

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY)	
EMPLOYEES DIVISION – IBT RAIL CONFERENCE)	Case No. 289
)	
and)	
)	Award No. 289
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. G. Miller, Jr., issued by letter dated November 27, 2017, in connection with his alleged: (1) improper performance of duty in that on October 16, 2017, while assigned to provide track protection for the Route 641 overhead bridge project at Mile Post 99.14, he failed to devote his full attention to duty, when at approximately 3:00 P.M. the Virginia Department of Transportation (VDOT) found him sitting in his truck with headphone ‘ear buds’ in his ears; (2) improper performance of duty in that on October 18, 2017, he failed to report to his assignment to provide track protection for the Route 641 overhead bridge project at Mile Post 99.14 and failed to contact the proper authority to request permission to be late for work; (3) conduct unbecoming an employee in that on October 19, 2017, he made false and/or conflicting statements to supervision when at approximately 8:54 A.M., he was asked about the status of the job for the day and advised his supervisor that he was at the Route 641 overhead bridge project jobsite at Mile Post 99.14 with the VDOT work crew when in fact he was not there; (4) improper performance of duty in connection with Charge Number 3, in that after becoming aware that VDOT would not be working on the Route 641 overhead bridge project on October 19, 2017, he failed to advise his supervisor of the change in the work obligation and failed to protect his position; and (5) conduct unbecoming an employee in that after failing to protect his position on October 19, 2017, he attempted to claim compensation for a vacation day without prior authorization from the proper authority, was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier’s File MW-HARR-17-96-LM-803 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant G. Miller, Jr., 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, on the dates relevant to this matter, October 18 and 19, 2017, had thirty-two (32) years' service with the Carrier. On those dates he was assigned to provide track protection for the Virginia Department of Transportation ("VDOT") as a Flagging Foreman at a bridge project at MP 99.14.

On the morning of October 18, 2017 Claimant went on duty at 7:00 AM. Around 9:00 AM another Carrier employee contacted Claimant's Supervisor to report that the VDOT construction crew was looking for its flagman in order to go to work. The Claimant's supervisor called Claimant at 9:10 to find out where he was. Claimant explained that he left the hotel at 7:00 AM but experienced some car trouble and stopped by a repair shop to have the car serviced. Claimant did not report that he was unable to be at work on time to proper authority. Claimant did not arrive at the jobsite that day until 10:00 AM.

Around noontime of that same day, Claimant's supervisor had a telephone conversation with the VDOT Bridge Superintendent who advised the supervisor that the

VDOT had a training class the following day, Thursday, October 19 and would be returning to work on the following Monday.

Around 4:00 PM Claimant called his supervisor and said plans had changed and there would be bridge crew employees working on Thursday, but that they would likely only work half of the day.

On the following morning, Claimant's supervisor went to the bridge project at 7:15 AM. The bridge crew workers were not there and neither was the Claimant. The supervisor did some paperwork while sitting in his truck waiting for someone to arrive at the jobsite and upon completion of his paperwork, called the Claimant around 9:00 AM and asked him where he was.

Claimant lied to his supervisor and told him he was at the jobsite with two bridge crew employees.

On the following Monday, the next regular workday, Claimant's supervisor met with Claimant and had him write out a statement and Claimant changed the story to reflect that on the previous Thursday the contractors were a "no show". Claimant was taken out of service on October 30, 2017.

On the Property, after investigation, Claimant was found guilty of improper performance of duty when on Wednesday, October 18, 2017 Claimant failed to report to his assignment and failed to contact proper authority to request permission to be late for work; conduct unbecoming an employee for lying to his supervisor about being at the jobsite with contractors on Thursday morning when he wasn't there; improper performance of duty in that he failed to advise his supervisor of the change in his work obligation on Thursday morning; and conduct unbecoming an employee for trying to claim compensation for a vacation day without proper authorization from proper authority.

Having reviewed the whole record established on the property, there can be no doubt that there was substantial evidence to support the findings made on the property.

Moreover, although the Organization complains that Claimant's due process rights were violated because the letter of charge was not precise and that the Hearing Officer failed to cite any testimony in Claimant's dismissal letter, we find Claimant was afforded all due process rights bargained for in the Parties' Agreement and in accord with just cause.

With regard to the discipline assessed, there is no doubt that Claimant lied to his supervisor on Wednesday afternoon when he reported that the bridge crew was working the following day, he lied when he reported on Thursday morning that he was on the jobsite with two contractor employees and he lied to change his story to the contractors were a no show. Dishonesty has been a dismissal offense since the railroads were running on steam.

Nevertheless, the Board finds the Claimant's thirty-two (32) year career with the Carrier mitigates against applying the ultimate discipline of dismissal. Although Claimant's service record is far from clean, we further note that it has been more than 8-1/2 years since Claimant's last disciplinary event.

The Board therefore determines that the Claimant shall be reinstated without compensation for time out of service and with the admonishment that laying out of work and lying will not be accepted in the future and that this is, indeed, his last straw with this Board.

AWARD:

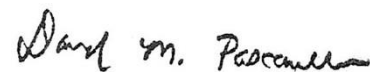
Claim sustained in accordance with the findings.



Richard K. Hanft, Chairman



S. M. Goodspeed, Carrier Member



D. M. Pascarella, Labor Member

Dated at Chicago, Illinois, August 26, 2019

