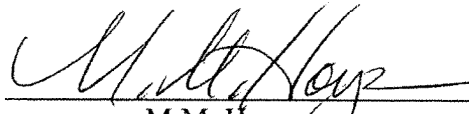
After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

The Claimant has three years seniority as a laborer for the Carrier with no past disciplinary infractions on his record. On December 10, 2009 the Claimant was working in Bellevue, Ohio on an R-9 surfacing gang. Due to the cold weather, Supervisor J. Broce told the Claimant and a few other members of the crew that they could remain in the van out of the cold until they were needed. While in the van, the Claimant received a phone call. He asserted that the phone call was from his fiancée who was calling about their sick child. The Claimant was on the phone when the Supervisor Broce motioned the Claimant to exit the van and begin working. The Claimant did not respond so Supervisor Broce

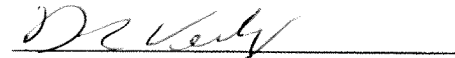
asked Foreman Tucker to go to the van and tell the grievant to start to work. Foreman Tucker told the Claimant he needed to get out and start working now or he would not be needed for the day. The record indicates that the Claimant was told to leave the van and begin work multiple times (see Transcript, Pages 15-17). At that point, the Claimant exited the van and directed comments toward Foreman Tucker that were to the effect of "Can't you see I am on the f\*\*\*\*\*g phone!" and "You're not my boss and nobody is going to tell me what to do!" (see Transcript, Page 34). Later the Claimant was removed from service for violation of General Conduct Rule Number 1 and General Regulation Number 3.

There is no factual dispute regarding the events that took place on December 10, 2009 which led to the Carrier's charges of refusal to work and conduct unbecoming a professional. If there were some problem that needed to be addressed before obeying the order to start working, the Board notes that there is a time honored industrial and legal practice that a grievant should "obey now and grieve later." The Board notes that there were no mitigating circumstances explained to the Carrier's managers at the time of the incident (See Transcript, Page 42). There were no extenuating circumstances which rise to the level of excusing the Claimant's conduct. Sometimes in the course of work, tempers will flare and unprofessional comments are made, but the grievant made no attempt to justify or apologize for his actions. Concurrently, given the Claimant's small amount of seniority, the Board is not compelled to mitigate this severe penalty because of any long service to the Carrier. Considering all these circumstances, we conclude that the Carrier had cause to dismiss the grievant since he did not obey a clear order and did engage in conduct unbecoming an employee.

The claim is denied.

  
M.M. Hoyman  
Chairperson and Neutral Member

  
T. Kreke  
Employee Member

  
D.L. Kerby  
Carrier Member

Award Date: June 30, 2011