NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION – IBT RAIL CONFERENCE	)))	Case No. 302
and	)	
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER SOUTHERN RAILWAY COMPANY)	)))	Award No. 302

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. B. Hutson, issued by letter dated August 27, 2018, in connection with his alleged: (1) conduct unbecoming an employee in that on or about August 7, 2017, his driver's license was revoked and he failed to notify supervision; (2) conduct unbecoming an employee in that on August 4, 2017, he was convicted of/pled guilty to driving while intoxicated and failed to report his arrest or conviction in accordance with the Carrier's rules; and (3) conduct unbecoming an employee in that despite having a court order from July, 2017, prohibiting him from operating any vehicle that is not equipped with an alcohol sensor, he continued to operate a Carrier vehicle for approximately one year, transporting several gang members, in violation of his court order and in violation of law was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier's File MW-BHAM-18-17-SG-368 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant B. Hutson 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 employe 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 concerns the dismissal of a track laborer on the S-9 Surfacing Gang. Claimant had previously been taken out of service on August 11, 2017 as the result of a machine collision. He was reinstated to service on January 8, 2018 and assigned to the S-9 Surface Gang.

After being taken out of service on August 11, 2017 Claimant was convicted of driving under the influence in Tennessee on August 14, 2017. Claimant's driving privileges were revoked as a result of the conviction, but he was subsequently granted restricted driving privileges conditioned on him only being able to drive a vehicle equipped with an ignition interlock system.

Claimant was reinstated to service on January 8, 2018 as a track laborer and some of his duties required him to transport fellow gang members between lodging and worksites in a Carrier vehicle. Claimant did not share with Carrier that his operation of Carrier's vehicles was a violation of the law.

On July 1, 2018, the S-9 Surfacing Gang got a new supervisor and by July 4, 2018 he overheard other members of the gang discussing that Claimant was wearing an ankle bracelet. That evening he reported that he had overheard that discussion to his supervisor.

On the next regular workday, July 9, 2018, the supervisor looked for any signs the Claimant was wearing the bracelet but did not observe anything unusual. That evening at the hotel the supervisor did see Claimant wearing an ankle bracelet and called and reported that fact to his supervisor. The Norfolk Southern Police were notified, and Claimant's driving record was

revealed. On July 10, 2018 Claimant was taken out of Service and summoned to an investigation on August 8, 2018. Claimant was found guilty of the charges and dismissed.

The Carrier submits that a full and fair investigation was had on August 8, 2018 where Claimant was represented by his Organization and afforded his full due process rights. As a result of the substantial evidence proven at the investigation, Claimant was found guilty of the violations charged and after consideration of Claimant's career service record and the gravity of the Claimant's conduct, he was dismissed on August 27, 2018.

The Organization contends that the Claimant was denied his due process rights to a full and fair investigative process, that the Carrier failed to meet its burden of proof and that the discipline assessed was arbitrary and unwarranted.

First the Organization argues that Claimant was denied his due process because Carrier failed to issue "precise charges" pursuant to Rule 40 because the precise rule that the carrier relied on at the investigation was not mentioned in thee Letter of Charge and thus, the Organization submits, the Claim must be sustained.

This Board has consistently found that in order to comply with the Agreement, Carrier is to provide notice of the charge in sufficient detail to enable the accused to prepare a defense. Here, upon review, we find that the notice clearly contained sufficient specificity to enable the Claimant to prepare his defense.

The Organization next claims that the Carrier committed a second fatal flaw when it failed to convene an investigation within the time limits agreed to by the Parties in Rule 40. The Organization asserts that Carrier had first knowledge that Claimant was wearing an ankle bracelet on July 4, 2018 when the Gang's supervisor overheard employees discussing the same. Since Carrier had this first knowledge on July 4, 2018 it had to hold an investigation within thirty (30) days to be in compliance with the time limitations of Rule 40, which it failed to do and did not convene an investigation until August 8, 2018. For the reason that Carrier did not comply with the time limitations of Rule 40 the Organization avers, the Board must now sustain Claimant's claim for relief.

The Board's thorough review of the record yields the following: The S-9 Gang's new supervisor overheard employees talking and heard about Claimant wearing an ankle bracelet. That raised the supervisor's suspicions and caused him to be concerned for Claimant's safety. He reported his concerns to his immediate supervisor on July 4, 2018. This was not a suspected rule violation, it was in fact the new supervisor's concern whether that may be a safety concern.

On the next workday after the holiday, July 9, 2018, the supervisor tried to observe anything about the Claimant wearing this ankle bracelet that may be a safety concern but testified that he noticed nothing unusual when observing the Claimant at work. It was not until that evening at the hotel when the supervisor saw the ankle bracelet that he could verify that the rumors he had been hearing that Claimant was wearing an ankle bracelet, were true.

It was at that time, Monday, July 9, 2018, during the evening hours that the supervisor contacted his supervisor and verified the rumors that he had previously reported and the two supervisors got the Norfolk Southern Police involved. It was not until the next day, July 10, 2018 when the Norfolk Southern Police provided Claimant's driving and court records that supervision had first knowledge that Claimant might be in violation of Carrier's rules and he was removed from service.

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.

Because this case involves allegations of moral turpitude in that Claimant is accused of dishonesty, the Organization points out that the Carrier is under an increased burden of proof and must prove the charges against the Claimant by at least clear and convincing evidence.

The evidence in this record clearly established that Claimant drove the Carrier's vehicles unlawfully and regularly for at least six (6) months. Accordingly, we find the Carrier proved the charge by clear and convincing evidence. Under the circumstances presented, we cannot say that dismissal was arbitrary, capricious or excessive.

AWARD: Claim denied.

Richard K. Hanft, Chairman

S. M. Goodspeed
Carrier Member

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