

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT 1048**

Brotherhood of Maintenance of Way Employees)	
Division-IBT Rail Conference)	
)	Case No. 219
And)	
)	Award No. 219
Norfolk Southern Railway Company)	
(Former Norfolk & Western Railway Company))	
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Richard K. Hanft, Chairman and Neutral Member
D. M. Pascarella, Employee Member
D. L. Kerby, Carrier Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) of Mr. J. Duke, issued by letter dated January 5, 2016, in connection with his alleged conduct unbecoming an employee, in that he physically attacked a co-worker, R. A. Eggleston, near Berryville, Virginia on Tuesday, September 8, 2015, resulting in an injury to Mr. Eggleston, was arbitrary, capricious, unreasonable and in violation of the Agreement (Carrier's file MW-ROAN-15-55-IM-907 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Duke shall be restored to service of the Carrier and paid for all time lost with seniority, vacation and all rights unimpaired."

FINDINGS:

Special Board of Adjustment Board 1048, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

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

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

There is no dispute that Claimant was involved in a verbal and physical altercation with another employee on September 8, 2015.

Claimant, at the time of the altercation was assigned and working as a foreman and the other participant in the altercation was assigned and working as a Ballast Regulator Operator on a Smoothing Gang out of Roanoke, Virginia. A physical altercation definitely occurred.

Both employees were taken out of service and instructed to present themselves at separate investigations on November 10, 2015. The Ballast Regulator Operator presented himself for his investigation, Claimant did not.

Upon receiving the evidence and listening to the unrebutted testimony of the Claimant and witnesses at the Ballast Regulator Operator's investigation, Carrier opened the investigation for Claimant, dismissed the charges and issued new charges based on the newly-acquired evidence presented in the Ballast Regulator Operator's Investigation.

A notice summoning Claimant to a new Investigation on the new charges was sent to Claimant's address of record. The new charges were presented in an instruction to appear stating the purpose of the investigation as such:

"To determine your responsibility, if any, in connection with conduct unbecoming an employee in that you physically attacked co-worker R. Eggleston near Berryville, GA on Tuesday, September 8, 2015 resulting in an injury to Mr. Eggleston."

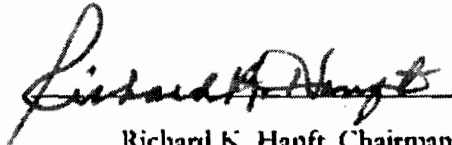
That Investigation convened on December 21, 2015 and again, Claimant did not appear. The Investigation proceeded *in absentia* and Claimant, it is no surprise, was found guilty of the charges and summarily dismissed.


The Board has no recourse but to deny the claim. Claimant, by his absence at the investigation, offered nothing on the record to rebut the partisan testimony put forth by his co-combatant. That testimony was that the altercation was completely unprovoked. Claimant, by his failure to appear, gave his representatives virtually nothing to work with to rebut that assertion. The evidence on this record for our review is unrebutted and puts the blame for this incident squarely on the Claimant. Moreover, dismissal for physically battering a fellow worker to the extent he is unable to work is neither arbitrary nor excessive. Hence, the Claim must be denied.


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Award:

The Claim is denied.


Richard K. Hanft, Chairman


D. M. Pascarella, Employee Member


D. L. Kerby, Carrier Member

Dated at Chicago, Illinois January 16, 2018