

**NATIONAL MEDIATION BOARD**

**SPECIAL BOARD OF ADJUSTMENT NO. 1049**

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BROTHERHOOD OF MAINTENANCE OF WAY	)	
EMPLOYES DIVISION – IBT RAIL CONFERENCE	)	Case No. 304
	)	
and	)	
	)	Award No. 304
NORFOLK SOUTHERN RAILWAY COMPANY	)	
(FORMER SOUTHERN RAILWAY COMPANY)	)	

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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, which dismissal was later reduced to an approximate one hundred (100) day suspension] of Mr. D. Franklin, issued by letter dated March 14, 2019, in connection with his alleged: (1) conduct unbecoming an employee in that he violated Norfolk Southern’s Policy on Alcohol and Drugs pertaining to an off-the-job prohibited drug activity that occurred on June 5, 2018, in Dade County, Georgia and (2) conduct unbecoming an employee and failure to protect his assignment on the R1-B Gang, in that he allowed his foreman to enter payment for time not worked, in that ten (10) hours of straight time was reported for him for June 6, 2018, even though he was not present at the work location was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier’s File MW-ATLA-19-07-SG-103 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Franklin 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; 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 concerns the dismissal and subsequent commutation of the discipline to a one hundred (100) day suspension of a laborer on the R 1-B Rail Gang. Claimant and a co-worker were arrested for possession of drugs in Dade County, Georgia on June 5, 2018. Both employees were incarcerated on the evening of June 5, 2018 and held overnight in the Dade County Jail until they could arrange to be bonded out on the following day. It is significant that Claimant requested and was administered a urine test on June 6, 2018 at the jail that proved his system was free from illegal drugs. Neither the Claimant nor his co-worker called in to let their foreman know they would not be reporting to work on June 6<sup>th</sup> as they were incarcerated.

In a perfect storm of circumstances, the rail gang was in Georgia to perform work but, through no fault of their own, their equipment and camp cars did not timely arrive at the work location and the gang was billeted in a local hotel. The gang had their normal morning meetings on Monday and Tuesday and the gang was compensated for waiting for the equipment to arrive. By Tuesday evening Claimant and a co-worker were getting restless and so they took a ride to a local music festival in the co-worker's truck. That is when they were arrested and incarcerated.

On Wednesday, June 6<sup>th</sup> the gang did not have a morning meeting. Because the gang did not meet and Claimant could not call the foreman to let him know that he would not be present, the foreman mistakenly marked Claimant, for payroll purposes as present. Claimant was subsequently compensated for time he was absent.

When Carrier gained knowledge that Claimant and his co-worker had been arrested in Dade County, they were charged with Rule violations herein being appealed, summoned to a formal investigation, found guilty of the charges filed and Claimant was dismissed but subsequently reinstated on May 20, 2019 after approximately one hundred (100) days suspension.

The Carrier submits that a full and fair investigation was had on March 4, 2019 where Claimant was represented by his Organization and afforded his full due process rights. As a result of the substantial evidence adduced 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 March 14, 2019. Claimant was subsequently reinstated to service on May 20, 2019.

The Organization contends that Claimant was denied his contractual rights because the Carrier failed to issue a precise charge. This Board has held on numerous occasions that to comply with the Agreement, Carrier is to provide notice of the charge with sufficient detail to enable the accused to prepare a defense. In the present case, the notice clearly contained sufficient specificity to enable the Claimant to prepare a defense.

The Organization further maintains that where, as here, the charges against Claimant contain allegations of moral turpitude, the Carrier must be held to a higher standard of proof. Here, the Organization argues, the Carrier must prove the charges against Claimant by clear and convincing probative evidence.

The Board finds merit in the Organization's argument concerning the charge that Claimant violated the Carrier's Policy on Drugs and Alcohol pertaining to off-the-job prohibited drug activity on June 5, 2018. We find that that charge was based on uncorroborated circumstantial evidence and that there has not been any connection proven concerning Claimant's possession of drugs. Hence the Carrier failed to meet its burden of proof and the charge cannot stand.

Regarding the two charges concerning Claimant not protecting his assignment and being paid compensation that he was not due, we find Claimant was culpable, but only to the extent that things were happening that Claimant had minimal control over and that Carrier cannot rely on the mere presumption that Claimant was even aware that he had been overpaid.

The Board further finds that the Claimant's Career Service Record of fifteen (15) years of unblemished service mitigates against the harshness of the penalty already suffered and directs the Carrier to remove any reference of Claimant violating the Carrier's Alcohol and Drug Policy or for Conduct Unbecoming for allowing his foreman to enter pay for time not worked from Carrier's record and to reduce the discipline assessed to a five (5) day suspension for failure to protect his assignment. Claimant is to be made whole in every way consistent with the findings.

AWARD : Claim sustained in part and denied in part.



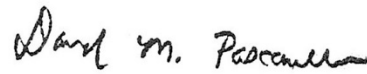
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Richard K. Hanft, Chairman



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S. M. Goodspeed  
Carrier Member



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D. M. Pascarella  
Employee Member

Dated at Chicago, Illinois, February 3, 2021