

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 139

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of T. J. Kitts 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 May 28, 2004, in connection with his violation of the Norfolk Southern Corporation (NS) Highway Vehicle Operator's Manual and Federal Motor Carrier Safety Administration (FMCSA) Regulations in that, as a holder of a Commercial Driver's License (CDL), he failed to notify his immediate supervisor of his conviction on November 19, 2003 for violating a State law/regulation, that being Driving Under the Influence (DUI), and also conduct unbecoming in that he subsequently operated a vehicle requiring a CDL after this conviction disqualified him as a driver of a commercial motor vehicle for one hundred twenty (120) days in Kentucky.

(Carrier File MW-BLUE-04-04-LM-090)

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.

This award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

AWARD

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

Claimant T. J. Kitts entered the service of the Carrier as a laborer in the Maintenance of Way Department on July 17, 1989. In November 2003, he was assigned as an Assistant Foreman, the responsibilities of which included driving a vehicle that required a Commercial Driver's License (CDL). The driving responsibility of his assignment placed the Claimant under the Carrier's policy regarding highway vehicle operators, and subjected him to federal regulations for CDL holders.

The Carrier's policy, as reflected in its Highway Vehicle Operator's Manual, requires drivers of highway vehicles "... to have the proper, current operator's license when driving any Company vehicle." Rule 39 of the Manual provides that, "Employees holding Commercial Driver's License (CDL) must notify their immediate supervisor of any violation or conviction of Federal,

State, and local laws or regulations. . . Any employee who's CDL has been revoked or has been disqualified as a driver will not be permitted to operate a commercial motor vehicle."

The Federal Motor Carriers Safety Regulations require in subsection 383.33, that:

Each employee who has a driver's license suspended, revoked or cancelled by a State or jurisdiction, who loses the right to operate a commercial motor vehicle in a State or jurisdiction for any period, or who is disqualified from operating a commercial motor vehicle for any period, shall notify his/her current employer of such suspension, revocation, cancellation, lost privilege, or disqualification. The notification must be made before the end of the business day following the day the employee received notice of suspension, revocation, cancellation, lost privilege, or disqualification.

On November 19, 2003, Claimant was convicted by the State of Kentucky of driving under the influence of alcohol/drugs, after pleading guilty to the charge. One of the elements of the disposition of Claimant's case was suspension of his license in Kentucky for 120 days, effective November 19, 2003. His license was also suspended in West Virginia, Claimant's home state.

Claimant did not notify any Carrier officer of his DUI conviction and the suspension of his license. He continued to operate a Carrier highway vehicle until December of 2003, when he began a medical leave due to an injury. When Claimant attempted to return to service on April 12, 2004, Carrier's Police Department investigated an anonymous tip that Claimant had been convicted of DUI in November 2003. The Carrier Police were able to confirm the information given by the anonymous caller, and that Claimant had operated a Carrier highway vehicle while his CDL was suspended in November and December 2003.

By letter dated May 10, 2004, Claimant was notified to attend a formal investigation on May 21, 2004, regarding the allegations that he violated Carrier and Federal rules regulating CDL drivers when he failed to report his November 19, 2003 DUI conviction, and that he engaged in conduct unbecoming an employee when he operated a vehicle requiring a CDL after the conviction disqualified him as a driver of a commercial motor vehicle. He was also notified that he would be withheld from service pending the hearing.

The investigation was held as scheduled, during which Claimant freely admitted his guilt in violating the previously noted Carrier and Federal regulations regarding commercial motor vehicle drivers. As a result, Claimant was notified by letter dated June 11, 2004, that he was dismissed from all service with the Carrier.

It is undisputed that the Carrier has the right to enforce obligations for employees to comply with the Highway Vehicle Operator Manual and State and Federal driving regulations unless they are in conflict with the collective bargaining agreement. The Carrier's right to enforce these obligations includes assessment of discipline for violations of those rules and regulations, up to and including dismissal. Further, this Board is aware that Claimant's fourteen years of service is not unblemished.

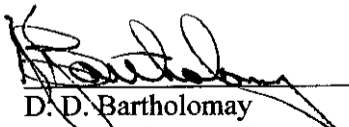
On the other hand, the Organization argues that the discipline of permanent dismissal was harsh and excessive, citing various Third Division Awards in support of the position that it is not always best policy to impose the most severe penalty.

Under the particular circumstances of this case, the Board agrees that permanent dismissal is excessive. Specifically, Claimant's DUI arrest occurred while he was off-duty and on vacation in June, 2002. If he had notified the Carrier immediately, as required, he would have been able to continue working on assignments that do not require a CDL. His offense is that he failed to make mandatory notification of the conviction and needlessly exposed his employer to considerable risk when he continued to operate a highway motor vehicle without a valid CDL. Substantial discipline is appropriate; therefore, Claimant's dismissal shall be reduced to a lengthy suspension, and he shall be reinstated to service. Such reinstatement is subject to Claimant's compliance with all conditions, restrictions and other terms of Carrier's DARS program.

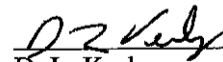
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board sign this award.



Mark D. Selbert
Chairman and Neutral Member



D. D. Bartholomay
Organization Member



D. L. Kerby
Carrier Member

Issued at Saint Augustine, Florida, on September 28, 2004