

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT 1049

Brotherhood of Maintenance of Way Employees)	
Division – IBT Rail Conference)	
)	Case No. 257
And)	
)	Award No. 257
Norfolk Southern Railway Company)	
(Former Southern 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 (dismissal) of Mr. J. Stephens, issued by letter dated November 24, 2015, in connection with his alleged failure to protect his assignment in that while he was assigned to the T&S-26 Gang that was working near Montpelier, Ohio, he was absent from work without authorization from the proper authority on October 12, 2015 to October 15, 2015 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive and without cause (Carrier’s File MW-ITW-15-166-SG-847 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant J. Stephens shall have his dismissal set aside with all notations thereof removed from all Carrier records and he shall be reinstated and restored all seniority rights and all entitlements to and credit for all financial and benefit losses, such as vacation and health insurance benefits occasioned as a result of the violation, including: (1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully removed from service); (2) any general lump-sum payment or retroactive general wage increase provided in any applicable agreement that became effective while Claimant was out of service; (3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any junior employee for work Claimant could have bid on and performed had Claimant not been removed from service; and (4) health, dental and vision care

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insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service.”

FINDINGS:

Special Board of Adjustment 1049, 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, without any doubt, absent from his job as a Track Laborer on T&S-26 gang without permission on October 12, 13 and 14, 2015. The Organization argues on Claimant's behalf that Claimant cannot be held culpable for this failure to protect his position because he was incarcerated on criminal charges that were subsequently dropped. The Organization contends that it was through no fault of his own that Claimant was unable to report off.

The Carrier submits that Claimant did not report for work as scheduled on October 12, 13 and 14, 2015 and was not heard from again until approximately two (2) weeks later. The Carrier avers that it is not obliged to retain indefinitely employees whose attendance is unreliable.

The Board notes that prior Awards have consistently held that incarceration does not excuse an Employee's failure to protect his job assignment. *See* 3 NRAB, Award No. 31627, BMWED v. BN (Malin) *and Awards therein*.

What may be more germane to the instant matter is the propriety of the discipline that was assessed: dismissal.

The Claimant's disciplinary history includes a Letter of Reprimand issued 6/30/2014, a Twenty-seven (27) day suspension issued just over a year prior to this violation and a Sixty (60) day suspension issued 3/08/2015.

The Claimant's supervisor testified at the Investigation for Claimant's most recent failure to protect his position that Claimant's habitual attendance problems have become

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a pattern. The Carrier maintains that it is not obligated to keep an employee in service who cannot or will not reliably report for work as assigned.


In the instant case, looking at Claimant's relatively short tenure coupled with his disciplinary record, we can find no mitigating evidence that would lead us to conclude that the discipline assessed was arbitrary, capricious or excessive. Accordingly, the claim is denied.

Award:

The claim is denied.


Richard K. Hanft, Chairman


D. M. Pascarella, Employee Member


D. L. Kerby, Carrier Member

Dated at Chicago, Illinois, January 28, 2018