

**NATIONAL MEDIATION BOARD**  
**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

BROTHERHOOD OF MAINTENANCE OF WAY	)	
EMPLOYEES DIVISION – IBT RAIL CONFERENCE	)	Case No. 288
	)	
and	)	
	)	Award No. 288
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. B. Hulsey, issued by letter dated March 14, 2018, in connection with his alleged conduct unbecoming an employee in that on January 9, 2018, supervision discovered that he was found guilty of Felony Burglary in the First Degree in the State of Georgia on August 4, 2017 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier’s File MW-GNVL-18-01-LM-044 SOU).
  
2. As a consequence of the violation referred to in Part 1 above, Claimant B. Hulsey 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 entered the Carrier's service on December 5, 2006. On August 5, 2015 Claimant reported off due to an ankle injury. Claimant made false statements concerning his ability to protect his assignment and, after an investigation, was dismissed on September 29, 2015.

The Organization appealed Claimant's dismissal and, after review, this Board ordered Claimant to be reinstated without compensation for time out of service on March 23, 2018.

In the interim, while Claimant's dismissal was being appealed, the Carrier learned that Claimant had been convicted on August 4, 2017 on twelve (12) felony counts of Burglary in the First Degree in the Superior Court of Lumpkin County, Georgia.

Upon learning of Claimant's convictions, Carrier informed Claimant by letter dated January 19, 2018 that he was being held out of service pending a formal investigation on February 2, 2018.

Claimant and his representative appeared on February 2, 2018 at the appointed time and place for the investigation and were informed by the Division Engineer that due to an administrative scheduling error and simultaneous obligations, the investigation would have to be postponed. A formal letter rescheduling the investigation until February 12, 2018 was issued February 5, 2018.

An investigation did convene on February 12, 2018 and although the Organization did appear on Claimant's behalf, the representative explained that the Claimant could not appear due to military reserve obligations and that investigation was recessed and reconvened on March 2, 2018.

On March 2, 2018 the Organization again appeared on Claimant's behalf and again the Claimant failed to appear. The investigation proceeded in absentia and after concluding, the Claimant was found guilty of Conduct Unbecoming an Employee and was dismissed. The Organization appeals Claimant's dismissal.

The Organization contends in its submission to the Board that this Claim must be sustained before the merits are even considered because the Carrier defaulted on its obligation to hold a valid investigation.

While the Organization concedes that the Carrier has a unilateral right to postpone investigations, it asserts that a postponement of an event can not be effectuated after the time for the event has come and gone.

The Carrier, on the other hand, argues that the Division Engineer informed the Organization and Claimant verbally on February 2, 2018 that the Carrier would need to postpone the investigation to a later date.

The Organization's argument is not without merit. Claimant and his representative appeared on February 2, 2018 at the appointed time and place ready to proceed. Carrier Supervision, however, was not prepared to proceed with the investigation that it had scheduled and arranged.

The Organization conceded in its submission that the Carrier had a unilateral right to postpone the Investigation. Indeed, the Fourth (4) Paragraph of the System Discipline Rule agreed to on March 14, 2001 provides:

"...At the request of either party, the investigation will be postponed; however, such investigation will not be postponed in excess of ten (10) calendar days beyond the date first set except by mutual agreement..."

In this matter, Claimant and his representative appeared as scheduled, a verbal request for postponement was given at that time, a formal letter under the date of February 5, 2018 was sent to the Organization resetting the investigation until February 12, 2018, exactly ten (10) days from the time appointed for the first scheduled investigation and that investigation convened, was recessed on account of Claimant's absence and was reconvened on March 2, 2018.

While Carrier Supervision really dropped the ball concerning the first scheduled hearing, it was able to remedy its errors, within the strictures of the System Discipline Rule and no violation occurred. Moreover, the postponement of the first scheduled

investigation in no way prejudiced the Claimant or deprived him of receiving a fair and impartial hearing on the charges.

The Organization further contends that the Claimant, who had already been dismissed for conduct unbecoming an employee and dishonesty could not be the subject of another investigation because, essentially, he was not an employee of the Carrier following his prior dismissal.

While the Organization's argument is also not without merit, it too, must fail. While the Claimant had been dismissed on September 29, 2015, that dismissal was appealed by the Organization and on the docket to be reviewed by this Board at the time that the Carrier obtained first knowledge of Claimant's criminal convictions. Claimant still had a connection with the Carrier and was still a member of the Organization at that time. Hence, Carrier was bound by the System Discipline Rule to charge Claimant within thirty (30) days of its first knowledge of the misconduct or forever forfeit its ability to do so.

Having considered the Due Process arguments presented by the Organization, the Board now considers whether there was ample evidence on this record to support the decision made on the property.

The records of the Superior Court of Lumpkin County, Georgia entered into evidence on this record provide substantial evidence of Claimants conduct unbecoming an employee.

Legions of Awards in this industry support the notion that dismissal is an appropriate response to dishonest and unbecoming conduct. In this matter, there were no mitigating factors that could persuade the Board that this dismissal was inappropriate. This Board can find no reason to disturb the determination made on the property.

AWARD:

The Claim is denied.

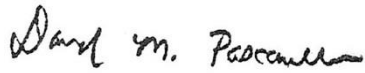


Richard K. Hanft, Chairman



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S. M. Goodspeed, Carrier Member



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D. M. Pascarella, Labor Member

Dated at Chicago, Illinois, August 26, 2019.