

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT 1049**

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| BROTHERHOOD OF MAINTENANCE OF WAY |) | |
| EMPLOYEES DIVISION – IBT RAIL CONFERENCE |) | |
| |) | |
| |) | Case No. 284 |
| And |) | |
| |) | Award No. 284 |
| NORFOLK SOUTHERN RAILWAY COMPANY |) | |
| (FORMER SOUTHERN RAILWAY COMPANY) |) | |

Richard K. Hanft, Chairman & Neutral Member
D. M. Pascarella, Employee Member
S. M. Goodspeed, Carrier Member

Hearing Date: July 24, 2019

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

1. The Carrier’s discipline (dismissal) of Mr. C. Childs, issued by letter dated July 12, 2017, in connection with his alleged: (1) failure to protect his assignment and excessive absenteeism in that on May 1-4, 8-11 and 31 and June 1, 5 and 6, 2017, he was absent without permission; (2) failure to follow instructions in connection with the above charge in that he failed to provide at least one (1) hour advance notice to supervision that he was unable to timely report to work on May 31 and June 1, 5 and 6, 2017, despite being counseled and instructed to do so; (3) failure to protect his assignment and failure to follow instructions in that on May 30, 2017, after being instructed to drive to Macon, Georgia, he abandoned his assignment without obtaining permission and failed to report to the work location; and (4) conduct unbecoming an employee in that on May 30, 2017, he submitted payroll information and attempted to claim payment for time in which he did not actually work on May 24, 2017 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier’s File MW-ATLA-17-17-BB-422 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant C. Childs shall be reinstated to service with all seniority rights restored and all entitlements to and credit 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 Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by Claimant while wrongfully removed); (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 with, finally, all notations of the dismissal removed from all Carrier records.”

FINDINGS:

Upon the whole record and all of 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.

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 had over ten years’ seniority at the time relevant to this dispute. Claimant was regularly assigned as a various headquartered crane operator and pilot/engineer. His regular schedule was four days, Monday through Thursday, ten hours per day from 7:00 AM until 5:30 PM. When this dispute arose, Claimant was working out of Carrier’s Millen, Georgia Depot.

On May 1, 2017 Claimant returned from a regularly scheduled vacation and initiated a conversation with the bridge supervisor that he worked for concerning his need for intermittent Family Medical Leave Act ("FMLA") leave to care for a seriously ill child.

It is undisputed that on that day Claimant and his supervisor filled out the necessary leave request on-line in the supervisor's office on the supervisor's computer. That request for leave was sent electronically from the supervisor's computer to the

Carrier's FMLA Coordinator. May 1, 2017 was a Monday and the Claimant took Tuesday through Thursday, May 2, 3, and 4 and all the next workweek, May 8-11, 2017 off to attend to the child's serious medical condition. Claimant returned to work on May 15, 2017 and worked his regular schedule through May 25, 2017. That should have been a pretty simple matter, everyone did what they were supposed to do, but as it turns out, it wasn't. Claimant's supervisor was notified on May 25, 2017 at 8:00 PM that the request for FMLA leave was denied on account of the second page of the request form not being transmitted to its offices.

On March 24, 2017 Claimant reported for work as usual, went through the safety meeting and then asked the foreman if he could slip away for a few minutes to drop off a trailer to a family member less than a mile away. Claimant testified he was only off the property for eleven (11) minutes to run the errand. Permission was granted by the foreman, but the foreman, Claimant later found out, is not considered proper authority to approve such requests. The bridge supervisor was not on-site and was away looking at a bridge on the "H-line" when all this transpired. Although this eventually resulted in a Letter of Counsel, which is not considered discipline and Claimant's pay being docked for thirty (30) minutes, Claimant felt slighted and cheated because he and his crew worked through lunch that day and didn't charge the Carrier for the overtime.

May 25, 2017 was a Thursday and the last scheduled workday for Claimant before the Memorial Day three-day weekend. Claimants work crew planned to take a break during the afternoon to have lunch and celebrate with a retiring co-worker. Claimant instead took two (2) hours unpaid time off while the rest of the crew was at the retirement celebration to get married.

Later that evening around 7:00 PM on Claimant's wedding night his supervisor called and instructed Claimant to be sure to bring documentation that he had indeed gotten married while he was away back to work with him. Receiving that phone call on his wedding night did not sit well with Claimant and he admitted on the record that the conversation got heated and profanity was used.

Claimant returned to work on Tuesday following the holiday and after the morning safety meeting was called into the Assistant Division Engineer ("ADE") of Bridge's office. The ADE showed Claimant the e-mail correspondence that she had received from the FMLA Coordinator after they had left work for that week denying Claimant's request for leave due to the second page of the request not being received and explained to him that if he didn't get the request completed and sent back in that the time taken to care for the child would go in as an unexcused absence. The ADE further counseled Claimant relative to leaving the property without proper permission for the errand he ran on Wednesday, May 24 to drop a trailer and further regarding conducting one's self in a professional manner while communicating with supervision

on the telephone. Claimant was then instructed that he was being reassigned to the Macon Georgia Depot, some two hours away.

Claimant left the ADE's office, entered his time for the previous week on the computer at Millen Depot, got in his personal vehicle and left for Macon. Claimant testified that all that had just transpired, the phone call that got heated on his wedding night, the counselling in the ADE's office, the accusation that he cheated on his time and everything going on at home was weighing heavily on his mind as he drove to Macon and that about half way there he just decided that his mental state was such that he just wasn't right to report for the Macon Depot assignment and he turned his vehicle around and just went home.

Carrier heard nothing further from Claimant and on June 6, 2017 after Claimant failed to report to Macon Depot and did not subsequently contact the Carrier, Claimant was taken out of service. An investigation was held on the property, Claimant was found guilty on all charges and dismissed.

With regard to the first of the four charges, there can be no doubt that the charge was proven by substantial evidence. Claimant, after being shown the correspondence from the FMLA Coordinator advising Claimant to resubmit the request for leave, failed to do so. The days that should have been covered under FMLA leave therefore became unexcused absences. It was Claimant's failure to resubmit the proper paperwork that resulted in a guaranteed right turning into an indefensible rule violation.

The last of the four charges involving claiming time not actually worked is less than clearly proven. It seems that there was a long-standing practice that employees are occasionally permitted to slip away for quick errands without consequence. Here, although Claimant readily admits that he slipped away for eleven minutes with the foreman's permission, he also explained without rebuttal that his crew worked through lunch on that day and so he actually worked ten (10) hours and nineteen (19) minutes for ten (10) hours straight time claimed. There was no testimony given on the property to refute Claimant's defense.

But then we come to the second and third charges which involve Claimant's failure to report to his new assignment in Macon, Georgia and failure notify Carrier that he was not going to go there. There is no denial from the Claimant or the Organization that that is what happened. While the Claimant points to his own mental state at the time as an excuse, no employer can tolerate an employee abandoning their assignment short of imminent danger to life or health, and even then, with notification to the employer.

Nevertheless, after much argumentation, the Board is persuaded that this Claimant's career is salvageable and that given the particular circumstances involved

that dismissal was excessive in this instance. Therefore, Claimant shall be reinstated without compensation for time out of service.

AWARD:

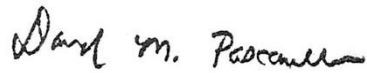
Claim sustained in accordance with the findings.



Richard K. Hanft, Chairman



S. M. Goodspeed, Carrier Member



D. M. Pascarella, Labor Member

Dated at Chicago, Illinois, August 26, 2019