

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY)	
EMPLOYES DIVISION – IBT RAIL CONFERENCE)	Case No. 297
)	
and)	
)	Award No. 297
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: December 10, 2020

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

1. The Carrier’s discipline (dismissed from all service with Norfolk Southern Railway Company) of Mr. M. Caldwell, issued by letter dated September 11, 2018, in connection with his alleged: (1) improper performance of duty in that on August 6, 2018 he was observed by a Carrier supervisor sitting in a Company truck in a slouched position with his eyes closed or covered/sleeping while on duty at Brosnan Yard and (2) conduct unbecoming an employee and failure to follow instructions in that after being verbally advised on August 6, 2018 that he was held out of service pending a formal investigation, he entered Carrier property on the morning of August 7, 2018 and refused to leave, requiring NS Police to escort him from the property was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier’s File MW-ATLA-18-20-LM-424 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant M. Caldwell shall have his dismissal set aside with all notations thereof removed from all Carrier records, and he shall also be restored to the Carrier’s service with all seniority and restored to 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 dismissed); (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 been not been unjustly dismissed.”

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:

This matter involves a Claimant who was working as a track laborer in the Brosnan Yard. Claimant had just returned to work for the Carrier and the weather, the record reveals, was oppressively hot during his first week back at work. The Gang was working to clean up a spilled rock truck and the gang was going to be required to work overtime to complete the job. At approximately 5:00 p.m. Claimant asked for and was granted permission to go to the gang truck, take a break to cool down and to text his wife to let her know he would be working late. Claimant noticed there were two other employees of the gang taking a break when he arrived at the truck and crawled into the back seat and began texting his wife.

The track supervisor came by the rock car job and noticed the missing employees. He radioed one of the other employees in the truck and asked if they were going to help with the job. The other two employees exited the gang truck and returned to the job site. Claimant remained behind texting his wife.

The Track Supervisor then went to the truck, observed Claimant, he says, sound asleep. He told Claimant to exit the truck, Claimant denied that he was sleeping and the Track Supervisor took him back to the office via the Track Supervisor's truck where he was taken out of service.

On the next morning Claimant arrived at the Carrier's office at 7:00 a.m. and was asked by the Track Supervisor to come into a storage area to speak with him and Claimant refused. Claimant declared that he wanted everything done in public with other people around. Claimant had apparently been advised that the Carrier had to provide him a written statement that he was being held out of service and he was there to get that piece of paper and wasn't going to leave

until he had the statement in hand. Because Claimant would not voluntarily leave the property, Norfolk Southern Police were called and Claimant was peaceably escorted from the property.

An investigation was held on the property on August 27, 2018 and Claimant was found guilty of improper performance of duty in that he was sleeping on the job and conduct unbecoming an employee and failure to follow instructions for refusing to leave the property when instructed to on August 7, 2018.

After thorough review of the Record we find that the Carrier failed to meet its burden of proof relative to violation of Operating Rule 2 and that there were mitigating circumstances related to failure to follow instructions on the following morning.

Claimant does not deny that he remained slouched over in the back seat of the gang truck texting his wife after his two coworkers returned to work. He spoke to one of his coworkers as he exited the truck and that witness testified that it may have been a minute later that the track supervisor approached the truck and saw the Claimant laying in the back seat.

The Track Supervisor is sure he saw Claimant sleeping, Claimant denies he was sleeping but instead feeling the effects of the extreme heat and trying to arrange a ride due to the gang working overtime. Because the uncorroborated testimony of one witness against the testimony of the Claimant does not allow us to conclude that the Carrier provided substantial evidence of guilt the Carrier has failed to meet its burden of proof.

Our review of the record further indicates that Claimant had been advised by someone at some level of the Organization's leadership that if he had not received written verification that he had been taken out of service that he needed to present himself on time at work in order to protect his assignment. While that advice did not give Claimant license to disobey the order for him to leave, it does give the Board understanding of why Claimant was there and what he was attempting to do, protect his assignment, and mitigates against the penalty of dismissal.

The Board has determined that while the decision made on the property was neither arbitrary nor excessive, the time served out of service should be sufficient to prevail upon Claimant that he must obey Carrier's rules. The Carrier is directed to reinstate Claimant without compensation for time out of service.

AWARD: Claim sustained in part and denied in part.

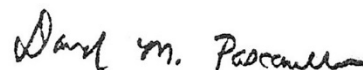


Richard K. Hanft, Chairman



S. M. Goodspeed
Carrier Member

Dated at Chicago, Illinois, February 3, 2021



D. M. Pascarella
Employee Member