

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1049

BROTHERHOOD OF MAINTENANCE OF WAY)	
EMPLOYES DIVISION – IBT RAIL CONFERENCE)	Case No. 305
)	
and)	
)	Award No. 305
NORFOLK SOUTHERN RAILWAY COMPANY)	
(FORMER SOUTHERN RAILWAY COMPANY))	

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) of Mr. W. Kirk, issued by letter dated October 5, 2018, in connection with his alleged: (1) improper performance of duty in that at approximately 1:30 P.M. on August 21, 2018, while making a reverse tram move on Nordco Spiker NS17030B, back to the east leg of the wye in New Bern yard to clear up for Train E49, he operated the machine through a switch that was lined against its movement and (2) conduct unbecoming an employee in connection with the aforementioned incident in that despite operating the machine through the switch that was lined against his movement at approximately 1:30 P.M., he continued to work and neglected to advise supervision of the incident until 6:45 P.M. was arbitrary, capricious, unjust, unwarranted, unreasonable, harsh or excessive (Carrier’s File MW-GNVL-18-20-SG-498 SOU).

2. As a consequence of the violation referred to in Part 1 above, Claimant W. Kirk 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 concerns a Spiker Machine Operator on the Southern Region Bridge Tie Production Group. It is undisputed that on August 21, 2018 Claimant ran a Spike Machine that he was operating through a switch that was lined against his movement causing substantial damage to the switch and failed to report his accident until the end of his workday some five (5) hours later leaving the switch in an unsafe condition for more than five (5) hours.

The Carrier submits that a full and fair investigation was had on September 20, 2018 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 October 5, 2018.

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.

There can be no doubt that the charges were proven by substantial evidence, Claimant admitted at the investigation that he ran the spiker through the switch that was lined against his movement and that he neglected to report that incident until the end of his workday some five (5) hours later.

The Board, however, finds that while Claimant was found guilty of Conduct Unbecoming an Employee because he failed to report the incident for more than five (5) hours, it seems clear from the record that Claimant was really not aware that there was anything to report. Claimant after the incident operated the switch and found it to be operable and did not think he had done

any damage to it. While that lack of knowledge does not excuse the Claimant's failure to timely report the fact that he ran through the switch, it does mitigate the aspect of Claimant being purposefully dishonest or acting in an unbecoming manner.

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. The Carrier is directed to reinstate claimant without compensation for time out of service.

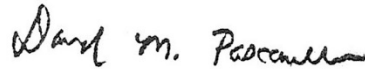
AWARD: Claim sustained in part and denied in part.



Richard K. Hanft, Chairman



S. M. Goodspeed
Carrier Member



D. M. Pascarella
Employee Member

Dated at Chicago, Illinois, February 3, 2021