

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 192

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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) of Mr. A. Waller issued by letter dated February 23, 2010 in connection with alleged failures to follow instructions and absenting himself from his duties without permission from the proper authority on January 21, 2010 by leaving to go home prior to the end of his regular shift, after his supervisor had denied his request to leave work, was harsh, excessive and an abuse of the Carrier's authority. (System File: MW-ROAN-10-06-SG-034).
2. The Carrier's discipline (dismissed from all service) of Mr. S. Perfater issued by letter dated February 23, 2010 in connection with alleged failures to follow instructions and absenting himself from his duties without permission from the proper authority on January 21, 2010 by leaving to go home prior to the end of his regular shift, after his Supervisor had denied him his request to leave work, was harsh, excessive and an abuse of the Carrier's authority. (System File MW-ROAN – 10-07 –SG-035).
3. As a consequence of the violation referred to in Part 1 above, Mr. A. Waller shall be granted remedy in accordance with Rule 30 of the agreement.
4. As a consequence of the violation referred to in Part 2 above, Mr. S. Perfater shall be granted remedy in accordance with Rule 30 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

The events that led to the removal from service of Claimant Waller and Claimant Perfater arose on January 21, 2010 in the Roanoke, Virginia material yard. The employees who were working that day included the Claimants and four other employees. The case involves whether the Claimants were in violation of the Carrier's rules when leaving the work site early due to severe weather. There is some ambiguity surrounding the facts. The Carrier claims that there was no bad weather that day. The Claimants attest that there were reports by family and friends of impending or actual bad weather near their homes. As such, they were seeking to get off work early to head home early. The supervisors claimed to have checked local and regional radar for severe weather but did not find anything of concern. Both Claimants reported to their supervisors that they were fearful for their safety and wanted to leave for home early. The supervisors contend that they did not give permission for the employees to leave. At about 10:40AM, both Claimants left the work site. However, two supervisors testified that no permission was granted to anyone to leave the work site early due to weather.

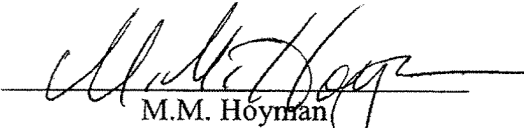
The Carrier argues that because the two Claimants left, it essentially pushed the work site to closing for the day due to inadequate staffing. The Organization argues that this is a differential treatment case. There were four employees (excluding the Claimants) who did leave early and who are now back in service. According to the testimony of Wolfe, none of the four were given permission to leave. The facts were that only one had a valid reason to leave, a family member had been in a car accident, but yet all four left early. The other three just happened to be in a carpool with that worker. Deciding to get to work via a carpool does not strike the Board as a fair way of distinguishing one employee for continuation of employment and another for being out of service.

In normal circumstances it is essential that employees follow orders under the industrial practice of "obey now, and grieve later." This is a time honored principle of industrial law. However the board finds that there were mitigating circumstances. It is undisputed that there was a concern on the part of the Claimants over the impending weather conditions in the area of the state, Christiansburg, where generally conditions are worse than local conditions.


The Carrier may choose to use its discretion and allow some employees to go home due to such carpool arrangements, however it must treat all employees equally in terms of severity of punishment for similar infractions. Although the facts of the four employees' situation versus the two employees' situation are slightly different, they do not rise to the level of difference to justify the vastly different punishments. Finally, it is well established that a penalty assessed for a transgression must not be disproportionate or too severe for the infraction. It would appear that remaining out of service is too severe a penalty for refusing to follow an order where employees were sincerely afraid of the safety situation (weather) that following an order would cause. In light of the record, the Board considers the concern over safety due to impending bad weather in this case to be an extenuating circumstance. On the other hand, the Claimants are not totally innocent.

Given the evidence, the Board finds that the Claimants should be reinstated with back pay from sixty days after the date of dismissal. As the date of dismissal was January 23, 2010, back pay shall be awarded from March 23, 2010 until the Claimants are reinstated. They should also be made whole in every other respect.

The claim is sustained in part.


M.M. Hoyman
Chairperson and Neutral Member


T. Kreke
Employee Member


D.L. Kerby
Carrier Member

Award Date: June 30, 2011

I DEBENT:

THE CLAIMANTS, WHO ABSENTED
THEMSELVES AFTER THE
MANAGER CONFIRMED A
LACK OF SEVERE WEATHER
IN THE AREA, WERE NOT
SIMILARLY SITUATED WITH
THE OTHER EMPLOYEES, WHO
ASSUMED THEIR CIRCUMSTANCE
PROVIDED BASIS TO LEAVE WORK,
SO AS TO WARRANT THIS
DEGREE OF ADJUSTMENT TO
THE DISMISSAL ASSESSED.

D.L. KERBY