

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 148

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-ROAN-04-050-LM-405)

Statement of Claim:

Claim on behalf of F.M. Davenport for reinstatement to service with seniority, vacation and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on January 6, 2005, in connection with his failure to protect his assignment, absenting himself from duty without permission, and failing to follow instructions when he left work on December 9, 2004, after the morning meeting in which he had been instructed to put in ties at the RT 14 track in Roanoke, Virginia, and taking off December 10, 2004.

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' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

F. M. Davenport, the Claimant herein, entered the Carrier's service on April 4, 1974 as a Thermit Welder Helper, and on December 9, 2004¹, the date of the incident giving rise to his ultimate

¹ All dates noted herein occurred in calendar year 2004 unless otherwise noted.

termination, was assigned as an Electric Welder in Roanoke, Virginia. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

The record evidence shows that at about 7:00 a.m. Assistant Track Supervisor Jenkins began conducting the normal daily morning safety meeting at the section house after which he announced that the Claimant would be assisting the Section Gang in installing track ties at the 14 track in Roanoke Terminal. This day's assignment would be in lieu of his normal welding duties. Following Mr. Jenkins completion of the daily assignments, the Claimant stood up and announced that he was "not going to put in any ties with this arm." The Claimant then left the station house without speaking further to the Supervisor, got into his personal vehicle, and left the property.

The following day, the Claimant left a message on an answering machine located at the Terminal stating that he would not be in that day, and that he wanted to take one or two days off in order to rest his arm.² The Claimant later attempted to turn this day in as a vacation day on the Carrier's records. Once on notice regarding the Claimant's arm, the Carrier arranged for a fitness-to-remain in service physical to be scheduled the following week. The test results were negative, and the Claimant was approved to remain in service. The Claimant offered no explanation as to why he made no further contact with the Carrier on either December 9th or December 10th following the message he left on the Carrier's answer machine.

On December 15th, the Claimant was directed to attend a formal investigation, which was ultimately held on January 6, 2005 in connection with his failure to protect his assignment, absenting himself from duty without permission, and failing to follow instructions. By letter dated January 18, 2005 the Hearing Officer, following his review of the transcript together with evidence admitted at the formal investigation, determined that the Claimant was guilty of the charge, and advised the Claimant that he was dismissed from the Carrier's service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

² Claimant's reference to his arm on December 9th was the first time he had given any indication to the Carrier that he had a medical condition that might affect his ability to perform his assigned duties.

DISCUSSION

Initially, this Board notes that it sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, we must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

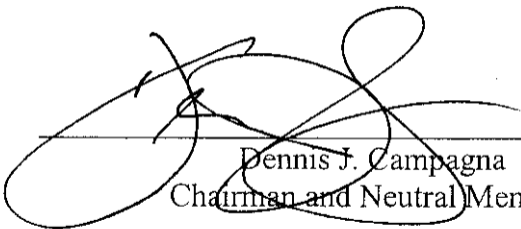
Following a careful review of the record evidence, the Board finds the existence of substantial evidence to support the Hearing Officer's decision and conclusion. The Hearing Officer concluded that on December 9th, the Claimant left the property without permission after receiving clear and explicit instructions about his assignment to assist a Section Gang in installing ties for the day, an assignment the Claimant did not like. In support of this conclusion, Assistant Track Supervisor Jenkins testified that he heard the Claimant say that he would not install any ties with his arm, and that he understood the Claimant's statement to mean that he was not going to put in any ties in any event. However, assuming for the sake of discussion that the Claimant did in fact have problems with his arm, he was obligated at the very least to discuss his problem with his Supervisor without leaving the property for the day. Had he done so, it is more likely than not that he could have been assigned to work that would not have further aggravated his arm.

Turning now to the discipline sought to be imposed, it is well established arbitration precedent that the penalty sought to be imposed by an Employer will not be disturbed so long as it is not arbitrary, capricious or discriminatory. In the instant matter, while the Claimant's actions warrant some form of disciplinary action, the Board finds that the penalty of termination is too harsh. In reaching this conclusion, the Board finds significant the fact that the Claimant has been employed since April 4, 1974, and has not been the subject of disciplinary action, prior to the instant matter, since 1976.

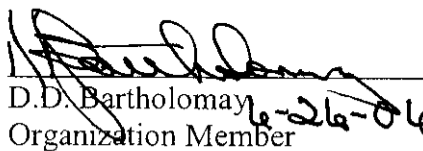
CONCLUSION

While the Investigation revealed that the Claimant engaged in an action that warrants a serious penalty, it is also clear that when fashioning an appropriate penalty that absent an egregious incident, not present here, the Claimant's length of service as well as his past disciplinary record

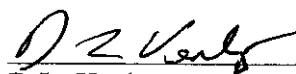
must be considered. And when so considered, the Board finds, with particular emphasis on his length of service and clean record since 1976, that the penalty of dismissal from service is excessive. Accordingly, the Carrier is ordered to reinstate the Claimant to service, with seniority and benefits unimpaired but without compensation for a one-year period commencing January 18, 2005, and ending January 15, 2006. The Claimant shall receive back pay, at his regular straight-time rate, beginning January 16, 2006 to the time of his reinstatement. However, let this decision serve as formal notice to the Claimant that if he has any hopes of continuing his employment with this Carrier, he is duty bound to follow all Rules, Regulations and Procedures promulgated by the Carrier for the efficient and safe operation of its business as well as the general welfare of all its employees.



Dennis J. Campagna
Chairman and Neutral Member



D.D. Bartholomay
Organization Member



D.L. Kerby
Carrier Member

Dated June 11, 2006, Buffalo, New York