

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 166

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-FTW-07-30-LM-340 &
MW-FTW-07-35-LM-361)

Statement of Claim:

Claim on behalf of J. D. Han, Sr. for reinstatement with all rights and privileges and pay for all time lost as a result of his dismissal from service following formal investigations on September 19, 2007, in connection with his conduct unbecoming an employee and violation of Norfolk Southern Safety and General Conduct Rule GCR-1 concerning a verbal altercation with and a physical assault on co-worker R. J. Metro on August 25, 2007, and a no contest plea and finding of guilt to assault on August 30, 2007, in Bryan Municipal Court.

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

J. D. Han, the Claimant herein, entered the Carrier's service on July 17, 1974 as a Laborer. The Claimant is represented by the Brotherhood of Maintenance of Way Employees. The circumstances giving rise to the Claimant's termination are as follows.

On August 25, 2007¹ the Claimant's section gang was assigned to set spikes ahead of a program maintenance gang scheduled to work in the Montpelier, Ohio area. Track Patrol Foreman R. J. Metro was assigned to drill holes in the ties in order to aid the setting of spikes by other members of the gang. The Claimant was working with three other employees setting spikes in the ties behind Track Patrol Foreman Metro. The Claimant and one other employee were setting spikes on the north rail, and two other employees were setting spikes only along the south rail. Mr. Metro was drilling holes to accommodate the setting of spikes only along the south rail.

As the work progressed, the Claimant inquired of Foreman Metro why he was only drilling holes in the south rail and suggested that Mr. Metro alternate back and forth from the south to the north and back. In response, Mr. Metro suggested to the spike setters, including the Claimant, that they all set spikes on the south rail where Mr. Metro was drilling holes. Ultimately the Claimant and Foreman Metro began arguing. During their verbal disagreement, the Claimant struck Foreman Metro in the face about his left eye. Foreman Metro suffered a cut above his eye that required medical attention. As a result of his action, the Claimant was removed from service pending a hearing.

By letter dated August 31st and September 18th, the Claimant was cited to a formal investigation to determine his responsibility, if any, in connection with conduct unbecoming an employee in connection with the altercation on company property and also in connection with his criminal conviction for assault. The formal investigations were conducted on September 19th. The Claimant was at all times represented by the Organization. By letter dated September 28th, 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 charges against him. The Claimant was thereupon dismissed from service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

¹ All dates noted herein occurred in calendar year 2007 unless otherwise noted.

DISCUSSION

The record supports the conclusion that the Claimant did as charged. This conclusion is best supported by the admission given by the Claimant himself at the formal investigation noted above where he admitted that he struck Track Patrol Foreman R. J. Metro on Carrier property, requiring Mr. Metro to seek medical attention. In addition, it was established that the Claimant pled no contest in the Bryan Municipal Court on August 30, 2007 to an assault charge. The Court found the Claimant guilty of the charges for which he received a 60-day suspended sentence with a probationary period of three years. Accordingly, following a careful review of the record, the Board finds and concludes that the Carrier satisfied its burden in demonstrating that the Claimant's actions on August 25th rose to a level of conduct unbecoming an employee in violation of Safety and General Conduct Rule GCR-1 which provides, in relevant part:

Employees are to conduct themselves in a professional manner and not engage in behavior or display material that would be considered offensive or inappropriate by co-workers, customers, or the public. Offensive or inappropriate behavior includes making disparaging remarks . . .

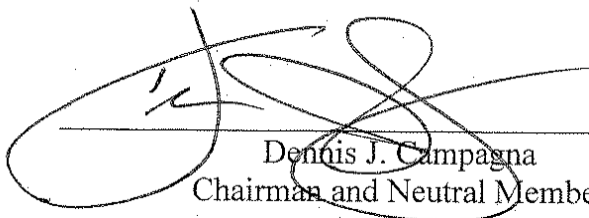
Given the Board's finding noted above, Claimant's actions were clearly out of line, unnecessary and unprofessional. However, while the Claimant's behavior cannot be excused, the totality of the Claimant's record, discussed below, bodes in favor of the his reinstatement.

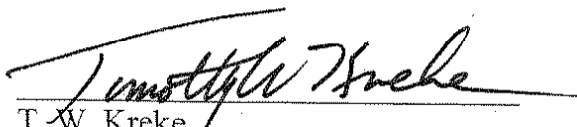
Having concluded that the Grievant did as charged, there remains a question of the appropriate penalty. In determining an appropriate penalty, the Board has taken notice of the Claimant's lengthy service with the Carrier, dating back to 1974. The Board has also taken notice of the Claimant's past disciplinary record, consisting of a letter of warning issued in May, 1976 for AWOL, a letter of counseling for AWOL issued in 1981, and the Claimant's termination from service in January 1982, followed by his reinstatement in July, 1982. The last such offense occurred in 1981, and it appears that aside from the instant and serious offense, the Claimant managed to keep out of trouble for a rather lengthy period of time. It is also significant to the Board that during the formal investigation, the Claimant willingly admitted to the offense at issue, and was contrite in the process. Therefore, notwithstanding the Claimant's prior disciplinary record, the Board concludes that his 33 years of service with the Carrier must count for something. Accordingly, the Board finds that the Claimant

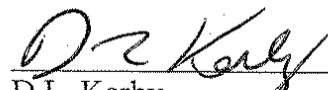
is due one last chance to demonstrate that he is capable of acting in a professional manner, as well as following all reasonable rules and regulations of the Carrier.

CONCLUSION

For the reasons noted and discussed above, the Board finds and concludes under the unique facts of this case, and without setting a precedent for future cases which must stand on their own facts, that the penalty of dismissal from service is excessive. In keeping with this conclusion, the Board finds that there is reason to believe that the Claimant has been rehabilitated and therefore poses no further risk to the Carrier or his fellow employees. However, given the serious nature of the Claimant's conduct which gave rise to his dismissal from service, the Board finds and concludes that the Claimant's lost time from work until his date of reinstatement shall be considered as an unpaid disciplinary suspension. Finally, and as a last note of warning, let this decision serve as formal notice to the Claimant that he is on "thin ice", and accordingly, if he has any hopes of continuing his employment with this Carrier, he is duty bound to act in a professional manner at all times, and 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


T.W. Kreke
Organization Member


D.L. Kerby
Carrier Member

Dated: Buffalo, N.Y. MARCH 31, 2008