

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 209

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

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

1. The Carrier's discipline (dismissed from all service) of Mr. J. Johnson Issued by letter dated March 2, 2010 in connection with alleged conduct unbecoming an employee concerning his failing to protect his assignment in that he failed to report for work on T&S 2 at regular starting time on November 21, 2009 and also reported to a different gang on November 30, 2009 without first obtaining, from the proper authority, a release from his position on T&S 2 and also alleged conduct unbecoming an employee in misleading Assistant Supervisor Handy on November 21, 2009 into believing that he had previously obtained a release from the proper authority was capricious, unjust and excessive (Carrier's File MW-CN-09-31-SG-544).
2. As a consequence of the violation referred to in Part 1 above, Mr. J. Johnson 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:

On November 18, 2009 Claimant Johnson was told by his supervisor that he had been awarded a bid on another gang and would be transferring there shortly. Claimant asserts that his

supervisor provided many particulars about the new work, most particularly when and where he should report. The supervisor denies sharing with the Claimant any such details, and instead says he told the Claimant he would receive further details about the assignment after consulting with the division engineer.

On the last day of his initial assignment (November 21, 2009), the Claimant and another employee overslept. The Claimant's supervisor went to their location and proceeded to call another supervisor to see if the Claimant could still report to work. The response from the supervisor was that they could not report to work since they overslept and would be tardy. Several bystander-employees reported that Assistant Supervisor Handy added "Have a good Thanksgiving." after having talked with other supervisor. At that point, the Claimant asserts that he was offered a written release form but he turned it down since using the forms was not standard operating practice. The Carrier's version of some of these facts differs considerably. For instance the Carrier attempts to discredit the testimony of by-standers as biased and self-serving. The Carrier points out that the Claimant just wanted to get out of his work assignment. In addition, the Carrier points out that the supervisors would have no reason to lie. Supervisor Myers and Supervisor Handy both deny releasing the Claimant. The Organization raised procedural flaws, such as the presence of his supervisor on several steps in the process which could have introduced bias and an element of self-interest.


The Claimant reported to his new work assignment on Monday, November 30, 2009, but was pulled out of service before the end of the day. On December 1, 2009, the Claimant was charged with conduct unbecoming an employee, in that he failed to protect his assignment on the first gang and by not having procured a proper release from his previous assignment. Further, the letter asserted that the Claimant misled the Carrier into thinking that Claimant had previously obtained a release. There was a long standing practice on the premises of not requiring a written release form even though supervisory discretion on whether such forms should be used was allowed. The Carrier denied granting a release. The Claimant did not dispute that he needed a release, but simply thought that he had received a release even without written approval because the written forms were not used most of the time.


There are a few facts that are undisputed: The Board finds that the Claimant did fail to report to his initial work gang assignment on the last day of it, November 21, 2009, and that he did proceed to the second gang without getting the appropriate release. The issue of whether it was without authorization totally depends on whose testimony one credits: the Supervisors' or the Claimant's and that of fellow employees. According to the two supervisors, they did not release him. The record is not clear on whether the bystanders were telling the truth and whether the relevant supervisors had consistently required a written release. There is not substantial evidence that the employee misled the supervisors into thinking he had permission. Thus, any misconduct here on behalf of employees seems to be more of a matter of negligence than fraud. Also, the Board notes that Supervisor Myers claims T&S 2 requires a written release as standard procedure. However, this practice does not appear to come from the collective bargaining agreement but is rather a practice of the individual supervisor.


The Board finds that the Claimant had been awarded the release. What is in dispute is whether he acted in accordance with the Carrier's procedures when moving on to the next work

assignment. Given this finding, the Board finds that the penalty of dismissal is too severe. The Claimant should be reinstated without back pay.

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