SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 219

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

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

1. The dismissal of Machine Operator D.S. Anders for making false and conflicting statements and marking off under false pretenses on August 16, 2010 is unjust, unwarranted, excessive and in violation of the Agreement (Carrier's File MW-ROAN-10-31-SG-312).

2. As a consequence of the violation referenced in Part 1 above, Mr. Anders shall be granted the remedy in accordance with Rule 40(d) 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

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 began service for the Carrier on March 19, 2007 and at the time of the incidents which led to this case held seniority as a machine operator. On August 16, 2010 the Claimant called in before the start of work – at approximately 6:16AM - and left a voice mail to notify Gang Supervisor J.L. Myers of a need to be off from work to go to court "for tickets." He also indicated he had another court hearing on Monday August 23, 2010 for which he would also have to miss work. During the day's safety meeting Supervisor Myers later tried to contact the Claimant by phone three times. On the third attempt, Supervisor Myers left the Claimant a voice mail stating that he could be given permission to be absent if he provided documentation from the court of his presence that day. The next morning, August 17, 2010 the Claimant reported for work and supervisor

Myers asked for the paper work to prove his August 16, 2010 absence. At that time, the Claimant stated he had forgotten to bring it with him.

As a result of the above the Claimant was removed from service pending investigation based on two charges. The first charge was conduct unbecoming an employee in that he told his supervisor that he needed to go to court when he did not need to do so on August 16, 2010. The second charge was a failure to protect his assignment via being absent without permission on August 16, 2010 because no documentation was provided to prove the stated reason for his absence. The Carrier conducted a formal investigation into these charges including a hearing on September 16, 2010. The Carrier informed the Claimant via letter on October 1, 2010 that he was considered guilty of these charges and dismissed him from service.

The Carrier points out that there is no dispute that Claimant had misrepresented his reasons for being absence. According to the case record, the Claimant had two separate reasons to go to appear before a court - one for tickets and the other for a marital matter. He claimed that his lawyer had told him one matter was to be heard on August 16 and the other was to be addressed on August 23. However, the Claimant explained that on the morning of the 16th he talked to his lawyer and discovered both matters were slated for August 23rd. The Carrier notes the Claimant's testimony at the hearing conflicts with his voice mail message that he was going to court for reasons related to a ticket. The Claimant also contradicted himself about whether or not he received the Supervisor's directive left on his voice mail. Originally, he testified no and later he testified that he did listen to the message sometime that day between 10:00AM and 10:30AM. The Carrier proffers a string of cases supporting employer's action of dismissal when an employee does not show up for work, including 2 NRAB Award 7852, CM vs. SOU (Lieberman) and PLB 1760 Award 93, BMWED v. N.W. (Van Wart). In addition the Carrier puts forth a series of cases which conclude that dishonesty is a dischargeable offense, including PLB 5846 Award 1, UTU v. NS (Vaughn); PLB 3445 Award 72, BMWED v. SOU (Zumas); PLB 1760 Award 36, BMWED v. NW (Van Wart); PLB 1760 Award 177, BMWED v. N.W. (Gold); and PLB 3445 Award 1, BMWED v. SOU (Zumas).

The Organization explains the behaviors of the Claimant in a more sympathetic light. For one, the reason the Claimant could not provide documentation of his court appearance on August 16 when he returned to work on August 17 was because he did not appear in court. Second, the confusion on dates was not intentional deception but was an honest misunderstanding between him and his attorney. The Organization's major argument however is that the burden of proof for dismissal cases rests squarely with the Carrier and it has not met this burden. The Organization argues that the allegation that the Claimant did not protect his assignment was also unjust and unwarranted. Finally, since it is the Claimant's first offense of this type the Organization argues that dismissal is not warranted, citing NRAB Second Division Award 6324 and Third Division Award 19037 which state that dismissal is the industrial equivalent of capital punishment and respectively, that with first time offenses dismissal would be unwarranted.

In coming to its conclusion, the board finds several aggravating circumstances that must be mentioned. Perhaps most importantly, we note that that this is the second dismissal charge for this three year employee. In addition, the charge in the instant case entails not just absenteeism but goes to the broader and more serious infraction of dishonesty. We concur with the Organization that dismissal is an extreme action and normally first time offenses would not be enough to warrant this punishment. However, we also agree with the Carrier that there are some offenses – such as dishonesty – that rise to a level which is so egregious that dismissal for a first time offense is warranted. When considering the record, we find that the Claimant failed to take several actions to protect his assignment if his versions of events are correct. For example, after finding out that he was misinformed about his court date, he could have contacted his Supervisor to see if he could still come to work – doing such would lend more weight to the "no intentional dishonesty" argument as brought forth by the Organization.

The claim is denied.

M.M. Hoyman
Chairperson and Neutral Member

T. Kreke
Employee Member

D.L. Kerby
Carrier Member

Issued at Chapel Hill, North Carolina on February 10, 2012.