

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1048

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
DIVISION – IBT RAIL CONFERENCE)

) Case No. 234

)
)
)
)
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)
NORFOLK & WESTERN RAILWAY COMPANY))

) Award No. 234

Richard K. Hanft, Chairman and Neutral Member
D. M Pascarella, Employee Member
D. L Kerby, Carrier Member

STATEMENT OF THE CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carriers discipline (30-day actual suspension and 15-day deferred suspension) of Mr. J. Reardon, issued by letter dated September 19, 2016, in connection with his alleged improper performance of duty in that while loading track panels for transport at the Roadway Material Yard, on August 9, 2016, he failed to maintain situational awareness and keep body parts free from a designated pinch point area, was in violation of time limit provisions stated within Rule 30 of the current Agreement between NS Railway and its employees represented by the Brotherhood of Maintenance of Way Employees (Carrier’s File MW-ROAN-16-19-SG-776 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Reardon shall have all charges expunged from his record and be reinstated with all rights and privileges including being paid for all lost time.”

FINDINGS:

Special Board of Adjustment No. 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 precedence 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 assigned as a Machine Operator at Carrier's Roadway Material Yard in Roanoke, Virginia on August 9, 2016. Claimant was injured on the job and charged with improper performance of duty in that he failed to maintain situational awareness and keep his body parts free from clearly marked and designated pinch point areas while loading track panels for transport.

An investigation was held on September 12, 2016 concerning the above-stated charges. The Hearing Officer found Claimant guilty of the charges and Claimant was assessed an actual suspension of thirty (30) days with an additional deferred suspension of fifteen (15) days.

The Organization appealed Carrier's assessment of discipline based not on the merit of the Hearing Officer's decision, but rather solely on the basis of a procedural objection that, due to a clerical error, the transcript of the investigation was not attached to the Hearing Officer's determination. The Organization contends that the Carrier's failure to provide the transcript of the investigation in a timely manner was a fatal procedural error requiring dismissal of the charge.

Once the Organization informed the Carrier, more than a month after receipt of the decision, that it had not attached the transcript of the investigation to the Hearing Officer's decision, the Carrier offered to extend the time limits to perfect an appeal, but the Organization declined additional time and chose, instead, to appeal the discipline solely on the basis of the procedural defect.

When relying on an affirmative defense such as this, the Organization has the burden to show that the procedural defect had a prejudicial effect on the Organization's obligation to defend the Claimant.

Here, the Organization has failed to meet that burden. Technical error, such as occurred inadvertently and due to clerical error in this instance, does not invalidate the disciplinary process nor does it require the cancellation of the disciplinary assessment, especially when the Organization was offered, but refused, additional time to perfect its appeal and there was no showing of prejudice or harm upon the Claimant nor the Organization.


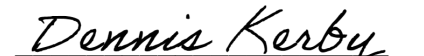
Hence, the Board can find no basis on which to disturb the action taken on the property. The Claim is therefore denied.

AWARD:

Claim denied.



Richard K. Hanft, Chairman and Neutral Member


D. M. Pascarella, Labor Member
D. L. Kerby, Carrier Member

Dated at Chicago, Illinois, February 21, 2019.