

SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 147

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-CN-04-14-SG-182)

Statement of Claim:

Claim on behalf of C.N. Simmons for reinstatement to service and pay for time lost as a result of his dismissal from service following a formal investigation held on October 8, 2004, in connection with his conduct unbecoming an employee, insubordination, failure to follow instructions and violation of Norfolk Southern Safety and General Conduct Rule GR-3, in that on Wednesday, July 21, 2004, he disrupted the morning safety meeting and subsequently refused an instruction from his supervisor to leave the meeting.

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

C.N. Simmons, the Claimant herein, entered the Carrier's service on April 14, 2002 as a Laborer. On July 21, 2004¹, the date of the incident, the Claimant was working as a Laborer on Timber and

¹ All dates noted herein occurred in calendar year 2004 unless otherwise noted.

Surfacing Gang 2 (T&S), Gang 15. The Claimant is represented by the Brotherhood of Maintenance of Way Employees.

The record evidence shows that at a safety/job briefing meeting was held on July 21st, during which time several operating rules were reviewed at the beginning of the meeting. One such rule was GR-3, which obligates all employees to follow instructions given from proper authorities, as well as the duty to perform all duties in a safe and efficient manner. During the meeting, the cleanliness of portajohns was raised by gang member Bragg. As the Supervisor began addressing Mr. Bragg's concern, the Claimant began raising his voice, speaking in what appeared to be an angry manner regarding numerous problems associated with the portajohns. The Supervisor's request to the Claimant to lower his voice went unheeded as the Claimant reportedly continued to raise his voice, and in the process, stood up and began gesturing with his hands, stating that he would not lower his voice. The Supervisor reacted by telling the Claimant that he needed to lower his voice, step outside of the meeting area, and that he would discuss the matter further when the meeting was over. The Claimant reportedly responded that he would not lower his voice, would not step outside, and that the Supervisor was going to hear what he had to say. When the Supervisor again directed the Claimant to leave the meeting area, the Claimant blatantly refused. At this point, the Supervisor advised the Claimant that if he refused to comply with his instruction to step outside of the meeting area, he would be removed from service. When the Claimant refused to do so, he was informed that he was removed from service.

As a direct result of the foregoing incident, the Claimant was notified to attend a formal investigation on August 19, 2004 to determine his responsibility, if any, in connection with his alleged conduct unbecoming an employee, insubordination, and failure to follow instructions, specifically as it relates to the Claimant's breach of Rule GR-3. The investigation was subsequently postponed and ultimately held on October 8, 2004. The Claimant was at all times represented by the Organization. By letter dated October 27, 2004, 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 charge alleged, and advised that he was dismissed from the Carrier's service. The Organization took exception to the discipline assessed, and the instant claim for review ensued.

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.

While the Organization does not take specific issue with the material facts as they relate to the July 21st incident, they have alleged the following procedural errors:

- First, the Organization asserts that the postponements and rescheduling of the Investigation “[c]reated other critical time limit violations.” In this regard, the Organization maintains that the continued postponements, together with the Carrier’s unilateral selection of the rescheduled dates for the investigation violated the System Discipline Rule. This Rule provides that at the request of either party the investigation will be postponed, noting however, that such investigation will not be postponed in excess of ten (10) calendar days beyond the first date set except by mutual agreement. The Organization maintains that the Carrier violated this Agreement by selecting dates for postponement that were in excess of ten days. The Organization’s claim must be read in conjunction with the System Discipline Rule mandating that investigations be held within 30 days of the Carrier’s first knowledge of the offense, and the mandate that the employee be given not less than 10 days advance notice, in writing, of the investigation. When read together, it is clear that the intent of the time limits set forth in the System Discipline Rule was to prevent unwarranted delays in the scheduling process, particularly where, as here, the Claimant is out of work. With that said, following a careful review of the record, it is clear that neither the Carrier nor the Organization acted in a manner so as to result in unwarranted delays. In this regard, while it took over two months from the time the Carrier became aware of the incident giving rise to the charges lodged to schedule the investigative hearing, it is apparent that the bulk of the adjournments and rescheduling activities stemmed from the Organization’s requested postponements due to scheduling conflicts. The alternative to the adjournments would have been for the Carrier to deny the Organization’s requests, and insist on a strict adherence to

the time limits, an alternative not in the best interest of either party, particularly where Labor-Management cooperation is essential.

- Next, the Organization asserts that the investigation was compromised due to the failure of the Carrier to call each and every employee present at the July 21, 2004 safety meeting to testify at the investigative hearing. With due respect to the Organization's claim, the Board must respectfully reject it. Adherence to such a demand may very well have resulted in repetitive testimony, resulting in an unwarranted delay in the proceedings. In a formal in-Court setting, such a demand may have been labeled by the Court as an "abuse of process". Moreover, the Board can no more dictate how the Carrier conducts its investigation as it can dictate how the Organization does so.

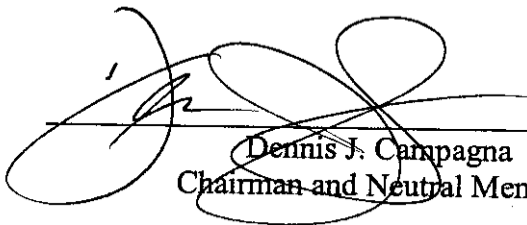
Given the foregoing discussion, the Board cannot find that the Claimant's due process or procedural rights have been violated. In addition, following a review of the relevant facts as contained in the record, we find that the Hearing Officer's conclusion bears a rational relationship to the record evidence. Accordingly, there is substantial evidence in the record to support the Carrier's assertion that the Claimant did as charged.

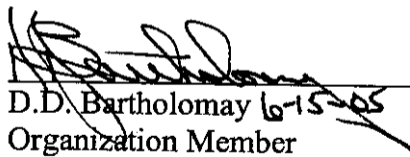
Turning now to the discipline sought to be imposed, it is well established arbitration precedent that the penalty sought to be imposed by an Employer will not be disturbed so long as it is not arbitrary, capricious or discriminatory.

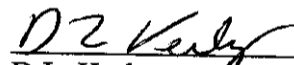
In assessing the appropriate penalty, the Claimant's 23 years of unblemished dedicated service must be balanced against his violation of Rule GR-3 as a result of his conduct on July 21, 2004. While not condoning the Claimant's conduct, which was in and of itself abusive, it is apparent to the Board that Supervisor Kirk was in a position to "disarm" a potentially volatile situation, perhaps by addressing the Claimant in private rather than in public. For example, the Supervisor could have permitted the Claimant to air his grievance to the group, and later dealt with his concerns over the Claimant's demeanor in private. In the opinion of the Board, an action such as this would have disarmed the Grievant, and perhaps resulted in a positive discussion over a mutually unacceptable situation – namely the status of the portajohns.

CONCLUSION

For the reasons noted and discussed above, given the unique circumstances of this case, and in recognition of the Claimant's 23 years of unblemished service, the Board finds that the penalty of dismissal was excessive. Accordingly, the Claimant shall be reinstated to service with seniority unimpaired but without compensation for the time held out of service.


Dennis J. Campagna
Chairman and Neutral Member


D.D. Bartholomay 6-15-05
Organization Member


D.L. Kerby 6-20-05
Carrier Member

Dated May 30, 2005, Buffalo, New York