

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 129

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim in behalf of K. L. Cogswell for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for time lost as a result of his dismissal from service following a formal investigation held on July 18, 2003, in connection with 1) being on Company property on June 4, 2003, and interrupting employees during work hours contrary to instructions of Division Engineer Stump in a September 25, 2002 letter and 2) conduct unbecoming an employee for soliciting defamatory testimony against a Carrier officer.

(Carrier File MW-DEAR-03-12-LM-179)

Upon the whole record and all the evidence, after hearing, the Board finds that 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.

AWARD

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

At the time of the incidents in question, Claimant was on furlough status. In such status, Claimant had the right to come on the property to check job bulletins and award notices. The Division Engineer, by letter dated September 25, 2002, instructed Claimant that he was not to enter the property for reasons other than Carrier business and was not to disrupt operations by entering into conversations with fellow employees while they were working.

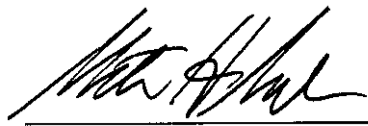
There was no dispute that Claimant came on the property on June 4, 2003, and that he engaged in conversation with two machine operators. Although Claimant testified that he had brief conversations with the machine operators in the parking lot, each of the machine operators testified that Claimant spoke with them in or by the tool trailer while they were working. As an appellate body that does not observe the witnesses, we defer to credibility determinations and resolutions of conflicting testimony made on the property. We conclude that Carrier proved the first charge by substantial evidence.

However, we find that the second charge cannot stand. The notice of investigation stated, "You will also be charged with conduct unbecoming an employee concerning the soliciting for \$1,000.00 of defamatory testimony against a Carrier officer." The Organization promptly wrote to Carrier requesting that it identify the individuals allegedly solicited and the date and location of the alleged solicitation. Carrier did not respond. The Organization protested the vagueness of the notice at the start of the investigation and has reiterated its position throughout the handling on the property and before this Board.

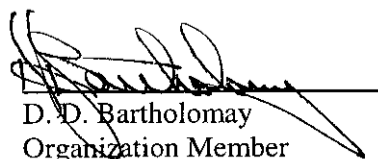
Rule 30(a) of the applicable Agreement requires that the notice of investigation "set forth the precise charge against the employee." Although this rule does not impose any formal type of pleading requirement, it does require that Carrier provide the accused employee with adequate notice so as to enable him to prepare a defense. The notice in the instant case did not meet this standard. It did not advise Claimant of the persons to whom he was alleged to have solicited defamatory testimony or of the dates of the alleged solicitation. Indeed, the only date mentioned in the notice was June 4, 2003, the date of which Claimant was alleged to have engaged in unauthorized activity on Carrier's property. As such, the notice concerning the conduct unbecoming charge was not only inadequate, it was misleading. A reasonable person reading the notice could interpret it as alleging that the inappropriate solicitation occurred when Claimant was on the property on June 4, 2003. However, the most serious alleged act of solicitation allegedly occurred at the home of one of the machine operators on May 22, 2003. The notice in no way placed Claimant and the Organization on notice to meet such an allegation.

Accordingly, we conclude that the first charge of being on Company property contrary to the instructions of the Division Engineer was established by substantial evidence and we see no reason to set the finding of guilt on that charge aside. However, the finding of guilt of conduct unbecoming an employee must be set aside because of the violation of Claimant's due process right to adequate notice of the charge as set forth in Rule 30(a). Claimant's dismissal was based on both charges.

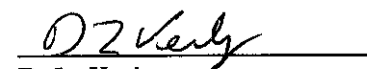
Being on Company property contrary to the instructions of the Division Engineer was a very serious offense. However, in light of the invalidity of Carrier's finding of guilt on the charge of conduct unbecoming an employee, Claimant's more than twenty years of service and the absence in the record of any prior discipline, we conclude that Claimant's presence on the property on June 4, 2003, cannot support a penalty of permanent dismissal. Accordingly, we award that Claimant be reinstated to service with seniority unimpaired but without compensation for time held out of service.



M. H. Malin
Chairman and Neutral Member



D. D. Bartholomay
Organization Member



D. L. Kerby
Carrier Member