

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

Brotherhood of Maintenance of Way Employees	)	
Division – IBT Rail Conference	)	
	)	Case No. 222
And	)	
	)	Award No. 222
Norfolk Southern Railway Company (Former	)	
Norfolk & Western Railway Company)	)	
_____	)	

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 [thirty (30) day actual suspension] of Mr. J. Booker, issued by letter dated April 6, 2016, in connection with his alleged improper performance of duty in that on March 9, 2016, while working on the main track near Mile Post PH 15.2 in Lynchburg, Virginia, he was observed talking on a cellular phone while standing in the foul of the track, was not pursuant to a fair and impartial investigation (Carrier’s File MW-BLUE-16-26-LM-305 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Booker shall be allowed all back pay from March 9, 2016 until April 8, 2016.”

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:

Claimant in this matter was charged with using a cell phone while in the foul of the track. He certainly did answer a call from his assistant foreman while standing in the foul. His machine was idled down and his ploughs were down and he was out of his machine, but he violated a cardinal safety rule. He admitted at the investigation that he did so and that he knew it was a rule violation. The charges against Claimant were without question proven by credible, substantial evidence.

But this Board reviews the record developed on the property also in regard to the Organization's complaints about Carrier's handling of the matter on the property and whether the due process guaranteed Claimant under the Parties' Agreement was observed. Rule 30 of that Agreement provides: "...The employee will be given not less than ten (10) days' advance notice, in writing, of the date of the investigation which shall set forth the precise charge against him with a copy to the general chairman..." Here, the notice of the investigation was purportedly mailed on March 15, 2016, received by the Claimant on March 17 and not received by the Organization until March 23, only one day prior to the formal investigation. The Hearing Officer, when confronted by Claimant's representative at the investigation blew this requirement off by simply asking Claimant if he was told there would be an investigation when he was taken out of service. Carrier in this instance, did not comply with its Agreement. Moreover, while the Carrier submits that numerous Awards have held that the Rule contemplates not when the notice was received, but when it was dispatched, it missed the mark there also. The notice was dispatched on March 15, 2016 and the investigation was held March 24, 2016 only nine (9) days after dispatch.

More troubling however, was the involvement of the hearing officer, who in order to provide a fair and impartial hearing must not be connected to the charges preferred. Here, the record shows, the hearing officer was instrumental in having Claimant pulled from service and charged to begin with, while also providing the charging officer with the rule to charge Claimant with at the investigation. But for Claimant's admission to the violation, this might be enough to overturn the outcome of this investigation.

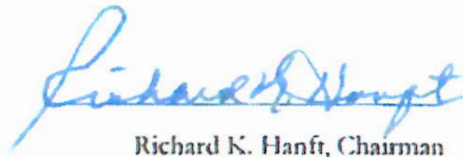
Finally, Carrier failed to provide the Organization with a transcript of the investigation as required by the Agreement.

Claimant's guilt in this matter is not set aside, but given the particular circumstances involved the Board determines that the penalty assessed on the property shall be reduced to a fifteen (15) day actual suspension. Claimant shall be made whole for all other time suspended from service.


Special Board of Adjustment No. 1048  
Award No. 222

Award:


Claim sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty days following the date that two members of this Board affix their signatures thereto.



Richard K. Hanft, Chairman



D. M. Pascarella, Employee Member



D. L. Kerby, Carrier Member

Concurrence and Dissent to follow  
Dated at Chicago, Illinois February 9, 2018