NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION – IBT RAIL CONFERENCE	)))	Case No. 298
and	))	Award No. 298
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER SOUTHERN RAILWAY COMPANY)	))	

Richard K. Hanft, Chairman & Neutral Member
D. M. Pascarella, Employe 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. D. Miles, issued by letter dated September 25, 2018, in connection with his alleged: (1) conduct unbecoming an employee in that he collected or attempted to collect compensation for travel time and/or mileage to which he was not entitled to receive on July 2, 3, 5, 6, 7, 8, 9, 12, 15 and 20 and (2) conduct unbecoming an employee in that he collected or attempted to collect compensation in excess of the actual time and/or mileage traveled on July 2, 3, 5, 6, 7, 8, 9, 12, 15 and 20 and failed to notify supervision of the payments to which he was not entitled, was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier's File MW-BHAM-18-23-LM-484 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant D. Miles 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 Track Laborer on the TM-506 Gang. During the month of July 2018, the TM-506 gang was dispatched to assist on a derailment job at Pell City, Alabama. The claims made to payroll for compensation during the above-referenced time period were reviewed by the Assistant Division Engineer ("ADE") while performing a routine spot check on payroll. The large numbers he saw on the payroll report raised some suspicion and he and the Division Engineer met with Claimant and other members of the gang on Monday, August 7, 2018 to try to get some understanding why the claims were so large.

When specifically asked if the Claimant noticed that his checks were high, the Claimant answered in the affirmative. When asked if he questioned why the checks were high, he responded no. When asked if he knew that he was getting paid more than he should have been paid, he responded "Correct."

It is the Carrier's position that a fair and impartial investigation was held on the property, that Claimant was afforded all due process required by the System Discipline Rule, that there were no procedural irregularities and that based on the preponderance of evidence adduced at the investigation the Claimant was found to be guilty as charged and was dismissed.

The Organization first contends that Rule 40 was violated in that the Charging Officer had "first knowledge" of an impropriety on August 3, 2018 and failed to hold an investigation until September 5, 2018. That statement is incorrect because the ADE testified, he was perusing the payroll records on Friday which was August 4, 2018. That perusal raised a suspicion that caused the ADE to interview the members of TM-506 on the next day the gang was at work. As the Board thoroughly discussed in another case before us, SBA 1049, Case 301, the ADE's suspicion did not ripen into "first knowledge" until he had a chance to speak with the gang members. An investigation was timely conducted thereafter on September 5, 2018.

The Organization also argues that because the charges filed against Claimant include allegations of moral turpitude, the Carrier bears the burden of proving the charges against Claimant by "clear and convincing evidence." The Board, in consideration of Claimant's admissions finds that the Carrier met that burden.

The Board is also cognizant of some mitigating factors, such as the fact that Claimant had no part in entering his pay claims into the payroll system, that the person who did enter the time entered the same amount for everyone in the gang, that Claimant truthfully reported his mileage and that the person entering the payroll inflated the number. The Board finds that while Claimant is guilty of collecting more compensation than he was entitled to, knew it and did nothing to report it to supervision, he was not as culpable as others involved.

The Board therefore determines 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 and conduct himself with honesty and integrity. 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

D. M. Pascarella
Employe Member

Dated at Chicago, Illinois, February 3, 2021

EMPLOYE MEMBER'S CONCURRENCE IN PART AND DISSENT
TO
AWARDS 298 AND 299 OF SBA NO. 1049
(Referee Richard Hanft)

I must dissent with the Majority's opinions, while concurring in part with the result of the awards, insofar as they sustained the claims involved herein. Specifically and with respect to my dissent, it is my position that the Majority erred when it held in these cases, as it had held in accordance with its findings in Award 301, as follows:

> "The Memorandum of Understanding of March 2001 amending Rule 40 clearly states '…the investigation shall be held within 30 days of first knowledge of the offense.' The question is: at what point did ADE Davidson's suspicion ripen into first knowledge? The Board, after thorough argumentation, determines that the Carrier's officer did not have first knowledge until he interviewed the Claimant on August 7, 2018 to investigate the suspicions raised by his routine perusal of the payroll record the Friday prior. Had the ADE charged the employee based on a hunch before giving the employee the opportunity to explain, that in itself would have been a deprivation of the Claimant's due process rights. We find that the time limitations set forth in Rule 40 were not violated in this instance."

These findings are contrary to the clear language of Rule 40 and on-property precedent interpreting and applying its provisions. Rule 40(a) states, in pertinent part:

> "*** The investigation shall be held within 30 days of first knowledge of the offense. ***"

The clear language of the Agreement only gives the Carrier thirty (30) days to hold an investigation from the date the Carrier has first knowledge of an offense. The Majority has essentially amended that language through its holding in these cases, as it has created a distinction between "first knowledge" and a "suspicion", which distinction is nowhere drawn in the Agreement language itself and provides the Carrier with standard-less cover that elastically delays the running of the Carrier's investigation time limits against it, in accordance with its own interpretation of when "suspicion" becomes "first knowledge". The Rule 40(a) language at issue in this case was bilaterally negotiated between the parties in good faith from the Organization side, but the Majority's decision in this case allows the Carrier to unilaterally rewrite that language, and on an ad hoc basis, to fit their particular needs in saving any possibility of an Agreement violation being found in any particular case. All the Carrier has to argue in any case where a Rule 40(a) violation has been committed by it is that what appears to be "first knowledge" was instead merely "suspicion", with the Carrier alone determining when "suspicion" graduates to "first knowledge", the Majority's decision herein giving deference to the Carrier's own interpretation thereof. As we argued before the Board regarding this Carrier argument making this unfounded distinction:

> "*** This response, however, does not extricate the Carrier from its fatal procedural problem herein, as it is only 'first knowledge' and not investigated or perfect knowledge that is required by Rule 40 to start the ticking of the thirty (30) day clock against the Carrier. This 'first knowledge' is perfectly synonymous with the Charging Officer's allusion to a 'suspicion', for the Carrier is given thirty (30) days to further investigate whether there is more to the 'first knowledge' or 'suspicion' before an investigation is even had, and even then the Carrier is not supposed to have perfected its knowledge to any certain degree beyond its 'first knowledge' or 'suspicion', as the investigation's very purpose is to explore whether the Carrier's imperfect knowledge of a possible offense is actually founded or not, when all of the relevant evidence is finally aired and vetted. ***" (Case 301 - Organization's Submission)

Not only is the Majority's holding on this issue nowhere evidenced in Rule 40(a)'s text and contrary to its essential integrity, but it is also contrary to precedent between these very parties concerning the same issue and Agreement provision at stake here. In Award 81 of Public Law Board (PLB) No. 6394, the same discipline-related contract provisions between the same parties on a different property were held to hold the Carrier to "first knowledge" of a possible offense when the Carrier simply approved payroll later complained of as fraudulent in the due course of normal administrative operations. As such, the mere occasion for discovering a potential violation was deemed "first knowledge" that triggered the running of the investigation time limits against the Carrier. Herein, it is clear that the Carrier need not even have actual knowledge of any wrongdoing or even an actual suspicion of wrongdoing, to use the Carrier's undefined concept/distinction. Constructively, "first knowledge" is imputed to the Carrier from the time that it should have known something might be amiss and could have started an on-property investigation into such matters. It is simply "disingenuous" for the Carrier to disclaim "first knowledge" under such circumstances, as PLB No. 6394 noted. Thus, even actual suspicion, which the Carrier says in these cases was not enough to trigger the running of investigation time limits, was previously found under the same Agreement language to be beside the point and a later stage of a process that would already have involved "first knowledge" on the part of the Carrier earlier. Certainly, then, wherever the Carrier is merely tipped off that something is potentially amiss with an employe's conduct under the rules, as it was in each of these cases, the investigation time limits begin running and a maximum of thirty (30) days therefrom is given to bring the employe involved to an investigation, to try the issue. In these cases, appropriate Carrier officials admitted that they had actual "suspicions" of employe wrongdoing in advance of the date selected by the Carrier for its self-serving determination of "first knowledge". On these records, then, it is clear that the Carrier actually had

"first knowledge" by the time appropriate Carrier officials claimed a "suspicion", at the latest. This corresponds with the Organization time line in each of these cases, which thus makes out a clear Carrier violation of the investigation time limits.

For these reasons, I must concur with the results of the awards in these cases, to the extent that they sustain these claims, while dissenting from the holdings as noted above, which deny the Claimants the complete relief due them.

Respectfully submitted,

David M. Pascarella
Employe Member