NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION – IBT RAIL CONFERENCE	)))	Case No. 299
and	))	Award No. 299
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. R. Myles, issued by letter dated September 26, 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-18-24-LM-485 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant R. Myles 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 is the third of four interrelated cases brought before this Board on appeal. The cases all concern the TM-506 Gang, headquartered in Chattanooga, Tennessee, being assigned to assist with a derailment that occurred on the Main Line in Pell City, Alabama during the month of July 2018.

This case involves the dismissal of the Material Handling Truck Operator on the TM-506 Gang. Claimant was dismissed after an investigation on the property found that he was culpable for conduct unbecoming an employee in that he collected or attempted to collect compensation for which he was not due and failed to notify supervision of the overpayment.

It is undisputed that payroll information was entered into the Carrier's payroll system on Claimant's behalf. A review of the transcript of the investigation on the property reveals that Claimant never entered payroll data for the relevant time period into the payroll system himself, nor did he inform or direct the employee who was entering his earnings into the system as to hours, mileage or expenses he was due.

Nevertheless, Claimant was charged with, and after a formal investigation on the property, found culpable of conduct unbecoming an employee in that he received compensation which was not due when Carrier directly deposited his reported earnings for the relevant time period into two of Claimant's bank accounts and he failed to report to supervision that the deposits made were more than what he was due.

It is the Carrier's position that a fair and impartial investigation was held on the property, that Claimant was afforded all due process require 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 sees this matter through a completely different lens. The Organization argues that the Carrier violated the Agreement by failing to provide a fair and impartial investigation process required by Claimant's due process rights, that the Carrier failed to meet its burden of proof and issued arbitrary and unwarranted discipline.

Specifically, the Organization contends that Rule 40 requires the Carrier to hold an investigation into alleged rule violation within thirty (30) days of Carrier's first knowledge that an offense may have been committed. Here, the Organization reasons, because the Assistant Division Engineer ("ADE") noticed that something was amiss with the hours reported for Gang TM-506 on August 4, 2018 during a routine spot-check of payroll, an investigation needed to be accomplished within thirty (30) days to comply with the Agreement. Carrier did not hold the investigation into this matter until September 6, 2018, more than thirty days since the ADE noticed the "red flags" in the payroll report.

The Board analyzed and argued regarding the same protestation in one of the other interrelated cases, SBA 1049, Case No. 301. There we found, as here, that the ADE's suspicions aroused by his perusal of the payroll reports did not ripen into "first knowledge" until he discussed his suspicions with the employee inputting the payroll data and the gang's foreman on the following workday. In that case as here, the Board found Carrier had first knowledge of a chargeable impropriety on August 7, 2018 and the investigations were held within the time limits required by Rule 40.

Also, while the Carrier states that the Claimant's dismissal was premised on the preponderance of evidence adduced at the investigation held on the property, the Organization contends that because this case involves allegations of moral turpitude via payroll fraud the Carrier must prove culpability by a clear and convincing standard and that burden the Carrier failed to bear. The Organization avers that the Carrier cannot rely on a mere presumption that Claimant should have realized that something was off when no evidence shows that Claimant had timely knowledge of anything being amiss.

The Organization further reasons that the discipline assessed was arbitrary and unwarranted and asserts that the Carrier cannot validly punish an employee for dishonesty when the Claimant was not proven to have the requisite knowledge to be dishonest. In these particular circumstances the Organization submits, the Claimant was taken out of service before he realized anything was amiss and not given an opportunity to say or do anything about it. For all the above reasons the Organization maintains that the Claim must be sustained.

We find that while the Organization's argument that Claimant was taken out of service before he had an opportunity to bring any undue payment to the attention of supervision relative to the earnings deposited into his accounts on August 3, 2018 had some merit, we are also aware that deposits were made two weeks earlier into his accounts that were based on inflated and undue earnings for the period of June 23 through July 6, 2018 and the overages were not reported to supervision. Claimant's admitted recognition that his pay was unusually high and failure to report it manifests an intent to keep it. We therefore determine that Claimant was culpable, just less so than his co-workers.

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 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

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