

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)

DIVISION – IBT RAIL CONFERENCE)

) Case No. 283

) Award No. 283

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

1. The Carrier’s discipline (dismissed in all capacities from Norfolk Southern) of Mr. R. Cooley, issued by letter dated October 20, 2017, in connection with his alleged violation of Operating Rule 2 (b), in that he was observed by Foreman Needham sitting in a Spiker Machine (NS 13607) in a slouched position with his eyes closed at approximately 3:15 on September 17, 2017 at Mile Post S51 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier’s File MW-CN-17-33-SG-721 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Cooley shall be reinstated to service with all seniority rights restored and all entitlements to and credits for benefits restored including vacation and health insurance benefits, being made whole for all financial losses as a result of the violation, including compensation for (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 the Claimant at the time of removal from service (this amount is not reduced by earnings from alternative employment obtained by Claimant while wrongfully suspended); (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 insurance premiums, deductibles and co-pays that he would not have paid had he not

been unjustly removed from service, finally, all notations of the dismissal removed from all Carrier records.”

FINDINGS:

Special Board of Adjustment No. 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 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:

On September 17, 2017 Claimant was working as a bid-in Laborer with the Designated Program Gang TS-2 on the No. 20 Switch at MP S-51. The record reflects that the gang was experiencing difficulty obtaining track authority throughout the morning so at lunchtime the gang's foreman instructed all of the gang's Laborers to be ready to start prepping the switch when the gang received Track Authority. At 3:15 P.M. the foreman noticed Claimant was not present and went to look for him. The foreman discovered Claimant sleeping in the feeder seat of the Spiker Machine he was assigned to. Claimant had been directed, with the other Laborers, to be at the switch prepared to manually prepare it when Track authority was obtained.

Upon discovering Claimant sleeping, the foreman asked the Spiker Machine Operator why there was a man sleeping in his machine. The Operator was unaware that Claimant was in the machine and got out of his seat and observed the Claimant sleeping in his machine. The Operator submitted a written statement that was introduced at the Investigation attesting that it was apparent that Claimant was sleeping.

The foreman then called out to Claimant four or five times before he was aroused. When claimant finally awoke the foreman instructed him to disembark the machine and summoned the Senior Supervisor for the TS-2 Gang. The Supervisor discussed the situation with the Claimant who denied having been sleeping. At that time, Claimant was removed from service pending an investigation.

Claimant was summoned to a formal investigation held on October 5, 2017. The Carrier determined that Claimant was guilty as charged and dismissed him from service.

The crux of this dispute centers on credibility. The foreman asserts that Claimant was asleep while on duty in violation of Operating Rule 2(b) and Claimant flatly denies the assertion. The Hearing Officer, after review of the transcript of the investigation on the property, determined that the foreman's recount of the events was more credible than the Claimant's denial.

As an appellate body, we are in a relatively poor position to determine credibility and so we generally defer to the credibility determinations made on the property. In the instant case, we see no reason to deny such deference. The foreman's testimony is corroborated by the written statement of a second eye-witness, the Machine Operator.

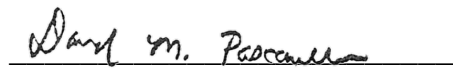
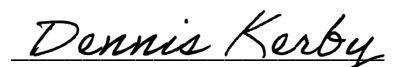
While the Board is cognizant that Claimant was suspended for twenty (20) days slightly more than a year earlier than the instant violation, we nevertheless determine that the penalty of dismissal was excessive. A lengthy suspension, equivalent to the time spent out of service, will serve the purpose of underscoring to the Claimant the importance of not hiding from the work and avoiding even the appearance of sleeping while on duty. Claimant shall be reinstated to service with seniority unimpaired but without compensation for time out of service.

AWARD:

Claim sustained in accordance with the findings. Carrier is directed to make this Award effective within thirty (30) days following the date that two members of this Board affix their signatures hereto.



Richard K. Hanft, Chairman and Neutral Member


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

Dated at Chicago, Illinois, February 21, 2019.