NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION – IBT RAIL CONFERENCE	)))	Case No. 301
and	))	Award No. 301
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. E. McAboy, Jr., 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 1, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15 and 20, 2018; (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 1, 3, 5, 6, 7, 8, 9, 12, 13, 14, 15 and 20, 2018 and failed to notify supervision of the payments to which he was not entitled; and (3) conduct unbecoming an employee in that you improperly claimed Foreman rate of pay between July 1, 2018 and July 31,2018 was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier's File MW-BHAM-18-22-LM-463 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant E. McAboy, Jr., 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.

This matter involves a Laborer on the TM-506 Gang who, during the prior absence of his foreman, had been entrusted with the payroll reporting responsibilities for the gang. After the regular foreman returned to the gang, by mutual consent, the Claimant continued to report the gang's time and mileage into the Carrier's payroll system.

In July 2018 the gang, headquartered in Chattanooga, Tennessee, was assigned to assist with a derailment job in Pell City, Alabama. The gang packed up and transported the Carrier's trucks and tools and the gang members' personal vehicles and arrived in Pell City by July 5, 2018.

For time spent and work performed in Pell City during the month July 2018 Claimant, it is undisputed, entered what was purported to be time worked and travel expenses due for the individual members of the gang into the Carrier's payroll system.

The record contains substantial probative evidence that the information inputted to the payroll system by Claimant was exorbitant, undue and in some instances, plainly false. The Claimant submitted claims for compensation for mileage, mileage for change of headquarters and overtime that was grossly inflated and, in some instances, fraudulent. As an example, Claimant claimed time for Hot Weather Patrol for himself on July 1, 13 and 15 but the Carrier has no record of Claimant performing Hot Weather Inspections on any of those dates. Additionally, on July 5, 6 and 7 the Claimant's payroll reflected that Claimant claimed compensation of 800 miles and 1400 miles travel time for traveling from Chattanooga, Tennessee to Pell City, Alabama. Claimant and other members of the gang, however, arrived in Pell City on July 5th and stayed there on the Sixth and Seventh. Further, the distance from Chattanooga to Pell City is only 127 miles. Thus, the mileage claimed for July 5 was not only excessive, but in the case of July 6th and 7th was deceitful.

Moreover, it is unrefuted the Claimant claimed Foreman Pay for the entire month of July 2018, when he was not the foreman and was not due the increased level of pay.

The Board thus concludes that there was ample evidence adduced to support the conclusion reached by Carrier on the property as to Claimant's culpability.

But the Board's inquiry does not end there. The Organization strongly asserts that the Carrier's discipline cannot stand because the Claimant was denied his contractual right to a fair and impartial investigation process consistent with his due process guarantees under the Parties' Agreement.

The Organization contends that Carrier failed to comply with Rule 40 in that Carrier had first knowledge that an offense had possibly been committed when ADE Davidson routinely perused the gang's payroll submissions on August 4, 2018 and found questionable submissions. Since an Investigation on the charges was not conducted until September 6, 2018, the Organization avers that the Investigation was held outside the maximum thirty (30) day limit agreed to by the Parties between the Carrier's first knowledge of a possible offense and the time the Investigation is conducted.

It is the Carrier's position that it is the standard on the property that the Carrier is afforded a reasonable time to investigate its suspicion of wrongdoing and in this matter took a reasonable (the gang's next workday) time to look into irregularities before it determined to charge the employees.

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.

The Board finds no mitigating circumstances in the record. Accordingly, we conclude that the dismissal assessed was neither arbitrary, capricious nor excessive.

AWARD: Claim denied.

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Richard K. Hanft, Chairman

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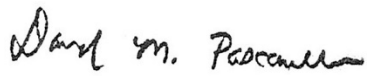
S. M. Goodspeed
Carrier Member



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D. M. Pascarella
Employe Member

Dated at Chicago, Illinois, February 3, 2021

EMPLOYE MEMBER'S DISSENT
TO
AWARDS 301 AND 302 OF SBA NO. 1049
(Referee Richard Hanft)

I must dissent with the Majority's opinions. Specifically, the Majority erred when it held in Award 301:

> "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."

Award 302 held:

> "While the Claimant's supervisor had suspicions that Claimant was wearing an ankle bracelet on July 4th and 9th that provoked no first knowledge of a possible rule violation. Claimant was not charged with wearing an ankle bracelet at work. It was when the Norfolk Southern Police provided Claimant's driving records that supervision had first knowledge that there was a possible rule violation and that was on July 10, 2018. The investigation into what Claimant was charged with, unlawfully driving Carrier's vehicle, took place within the agreed to time frame on August 8, 2018."

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 dissent.

Respectfully submitted,

David M. Pascarella
Employe Member