SPECIAL BOARD OF ADJUSTMENT NO. 1049

AWARD NO. 189

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of S. H. Gentry for reinstatement with seniority, vacation and all other rights unimpaired and pay for all time lost as a result of his dismissal from service following a formal investigation on October 7, 2008, for absenting himself from duty without proper authority and for falsification of payroll on September 11 and 12, 2008, as well as for making offensive and inappropriate remarks to his supervisor on September 17, 2008.

(Carrier File MW-GNVL-08-30-LM-560)

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.

AWARD

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

The record reflects that the investigation was conducted on October 7, 2008. Carrier's decision dismissing Claimant was dated and mailed to Claimant on October 27, 2008, and was received by Claimant on October 29, 2008. Rule 40(a) provides, in part, "Decision will be rendered in writing to the employee and representative within twenty (20) days after completion of the investigation unless an extension of time is agreed upon." There is no dispute that an extension of time was not agreed upon. The Organization contends that the decision was not rendered in a timely fashion because Claimant did not receive it within twenty days following the investigation and, by mailing it on the twentieth day, Carrier could foresee that Claimant would not receive it in a timely manner. Carrier maintains that it rendered the decision in a timely manner.

We note that, on its face, the Agreement requires only that the decision be rendered within twenty days following the investigation, not that it be received by the employee within twenty days. Awards cited by the Organization in support of its position that the decision must also be received within the twenty day period do not persuade us otherwise. In NRAB Third Division Award No. 10035, the Agreement required that a decision be rendered within seven days following the investigation. On the seventh day following the investigation, the Superintendent told Claimant that if Claimant did not elect to retire, Claimant would be dismissed. Claimant declined to retire. The following day, the Superintendent again asked Claimant if he would retire and Claimant again declined. The Superintendent then wrote and sent a letter dismissing Claimant. The Board held that the conversation on the seventh day following the investigation did not amount to a decision and that the decision was not rendered until the eighth day and

was therefore untimely. In other words, in Award No. 10035, the decision was not written or sent to Claimant until the eighth day. The only question was whether the oral conversation on the seventh day in which the Superintendent gave Claimant the option to retire satisfied the Agreement requirement that a decision be rendered by that day. The Board held that it did not.

In Third Division Award No. 24623, no written decision was ever rendered. The Board sustained the claim because Carrier violated the Agreement's requirement of a written decision within thirty days following the hearing. In Third Division Award No. 3259, the written decision was mailed 21 days after the hearing but the Agreement required that the decision be rendered within 15 days. Again, the Board sustained the claim.

In the instant case, the decision was written and mailed on the twentieth day, i.e. in a timely manner under the Agreement. We conclude that the decision was rendered within the Agreement's time limits even though it was received by Claimant two days later.

Claimant was charged with falsifying his payroll entries for September 11 and 12, 2008. There were two parts to the falsification charge. Claimant reported that he worked eight hours of straight time on those days and that he worked three hours of overtime on both days. On the days in question, Claimant was assigned to provide flagging protection for a contractor working at MP S-127. Because it was raining both days, the contractor advised Claimant that it would not work those days and that Claimant's services would not be needed. Claimant acknowledged being so advised by the contractor but testified that he worked both days anyway, making himself available in case the contractor decided to return to the job site. Claimant's testimony simply made no sense. There is absolutely no logical reason why Claimant, having been told by the contractor that it would not be working those days due to inclement weather, would hang around expecting that the contractor might actually appear. Moreover, an Assistant Supervisor testified that when he patrolled through the area, he did not see Claimant at all.

Claimant admitted that he did not work overtime on either of the days in question. Claimant maintained that he had worked overtime on two prior days but the time had not been submitted and because the time for those days had already been approved by the Assistant Supervisor, he could not change the payroll record. According to Claimant, he followed an established practice and submitted the make-up overtime for September 11 and 12. There was conflicting testimony as to whether such a practice of submitting make-up overtime existed. Whether the practice existed or not is beside the point. The actual payroll records reflected that Claimant in fact had submitted the claimed overtime for one of the prior days in question. Claimant denied submitting the overtime but the payroll records clearly reflected Claimant's username and password. Claimant tried to explain this by stating that he had written his username and password on a calendar kept by the computer several months prior and suggesting that someone else used it to enter the overtime. However, like his testimony that he hung around in case the contractor returned even though the contractor had advised him that it would not be working, Claimant's testimony and speculation that someone else entered the overtime simply made no sense. We conclude that Carrier proved that charges of payroll falsification by substantial evidence.

There is no dispute that on September 17, 2008, Claimant left a vulgar and unprofessional message on the Track Supervisor's voice mail. Claimant explained that he was upset because the Supervisor had just removed him from service but this cannot justify Claimant's misconduct. We conclude that Carrier proved the charge of making inappropriate remarks by substantial evidence.

The charge of being absent without authority stemmed from the Supervisor's testimony that he had previously instructed Claimant that if Claimant's flagging services should not be needed by the

contractor, Claimant was to contact the Supervisor for an alternate assignment. There is no dispute that Claimant did not contact supervision for an alternate assignment on September 11 and 12, 2008. However, Claimant denied ever being given such an instruction and there is no evidence corroborating the Supervisor's testimony. On the contrary, neither Assistant Supervisor who testified was aware of any such instruction. We conclude that Carrier failed to prove this charge by substantial evidence.

To summarize, we find that Carrier proved the charges of falsification of payroll and making inappropriate remarks to a supervisor by substantial evidence. The charge of falsification alone would justify dismissal. In the instant case, the charges are aggravated by Claimant's record which includes a prior dismissal followed by reinstatement followed by a subsequent five day suspension. Even though Carrier failed to prove the charge of being absent without authority, we cannot say that the penalty of dismissal was arbitrary, capricious or excessive.

M. H. Malin
Chairman and Neutral Member

T. W. Kreke 6-15-09
Organization Member

D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on May 30, 2009