

**SPECIAL BOARD OF ADJUSTMENT 1048**

**CASE NO. 164**

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier's File: MW-DEAR-07-45-LM-224)

Statement of Claim:

Claim on behalf of L. L. Hardy for reinstatement to service with all seniority and benefits intact and compensation for all time lost resulting from his dismissal following a formal investigation on July 10, 2007, concerning excessive absenteeism and failing to protect his assignment on fourteen (14) days between January 7 and May 29, 2007.

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

L. L. Hardy, the Claimant herein, entered the Carrier's service on July 25, 1979 as a Laborer.

The instant matter concerns the propriety of the Carrier's decision to dismiss the Claimant for his failure to protect his assignment and for his excessive absenteeism. The record reflects that the Claimant was absent for all or part of his shift on fourteen days between the period January 7 and May 30, 2007, and on January 7<sup>th</sup>, 19<sup>th</sup> and February 2, 2007, the Claimant failed to protect his assignment and failed to notify the Carrier that he would be absent. The Claimant was counseled on

February 13, 2007 regarding his absenteeism, but to no avail since he continued to miss work on February 22<sup>nd</sup> (where the Claimant's daughter notified the Carrier that the Claimant would be absent but he not given permission to do so), March 2<sup>nd</sup> (where the Claimant notified the Carrier that he would be late for work but then failed to report for duty and failed to further notify the Carrier that he would not be reporting), March 23<sup>rd</sup> (when the Claimant reported to work thirty minutes late), April 1<sup>st</sup> and 13<sup>th</sup> (where the Claimant was "no call, no show" thereby failing to protect his assignment), May 11<sup>th</sup> (when the Claimant's wife notified that Carrier that he would be absent but was not given permission by the Carrier to mark off as such), May 16<sup>th</sup> (when the Claimant left work one hour early without receiving permission from his supervisor to do so) and on May 17<sup>th</sup>, 19<sup>th</sup>, 25<sup>th</sup> and 29<sup>th</sup>, 2007 (where the Claimant was again "no call, no show" and as a result, failed to protect his assignment). Following a formal investigation held on July 10, 2007, the Hearing Officer determined that the Claimant was guilty of the charges, and after considering the Claimant's prior service record, advised the Claimant by letter dated July 27, 2007 that he was dismissed from service.

### 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.

At the investigation, the Carrier sustained its burden of proof by establishing, through substantive credible evidence, that during the period at issue, the Claimant was guilty of excessive absenteeism and failing to protect his assignment as a result of his absence from all or part of his shift on fourteen different occasions. The record also reflects that on numerous occasions, the Claimant made no attempt to contact the Carrier of his absence. On those other occasions when the Claimant did call, he made no attempt to explain his absence and only sought to comment that he would not be reporting for duty, or that he would be reporting, albeit late. On one occasion, the Claimant called in to report that he would be coming to work late, but he never showed. Finally, the record also reflects that this is not a case where the Carrier rushed to judgment seeking an early dismissal of the Claimant's employment. In fact, the record demonstrates that on February 13, 2007, the Division

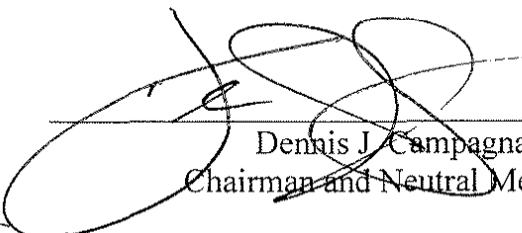
Engineer counseled the Claimant about his absence, yet just nine days later, the Claimant proceeded on a path that resulted in his termination.

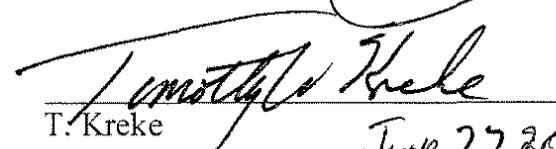
Given the foregoing, while the Carrier has good reason to seek an affirmation of the Claimant's termination, there is an adequate basis in this record to provide the Claimant with one last chance to save his job. In this regard, the record reflects a Claimant with a 29 year service record. The record also reflects that fact that while he may have had a sporadic pattern of attendance issues, beginning 2004, those instances where the Claimant failed to protect his assignment became more regular and troublesome, thereby raising a serious concern on the part of the Carrier as to whether the Claimant could be counted upon to exhibit good attendance. Accordingly, given the Claimant's long history with this Carrier, and without setting a precedent for future cases which must stand on their own facts, while the Claimant's attendance issues are no doubt serious, on the basis of this record, the Board finds that he should be reinstated to his position as a Laborer, but without back pay.

Given the undisputed fact that being regular in attendance is an essential requirement of any job, the Board must impress upon the Claimant that he is duty bound to improve his attendance and to comply with all Carrier Rules and Regulations in regard thereto, particularly with respect to his duty to notify the Carrier of any instances where he might be legitimately late or absent. Finally, given the unique circumstances of this case, the Board strongly recommends that the Claimant contact the Employee Assistance Program (EAP) and take advantage of any assistance they might offer.

### CONCLUSION

The Claim is sustained consistent with the findings and conclusions noted above.

  
Dennis J. Campagna  
Chairman and Neutral Member

  
T. Kreke  
Organization Member

June 27, 2008

  
D.L. Kerby

Carrier Member - I dissent to

Dated: May 31, 2008

reinstatement, considering prior  
discipline for absenteeism. 3